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THE ORDINARY DISEASE EXCLUSION IN VIRGINIA'S WORKERS' COMPENSATION ACT: WHERE IS IT GOING AFTER ASHLAND OIL CO. v. BEAN?

Recoverable claims under the Virginia Workers' Compensation Act are divided into two categories: injuries by accident\(^1\) and injuries from occupational diseases.\(^2\) Occupational disease coverage has undergone significant expansion in the past decade. Faced with society's demand and its own desire to expand, the Industrial Commission has gradually broadened its interpretation of the Act. The expansion of occupational disease coverage has, however, been significantly hindered by the statutory compensation exclusion for ordinary diseases. Uncertain as to the full effect of this exclusion, the Commission has fluctuated between granting and denying awards for ordinary diseases. The Commission's conflicting treatment of ordinary diseases has led to general confusion regarding the law.

After a decade of silence, the Virginia Supreme Court in *Ashland Oil Co. v. Bean*\(^3\) attempted to resolve the conflicts surrounding ordinary disease compensation. Unfortunately, the court's intervention simply compounded the existing confusion.

This comment discusses the changes which led to the occupational disease expansion, the problems encountered by the Industrial Commission in expanding such coverage, and the court's attempt to clarify the law. Both the court's and the Commission's prevailing positions on compensability of ordinary diseases are explored, as well as the changes in the law that are likely to occur as a result of pending litigation.

I. BACKGROUND

The Virginia Workers' Compensation Act,\(^4\) first enacted in 1918,\(^5\) pro-

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vides compensation to workers injured on the job. The theory of workers' compensation is that employment injuries should be treated as business expenses and borne by the employer. Prior to the enactment of workers' compensation laws, the employee had difficulty recovering against an employer since his only cause of action was based on common-law negligence. Under workers' compensation, the employee agrees to surrender his legal rights against the employer in exchange for compensation security. Thus, both parties benefit from this mutual exchange.

A. The Growth and Development of Occupational Disease Coverage

Historically, disease coverage has lagged far behind accident coverage. Since its inception, workers' compensation has compensated employees for on-the-job accidents, but until recently employees have not received compensation for diseases contracted in the workplace. It was not until more than 400 workers in West Virginia died from a single incident of silicosis, an occupational disease, that many states passed statutes to expand their compensation coverage.

Fearing that a broad occupational disease coverage would turn into a general workers' health insurance, many states followed the English lead and adopted a schedule-type coverage. This type of coverage lists

8. In a negligence action the employer had the "'unholy trinity' of common law defenses—contributory negligence, assumption of risk, and the fellow servant rule" against an employee's action. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80 (4th ed. 1971). As a result, few actions were successful against the employer. Id.
9. In accepting a statutorily fixed amount of compensation, the employee gives up his right to sue his employer for full damages. The employer surrenders his right to the defenses of contributory negligence, assumption of risk, and fellow servant rule, but gains relief from full damage liability. Fauver v. Bell, 192 Va. 518, 521-22, 65 S.E.2d 575, 577 (1951). 10. Id.
11. 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 41.20 (Repl. Vol. 1982 & Cum. Supp. 1983). Reasons for this lag included the fear of substituting no-fault liability for injuries potentially based on fault liability; uncertainty that this occupational disease problem could not be better handled under general health insurance legislation; and the lack of a common-law origin for occupational disease legislation. Id.
14. See infra note 51 and accompanying text.
15. See generally 1B A. LARSON, supra note 11, § 41.10 & nn.6-7. For a good overview of the fifty states' occupational disease laws, see 4 id., table 2A.
16. Note, supra note 13, at 543 n.2.
and defines the diseases considered occupational.\textsuperscript{17}

Gradually, as workers' compensation expanded to provide a more comprehensive coverage for workers, the limiting schedule-type coverage was replaced. Today, all states have general coverage which compensates for any disease peculiar to the occupation.\textsuperscript{18}

\section*{B. Coverage Under Virginia's Workers' Compensation Act}

Coverage under the Virginia Workers' Compensation Act is divided into two areas: injuries by accidents\textsuperscript{19} and injuries by occupational diseases.\textsuperscript{20} A claimant must assert one of these two theories as grounds for compensation. Although each theory is defined and governed by its own code section,\textsuperscript{21} many of the disease definitions, tests, and burdens are directly borrowed from the "injury by accident" statute.\textsuperscript{22} Thus, to fully understand the limitations on occupational disease coverage, it is useful to look first at the "injury by accident" coverage.

\textsuperscript{17} Under the schedule, the following diseases and conditions were deemed to be "occupational": anthrax; asbestosis; cataract of the eyes because of exposure to heat and glare of molten glass or radiant rays; compressed air illness; conjunctivitis or retinitis; dermatitis; epitheliomatous cancer or ulceration of the skin or eye; glanders; infection or inflammation of the skin, eyes, or oral or nasal cavities; infections or contagious diseases contracted in the course of employment in, or in immediate connection with, a hospital or sanitarium; poisoning; radium disability; silicosis; and ulceration because of chrome compounds or caustic chemicals. VA. CODE § 1887(2g) (Supp. 1944).

\textsuperscript{18} See, e.g., CONN. GEN. STAT. ANN. § 31-275 (West Cum. Supp. 1983-84) ("'occupational disease' means a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such"). The states either repealed their old schedules, as Virginia did, 1970 Va. Acts ch. 470, or added a "catch-all" phrase to their existing schedules. See, e.g., IDAHO CODE § 72-438 (Supp. 1983) (After listing 12 diseases considered to be occupational, the schedule states: "Recognizing that additional toxic or harmful substances or matter are continually being discovered and used or misused, the above enumerated occupational diseases are not intended to be exclusive.").

\textsuperscript{19} VA. CODE ANN. §§ 65.1-1 to -9 (Repl. Vol. 1980 & Cum. Supp. 1983). In 1982, there were 43,837 "injury by accident" claims filed with the Virginia Industrial Commission. (If minor medical claims, which resulted in no work loss, are included, the total number increases to 184,535.) Telephone interview with Ronald Umble, Systems Analyst, Virginia Industrial Commission in Richmond, Va. (Oct. 11, 1983).


\textsuperscript{22} Cf. the "arising out of" definition, the "just as probable cause" rule, and the burden of proof necessary to establish a successful claim under VA. CODE ANN. §§ 65.1-7 and 65.1-46 (Repl. Vol. 1980).
1. “Injury By Accident” Coverage

a. Elements

The Virginia Code identifies three elements that must be proven before compensation under “injury by accident” is awarded: First, the injury must be by accident; second, it must arise out of the employment; and third, it must occur in the course of the employment.23

“By accident” requires that an injury be received at a specifically identifiable time and place, and by a specifically identifiable accident.24 Although the term “injury by accident” has generally been given a broad interpretation,25 the courts have not expanded it sufficiently to compensate work-related injuries that are partly accidents and partly diseases, such as cumulative injuries.26

An injury must also “arise out of the employment.” The words “arising out of” refer to the “origin or cause of the injury.”27 The Virginia Supreme Court, relying on the definition outlined by the Massachusetts Supreme Judicial Court in In re McNicol,28 has held that an 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.”29 To prove this causal connection, the court and the

23. 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.
25. Aistrop, 181 Va. at 292, 24 S.E.2d at 548. See also Reserve Life Ins. Co. v. Hosey, 208 Va. 568, 159 S.E.2d 633 (1968) (claimant was engaged in door-to-door sales when her knee gave out; the court interpreted the “by accident” requirement to include an unusual or unexpected event).
26. See infra notes 108-14 and accompanying text.
27. Hosey, 208 Va. at 571, 159 S.E.2d at 635-36. The expressions “arising out of” and “in the course of” employment are used conjunctively and not synonymously. Id. at 571, 159 S.E.2d at 635. Both must be satisfied before compensation is awarded. See Graybeal v. Board of Supervisors, 216 Va. 77, 80, 216 S.E.2d 52, 53-54 (1975). See also Note, Workmen’s Compensation and Welfare, 61 VA. L. Rev. 1862, 1863 (1975).
29. Id. The court added:
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
Commission look primarily to the persuasiveness of the available medical evidence. Medical evidence includes doctor's testimony, physical examination of the claimant, medical history of the claimant, and hospital charts and records of the claimant. Compensation is awarded only when there is sufficient evidence linking the physical injury to the work activity.

The injury must also occur "in the course of the employment." This term "refers to continuity of time, space, and circumstance. . . . This requirement [is] satisfied by a showing of an unbroken course beginning with work and ending with injury . . . ." The requirement is met when the claimant shows that an accident took place in the course of employment, in a place where the employee reasonably should have been, and while he was reasonably fulfilling duties of his employment.

In an "injury by accident" claim, the claimant has the burden of proving by a preponderance of the evidence that the accident arose out of and in the course of the employment. If the evidence shows that it is just as 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 that source as a rational consequence. Id. at 499, 102 N.E. at 697, quoted with approval in Connor v. Bragg, 203 Va. 204, 208-09, 123 S.E.2d 393, 396 (1962). See also Survey of Developments in Virginia Law: 1970-71 Workmen's Compensation, 57 Va. L. Rev. 1520, 1523-24 (1971); Thirteenth Annual Survey of Virginia Law: Torts, 54 Va. L. Rev. 1649, 1657-58 (1968).


31. Tomko, 210 Va. at 700, 173 S.E.2d at 836.
34. Id. at 339-40, 49 S.E.2d at 419.
36. Bradshaw v. Aronovitch, 170 Va. 329, 335, 196 S.E. 684, 686 (1938). Since occupational diseases may develop gradually, the claimant is not required to show a definite time, place, and circumstance of disease exposure. Nevertheless, the claimant must demonstrate that the disease is traceable to employment as the proximate cause. Van Geuder v. Commonwealth, 192 Va. 548, 557, 65 S.E.2d 565, 570-71 (1951).
37. For an excellent summary of the claimant's burden of proof in an "injury by accident"
probable that the injury is the result of a noncompensable cause, such as smoking,\textsuperscript{38} or the natural development of an unrelated disease,\textsuperscript{39} then the burden of proof has not been sustained, and compensation will be denied.\textsuperscript{40}

\textbf{b. Aggravation of Pre-Existing Infirmitiy by Accident\textsuperscript{41}}

Another component of an "injury by accident" claim which may assist in understanding disease claims is the aggravation of an employee's pre-existing infirmitiy. When an accident aggravates or accelerates such a condition, compensation will be awarded,\textsuperscript{42} because the employer takes the

\textsuperscript{38} Adkins v. Dan River Mills, Inc., 60 Op. Indus. Comm'n 9, 12 (1981) (claim for byssinosis denied because medical specialist was unable to determine whether the disease was caused by cotton dust or thirty years of cigarette smoking).

\textsuperscript{39} Rust Eng'g Co. v. Ramsey, 194 Va. 975, 76 S.E.2d 195 (1953) (compensation denied because employee's injury resulted from the progressive development of arteriosclerosis, and not from the employment accident).

\textsuperscript{40} Id. at 979-80, 76 S.E.2d at 198. \textit{See also} Bergman v. L & W Drywall, 222 Va. 30, 32, 278 S.E.2d 801, 802 (1981) (per curiam). The "just as probable" rule should not be confused with the "two cause" rule. The latter refers to a disability which has two causes, one related to the employment and one unrelated. Under the "two cause" rule, the claimant will be fully compensated when it is shown that the employment contributed to the injury. \textit{See id.}, 278 S.E.2d at 802-03 (remanded to the Industrial Commission because the two rules were confused).

\textsuperscript{41} A pre-existing infirmitiy may be aggravated in two ways: by a specific accident or by the general employment environment. The former is compensable as long as the accident is work-related. The latter, however, is not usually compensable. \textit{See infra} notes 98-101 and accompanying text.

employee as he finds him.\textsuperscript{43} For example, in \textit{Liberty Mutual Insurance Co. v. Money},\textsuperscript{44} the claimant, who suffered from several serious diseases, received an accidental injury at work.\textsuperscript{45} The accident aggravated these latent diseases and ultimately led to his death. The court, affirming the Industrial Commission's decision to award compensation, held:

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 . . . .\textsuperscript{46}

To be compensated, the claimant must show only that the accident materially aggravated or accelerated his pre-existing disease.\textsuperscript{47} Furthermore, the accident need not be the principal cause of the disability so long as it is a contributing factor.\textsuperscript{48}

2. Occupational Disease Coverage

Accidents are dramatic, time-definite events which are easily identifiable to the job. Occupational diseases, on the other hand, develop slowly over time and have less obvious origins.\textsuperscript{49} Consequently, it is more difficult to prove that an employee's disease is the result of his employment so that compensation should be awarded.

The purpose of occupational disease coverage, like that of workers' compensation generally, is to compensate a worker for wage losses sustained when his disability results from an occurrence arising out of, and

\textsuperscript{43}See generally W. Prosser, supra note 8, at § 43.
\textsuperscript{44}174 Va. 50, 4 S.E.2d 739 (1939).
\textsuperscript{45}Claimant was suffering from pyorrhea, chronic nephritis, generalized toxemia, diabetes, and thrombophlebitis of the right femoral vein when he received a compensable groin injury. One month later claimant died of lobar pneumonia. \textit{Id.} at 52-53, 4 S.E.2d at 739-40.
\textsuperscript{46}\textit{Id.} at 55-56, 4 S.E.2d at 741. Compensation does not include injury from the natural progression of a disease. \textit{Id.} at 56, 4 S.E.2d at 741.
\textsuperscript{48}Money, 174 Va. at 56, 4 S.E.2d at 741. The claimant's death did not principally result from the groin injury, but instead from the aggravation of his pre-existing diseases.

Again substantial medical evidence is needed to link the aggravation of the pre-existing condition to the compensable accident. Justice v. Panther Coal Co., 173 Va. 1, 3-4, 2 S.E.2d 333, 334 (1939).

\textsuperscript{49}Note, \textit{Compensating Victims of Occupational Disease}, 93 Harv. L. Rev. 916, 921 (1980). The crucial distinction between a disease and an accident is the foreseeability of the disease as a job-related hazard as opposed to the suddenness of the accident. 1B A. Larson, \textit{supra} note 11, § 41.31.
in the course of, the employment. 50 Fearful of developing a general system of health insurance, 51 the Virginia legislature defined the term "occupational disease" narrowly and carefully articulated what was required to constitute an occupational disease. 52 Like "injury by accident," the occupational disease must arise out of and in the course of the employment.

The Virginia Code outlines six requirements that must be satisfied before a disease is considered occupational in nature.

A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances:

1. A direct causal connection between the conditions under which work is performed and the occupational disease,

2. It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment,

3. It can be fairly traced to the employment as the proximate cause,

4. It does not come from a hazard to which workmen would have been equally exposed outside of the employment,

5. It is incidental to the character of the business and not independent of the relation of employer and employee, and

6. It must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction. 53

Although neither the Virginia Supreme Court 54 nor the Industrial Commission 55 has provided a detailed definition of an occupational disease, Indiana, on whose statute Virginia based its own workers' compensation legislation, 56 has provided definitional guidelines. The Indiana Court defines an occupational disease as "one which gradually develops from, and

50. For the general purpose of workers' compensation, see Burlington Mills Corp. v. Haggard, 177 Va. 204, 211, 13 S.E.2d 291, 293 (1941).
51. Van Geuder v. Commonwealth, 192 Va. 548, 552, 65 S.E.2d 565, 567 (1951). See also Rust Eng’g Co. v. Ramsey, 194 Va. 975, 980, 76 S.E.2d 195, 199 (1953) (the Workmen’s Compensation Act should be liberally construed, but should not be converted into a general form of health insurance).
53. Id. Note the similarity between this Code section and the McNicol definition of “arising out of,” supra note 29.
54. Since the Virginia Supreme Court rarely grants appeals from the Industrial Commission’s decisions, see infra note 122 and accompanying text, there have been few occupational disease cases decided by the court. Therefore, the only definition provided thus far is that in the Code.
55. The Industrial Commission has offered this vague definition: “Whether the disease is occupational must be determined by the peculiar characteristics of each employment and the effect it has on the individual who suffers from that employment.” Dowdy v. Black Constr. Co., 40 Op. Indus. Comm’n 44, 46 (1958) (emphasis added).
56. See supra note 5.
bears a direct causal connection with the conditions under which the work is performed, and which results from an exposure occasioned by and naturally incidental to a particular employment. This definition contains most of the elements identified by the Virginia Supreme Court as necessary to establish a successful occupational disease claim. A claimant must prove a direct causal relation between the work conditions and the disease, show that the disease was contracted because of employment exposure, and trace the disease to the employment as the proximate cause. It appears from the definition that a causal connection linking the injury to the employment is more important in a successful disease claim than it is in an accident claim.


58. Van Geuder, 192 Va. at 556, 65 S.E.2d at 570.

Because of the difficulty in proving causation in occupational disease claims, Virginia has relieved some of the burden by enacting statutory presumptions and by following the "last injurious exposure" rule. Under Virginia's "last injurious exposure" rule, Va. Code Ann. §§ 65.1-50 to -52 (Repl. Vol. 1980 & Cum. Supp. 1983), an employee is not required to prove that his occupational disease was contracted while working for any particular employer, but rather must merely establish, by a preponderance of the evidence, in whose employment he was last injuriously exposed. See Pocahontas Fuel Co., v. Godbey, 192 Va. 845, 852-53, 66 S.E.2d 859, 864 (1951); see generally Note, supra note 27, at 1862.

60. See supra notes 30-34 and accompanying text.
tradicted medical testimony tracing the illness to the occupation stands a
much greater chance of compensation than medical evidence which
merely predicts or suggests that the illness is related to the
employment.\footnote{62}

II. PROBLEMS IN EXPANDING OCCUPATIONAL DISEASE COVERAGE

Both by legislation and by judicial decision, Virginia has gradually fol-
lowed the nationwide trend to expand occupational disease coverage.\footnote{63}
The repeal of the occupational disease schedule,\footnote{64} which removed statu-
tory barriers to occupational disease coverage, and the court's deference
to the Industrial Commission's decisions have afforded the Commission
greater freedom to make awards.\footnote{65}

Despite the national trend, the Virginia Industrial Commission has, un-
til recently, tended to favor the employer rather than the claimant.\footnote{66}
However, in March of 1983, following a change in Commissioners,\footnote{67}
the Commission's alignment shifted toward the claimant.\footnote{68}

was necessarily caused by it); Esque v. Giant Food, Inc., 56 Op. Indus. Comm'n 104, 105
(1975) (medical evidence indicated that the claimant was allergic to many substances, and
that exposure on the job merely aggravated her allergies).

tested medical evidence linking the disease to the employment) \textit{with} Tuck v. Roanoke Me-
attending physician's report could establish only a possible causative link between hepatitis
and the claimant's occupation as a nurse).

\footnote{63. \textit{See}, e.g., Gillette v. Harold, Inc., 257 Minn. 313, ---, 101 N.W.2d 200, 207 (1960)
(deterioration of salesperson's toe joint from standing all day held compensable as an occu-
pational disease); Brown Shoe Co. v. Fooks, 228 Ark. 815, ---, 310 S.W.2d 816, 818 (1958)
ischial bursitis from sitting held compensable). \textit{See generally} 1B A. LARSON, \textit{supra} note 11,
\S\S 41.40, 41.70, 41.72.

\footnote{64. 1970 Va. Acts ch. 470.}

\footnote{65. The court has declined to accept many Industrial Commission decisions on appeal. \textit{See infra} note 122 and accompanying text.

\footnote{66. Interview with Andrew Edelstein, Claims Manager, Virginia Industrial Commission,
in Richmond, Va. (Sept. 20, 1983).

\footnote{67. On March 31, 1983, Commissioner Thomas Miller retired. He was replaced by Wil-
liam O'Neill. Telephone interview with Lou-Ann Joyner, Clerk of the Industrial Commission
in Richmond, Va. (Oct. 11, 1983).

\footnote{68. Commissioner Miller was usually the swing vote between the pro-claimant position of
Commissioner Robert Joyner and the pro-carrier position of Commissioner Charles James
(and Commissioner M. Edwards Evans who retired in 1980). \textit{See}, e.g., Hatfield v. Safeway
the employer and the insurance carrier; Joyner, Comm'r, dissenting); Williams v. City of
Chesapeake, 57 Op. Indus. Comm'n 383, 387 (1976) (Joyner and Miller, Comm'r's, in favor of
the claimant; Evans, Comm'r, dissenting).

Although on the Commission only a short time, Commissioner O'Neill appears to have
departed from the middle ground occupied by former Commissioner Miller. Consequently,
the balance has tilted in favor of the claimant. \textit{See} Yancy v. Holly Farms, No. 106-63-71
Because of Virginia's narrowly defined occupational disease statute and the court's unwillingness to broaden the act, the Industrial Commission is experiencing difficulty in expanding occupational disease coverage. Problems in expansion lie primarily in three areas: ordinary diseases, aggravation of pre-existing conditions, and cumulative injuries.

A. The Exclusion of Ordinary Disease from Compensation

Through adoption of a schedule of coverage for occupational diseases in 1944, Virginia expanded its workers' compensation coverage to encompass work-related diseases. Fearing the development of a general health insurance, the legislature placed limitations on this coverage. The most controversial of these limitations was and still is the ordinary disease exclusion. Under the Workers' Compensation Act,

\[
\text{(n)o ordinary disease of life to which the general public is exposed outside of the employment shall be compensable, except:}
\]

(1) When it follows as an incident of occupational disease as defined in this title; or

(2) When it is an infectious or contagious disease contracted in the course of employment in a hospital or sanitarium or public health laboratory.

Thus the statute makes it clear that an ordinary disease of life is one to which the general public is exposed. The Commission has held that asthma, emphysema, bronchitis, and arthritis are ordinary diseases...
of life and therefore not compensable.

Like most states, until 1970 Virginia used a schedule which listed and defined specific diseases considered to be occupational. Under this schedule, the Industrial Commission had a relatively easy task in determining whether or not a disease was occupational. First, the Commission checked the schedule to see if the disease was statutorily classified as an occupational disease. If it was, the Commission then applied the six-point "arising out of" test. If it passed this test, compensation was awarded. If the disease was not listed on the schedule, or if it failed to satisfy an element of the causative test, compensation was denied.

The Commission never needed to consider ordinary diseases since such diseases did not appear on the schedule. The result was an easy enforcement of the ordinary disease exclusion with only two circumstances when ordinary disease could be compensated.

It was not until the repeal of the statutory schedule that the Indus-

80. See generally 1B A. Larson, supra note 11, §§ 41.10-41.20.
81. See supra notes 17-18.
83. The law required that even diseases listed in the schedule had to satisfy the "arising out of" test in order to be considered occupational. Va. Code Ann. § 65.1-47 (1950), repealed by 1970 Va. Acts ch. 470. The "arising out of" test, also referred to as the causation or causative test, requires that a disease must meet the six requirements outlined in the Code in order to be considered occupational. Va. Code Ann. § 65.1-46 (Repl. Vol. 1980). See also supra text accompanying note 53.
85. If a disease was ordinary, it did not appear on the schedule; and a disease not on the schedule could never be compensated.
86. See supra text accompanying note 74. The two exceptions compensating ordinary diseases have rarely been interpreted by the Virginia Supreme Court. See Van Geuder v. Commonwealth, 192 Va. 548, 551, 65 S.E.2d 565, 567 (1951) (a nurse’s contraction of tuberculosis did not follow as an incident of occupational disease). Indiana has, however, interpreted the “incident to occupational disease” exception to mean an ordinary secondary disease, such as bronchitis, which follows from a primary occupational disease such as inflammation of the lungs. Chevrolet Muncie Div. v. Hirst, 113 Ind. App. 181, 183, 46 N.E.2d 281, 284 (1943).
ORDINARY DISEASE EXCLUSION

trial Commission encountered difficulty with the ordinary disease exclusion. Free from the confines of the schedule and left with only the six requirements defining when a disease "arises out of" the employment, the Commission started applying this causative test to all diseases. This routine application led to the tracing of ordinary diseases of life to the claimant's employment, particularly since some ordinary diseases may also be occupational in nature, and some occupational diseases may be easily confused with ordinary diseases. As the Commission has recently discovered, a literal reading of this test can severely hamper claims for relief.

The Commission has justified ordinary disease awards by basing them on an unusual condition or hazard inherent in the work, which exposed the claimant to a greater risk of contracting the disease. The Commis-

88. The 1970 changes to the Act merely repealed the schedule of diseases but left the six-point "arising out of" test. See VA. CODE ANN. § 65.1-46 (Repl. Vol. 1980).
Under the exclusive schedule-type coverage, there was little room for the Commission or the court to expand occupational disease coverage, even if the illness was obviously occupational. But when general coverage became prevalent, the Commission was faced with the difficult task of defining occupational diseases. IB A. LARSON, supra note 11, § 41.40.
91. For instance, most cancers caused by the workplace are not "medically distinguishable from non-occupationally induced cancers." Solomons, Workers' Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems, 41 ALB. L. REV. 195, 199 (1977).
93. In these cases, the diseases, although ordinary, were also clearly traceable to the employment and there was some inherent factor in the employment which exposed the claimant to a greater risk of contracting the disease. See, e.g., Hacker v. Hanes Corp., 60 Op. Indus. Comm'n 176, 178 (1981) (claimant's tendonitis caused by repetitive motions as a "closed sleeve machine operator" compensable); Fragale v. Giant of Va., Inc., 53 Op. Indus. Comm'n 100, 103 (1971) (tendonitis of the shoulder compensable when the claimant was required to bend and twist her shoulders constantly while operating cash register and packing groceries); Sage v. Independence Indus., 53 Op. Indus. Comm'n 322, 324 (1971) (tendonitis of the forearm compensable because of repeated motion involved with work as a "seamer"); see also Good v. Great A & P Tea Co., 52 Op. Indus. Comm'n 112, 115 (1971) ("meat wrapper's disease," asthmatic bronchitis, held compensable because the general public was not exposed to the risk). But cf. Esque v. Giant Food, Inc., 56 Op. Indus. Comm'n
sioners have generally agreed that a disease which naturally follows from an inherent employment hazard and which exposes employees to a greater risk of contracting the disease is occupational. Dissent among the Commissioners arises, however, when this rule is applied to very common diseases to which the general public is exposed, or when the causative link is relatively tenuous. In these cases some Commissioners retreat to the ordinary disease exclusion and deny all compensation. As a result, under some circumstances, the Commission grants compensation to ordinary diseases and at other times denies it.

Repeal of the schedule has forced the Commission to deal with the true dilemma of the ordinary disease exclusion: Should compensation be awarded to an ordinary disease to which the general public is exposed if there is a causal link with the employment; or should the ordinary disease exclusion preclude such compensation? Ultimately, the Commissioners' conflicting treatment of ordinary disease compensation has led to confusion.

B. The Refusal to Compensate an Aggravation of a Pre-existing Condition

Another obstacle to the expansion of occupational disease coverage has been the Industrial Commission's consistent refusal to compensate aggravation by the work environment of a pre-existing infirmity unless the aggravation is the result of a specific accident. The Commission has repeat-

104, 105 (1975) ("meat wrapper’s disease" not compensable). Missouri has held, under an occupational disease statute similar to Virginia’s, Mo. ANN. STAT. § 287.067 (Vernon 1965), that an ordinary disease is compensable if it results from an unusual work condition which exposes the claimant to a greater chance of contracting the disease. See Collins v. Neveil Luggage Mfg., 481 S.W.2d 548, 555 (Mo. 1972) (claimant compensated for carpel tunnel syndrome); see also Recent Cases, Workmen’s Compensation, Compensation for Occupational Diseases—Application of the Ordinary-Disease-of-Life Exclusionary Clause of the Missouri Occupational Disease Statute, 38 Mo. L. REV. 705 (1973).

94. For example, even though asthmatic bronchitis is a disease to which the general public is exposed, compensation was awarded in one case because the claimant’s chances of contracting the disease were higher than the general public’s. Good, 52 Op. Indus. Comm’n at 115.


96. The Industrial Commission also has difficulty awarding compensation when the causation is not certain. See, e.g., Williams v. City of Chesapeake, 57 Op. Indus. Comm’n 387, 388 (1976) (dissent finding insufficient link between claimant firefighter’s emphysema and his occupation, when claimant had also smoked for twenty years).

edly held that there are no provisions which permit recovery for aggravation of an ordinary disease. The Federal District Court for the Western District of Virginia has affirmed the Commission's denial of such compensation.

Virginia's refusal to treat such aggravation as an occupational disease is contrary to the position held in most jurisdictions. The majority view is that when distinctive employment hazards act upon a claimant's pre-existing condition to produce a disease, the result is compensable as an occupational disease.

However, the Commission has recently become more inclined to compensate the aggravation of a pre-existing condition. The Commissioner most closely identified with this view draws an analogy between this type of aggravation and the aggravation "by accident" of a pre-existing condition, which is always compensable. This new view asserts that the employer should take the employee as he finds him, with all of his pre-existing infirmity.


100. For a general discussion of the majority and minority views, see 1B A. Larson, supra note 11, §§ 41.60-41.63.


103. Commissioner Joyner is the proponent of the new view which would compensate as an occupational disease the aggravation, by the work environment, of a claimant's pre-existing infirmity.


105. See supra notes 41-48 and accompanying text.
predispositions, weaknesses, and infirmities; if the employment environment aggravates those conditions, the result is an occupational disease. Nevertheless, this is still a minority view on the Commission.

C. Difficulty Obtaining Compensation for Cumulative Injuries

The last area of difficulty in broadening the occupational disease coverage has been the compensation of cumulative injuries. Cumulative injuries—or, as one authority describes them, "generalized conditions"—are gradually-incurred, work-related conditions. The most prevalent of these are back and heart injuries.

The Commission initially denied compensation for back strain resulting from repeated trauma because back strain was neither an accident nor an occupational disease. In recent years, a majority of the Commission came to believe that gradually-developing, work-related back strain should be compensated under workers' compensation. As a result, the Commission has awarded compensation under "injury by accident" to two claimants suffering from work-related back strain. However, the Virginia Supreme Court reversed both cases, holding that an accident must arise "from an identifiable incident that occurs at some reasonably definite time." Consequently, the court blocked any further attempts by the Commission to compensate cumulative injuries as "injuries by accident."

108. 1B A. Larson, supra note 11, § 38.30. These injuries do not display the obvious, sudden mechanical or structural changes in the body that characterize an injury by accident, but rather result gradually from employment trauma.
110. In 1982, the Virginia Industrial Commission received 10,794 claims regarding back strain or sprains. This figure represents approximately 25% of the total claims filed. Telephone interview with Ronald Umble, Systems Analyst for the Virginia Industrial Commission in Richmond, Va. (Oct. 11, 1983).
111. In 1982, 160 claims for heart injuries were filed. Id.
112. Hensley v. Morton Frozen Foods Div., 46 Op. Indus. Comm'n 107, 109 (1964). The Commission stated that "[i]f back pains due to strain or sprain were construed to be an occupational disease, the Workmen's Compensation Act would become a health insurance policy." Id. at 109.
Responding to the court's action in these cases, the Virginia General Assembly appointed a joint House-Senate subcommittee to study the effects of amending the Virginia Code to compensate gradually-incurred, work-related injuries. Although the subcommittee did not make any specific recommendations, three bills amending the "injury by accident" requirement were introduced by individual representatives. All three were defeated in committee.

Even though the court refused to compensate back pain as an accidental injury and the legislature declined to amend the statute, the Industrial Commission has continued to compensate cumulative injuries. In a case now pending before the Virginia Supreme Court, the Commission compensated back pain as an occupational disease rather than as injury by accident.

III. THE VIRGINIA SUPREME COURT INTERVENES

For the past decade the Virginia Supreme Court has left the interpretation of Virginia's occupational disease statute to the Industrial Commission's discretion. The court has shown considerable deference to the Commission's decisions, as evidenced by the small number of appeals granted. However, with little judicial guidance as to the compensability of cumulative injuries, the legislature and the Industrial Commission appear to be converging on a broader interpretation of the act.

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116. Id. at 7.

The consensus of the legislature appears to be that cumulative injuries should be compensated under workers' compensation, but that such compensation should be achieved through a broader judicial interpretation of the act and not by legislative amendment. Telephone interview with Delegate Warren G. Stambaugh, Chairman of the Joint Subcommittee Studying the Feasibility of Compensating Gradually-Incurred, Work-Related Injuries Under the Virginia's Workmen's Compensation Act (Sept. 30, 1983). Consequently, there are no plans to introduce another bill to amend the law until further word is received from the court. Id.

118. Telephone interview with the Virginia General Assembly Legislative Services in Richmond, Va. (Oct. 13, 1983).


120. Id.
121. Id.

122. For example, in 1981 the Virginia Industrial Commission issued 876 review opinions, of which 150 were appealed to the Virginia Supreme Court. The court granted review to only 14 of those cases. In 1982, the Commission issued 909 review opinions, of which 170 were appealed. The court granted review to only 13 of those cases. Interview with Andrew Edelstein, Claims Manager, Virginia Industrial Commission, in Richmond, Va. (Sept. 20, 1983).
of ordinary disease, the Commissioners have relied on their own ideas and values in shaping this area of workers’ compensation. The result has been a lack of firm standards defining the scope of ordinary disease compensability. Recognizing the present confusion, the court attempted, in Ashland Oil Co. v. Bean, to clarify the situation.

A. The Court's Attempt to Clarify the Ordinary Disease Exclusion

1. Facts of Ashland Oil Co. v. Bean

The claimant, who had been a waitress for most of her life, accepted a job as a gas-station attendant for the appellant. She worked alone for six- or nine-hour shifts, without scheduled breaks, and was constantly on her feet. As part of her uniform, the claimant was required to wear "'closed shoes' with hard soles." After six months of this work, she developed a foot pain which was later diagnosed as a bunion for which she subsequently underwent surgery and was unable to return to work. The medical report indicated that "the time spent on her feet in closed hard shoes was definitely a factor . . . in her problem." The report also disclosed that the claimant had a pre-existing "bump" on her foot, but that it had never caused her any problems. The claimant sought disability compensation for an occupational disease.

The Deputy Commissioner, finding that bunions are ordinary diseases of life, denied compensation because the claimant had failed to carry her burden of proof. On review to the full Commission, the majority ignored the finding of an ordinary disease, and instead held that a sufficient causal connection existed between the injury and the job to warrant compensation. The dissenting Commissioner argued that compensation should be denied since the claimant’s disease was simply an

124. Id. at 2, 300 S.E.2d at 739.
125. The claimant underwent an unsuccessful bunionectomy on the left foot and a "wedge osteotomy 1st metatarsal." Id. at 2, 300 S.E.2d at 739.
126. Id. at 3, 300 S.E.2d at 739.
127. Id.
128. A de novo hearing on the claim was held in Alexandria, Va., because of the failure to preserve the record of a previous hearing held on July 23, 1981. No. 100-79-01 (Indus. Comm’n Sept. 24, 1981) (MacBeth Comm’r).
129. Deputy Commissioner MacBeth found an insufficient causal connection between the claimant’s employment and her development of bunions. According to the opinion, the sixth statutory requirement, a risk connected with this employment that would lead to bunions, was not identified. No. 100-79-01 at 4.
131. The majority held that “the claimant’s disability sufficiently meets the requirements of § 85.1-46. Specifically we find that the claimant’s pre-existing condition was aggravated by her work to the point that it became disabling . . . .” No. 100-79-01 at 2.
aggravation of a pre-existing condition.\textsuperscript{132}

2. The Court's Findings

The Virginia Supreme Court, in a per curiam opinion, reversed the Industrial Commission's compensation award.\textsuperscript{133} The court based its decision on several different and seemingly conflicting theories. First, it found that the claimant's disease did not arise out of her employment because the bunion's origin antedated her employment.\textsuperscript{134} The court also stated that the claim was not compensable because bunions are an ordinary disease of life to which the general public is exposed,\textsuperscript{135} and that because the claim did not fit into either of the two exceptions to the ordinary disease exclusion, compensation should be denied.\textsuperscript{136}

In its last finding, the court reversed the award because of the existence of the claimant's pre-existing "bump."\textsuperscript{137} The court found that the prior condition was merely aggravated by the work environment and, under the Workers' Compensation Act, was not compensable as an occupational disease.\textsuperscript{138}

3. Analysis of the Court's Findings

Three holdings emerge from the Virginia Supreme Court's analysis in Bean: (1) ordinary diseases of life to which the general public is exposed are compensable so long as the six requirements of the "arising out of" test are met; (2) ordinary diseases of life are not compensable unless they fall within the two enumerated exceptions; and (3) aggravations of a pre-existing condition by the work environment are not compensable as occupational diseases.

The first finding, that the disease did not arise out of the employment, suggests that the court has adopted the expansive view of occupational diseases.\textsuperscript{139} This view applies the six-point causative test to all diseases to determine whether they are occupational. In Bean, the sixth requirement, that an occupational disease "must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a

\textsuperscript{132} Since the claimant's bunion pre-existed her employment, Commissioner James would have affirmed the initial denial of compensation as an aggravation of a pre-existing disease. No. 100-79-01 at 3-4 (James, Comm'r, dissenting).

\textsuperscript{133} 225 Va. 1, 3, 300 S.E.2d 739, 740 (1983).

\textsuperscript{134} Id.

\textsuperscript{135} Id. at 3-4, 300 S.E.2d at 740.

\textsuperscript{136} The court specifically found the two exceptions to ordinary disease exclusion inapplicable here. Id. at 3, 300 S.E.2d at 740.

\textsuperscript{137} Id.

\textsuperscript{138} Id.

\textsuperscript{139} See infra note 148.
natural consequence..." was not satisfied. Compensation was denied because the bunions' origin antedated the claimant's employment. This reasoning makes it appear that the court intended to apply the six-point test to all ordinary diseases; otherwise, there was no need to determine that the sixth requirement was not fulfilled. This language suggests that diseases, even ordinary ones, would be compensable as occupational diseases so long as the six requirements of the "arising out of" test are met.

The court's second finding seems directly to contradict the first. The court expressly ruled that compensation should be denied for an ordinary disease unless the disease falls within one of the two enumerated exceptions: Either the ordinary disease must follow as an incident of an occupational disease, or it must be an infectious disease contracted in the course of employment in a hospital. Quoting the statute, the court explicitly denied compensation for ordinary diseases of life to which the general public is exposed. This approach is the more conservative and traditional view, which denies compensation for all ordinary diseases regardless of their causal connection to the employment. Under the court's reasoning in this second holding, it would be virtually impossible for a claimant to receive compensation for a disease to which the general public is prone.

In its third finding, the court indicates that the mere fact of the claimant's pre-existing "bump" made compensation improper. The court here embraced the dissenting Commissioner's position and denied compensation for a pre-existing condition which is aggravated by the work environment. This position is supported by both Commission and court decisions. Consequently, this third holding suggests that the crucial issue in ordinary disease compensation is whether or not the claimant's disease resulted from aggravation of a pre-existing condition. If a claimant has a pre-existing infirmity which is aggravated by the employment, as in Bean, then compensation is denied.

Although the court intended to clarify the status of ordinary disease compensation, the Bean decision instead compounded the confusion. After Bean, either of the differing interpretations of the ordinary disease

141. 225 Va. at 3, 300 S.E.2d at 740.
143. 225 Va. at 3-4, 300 S.E.2d at 740.
144. See infra note 148.
145. 225 Va. at 3, 300 S.E.2d at 740.
146. See supra note 132.
147. See supra notes 98-101 and accompanying text.
148. These two views are exemplified by the positions of Commissioner James and Commissioner Joyner. Commissioner Joyner advocates the expansive view of ordinary disease compensation, under which all ordinary diseases should be compensable as occupational diseases so long as they meet the six requirements of the "arising out of" test and are therefore
exclusion can find judicial support. The expansive view can rely on the court's first finding, which traces the disease back to the employment and applies the six-point causation test, to justify compensation. The conservative sector may simply look to the court's reaffirmation of the ordinary disease exclusion, in the second finding, to deny compensation.

**B. The Court's Second Chance to Clarify the Ordinary Disease Exclusion**

The Virginia Supreme Court will have another opportunity to define the parameters of the ordinary disease exclusion and to clarify the holdings in *Bean*. On July 26, 1983, the Industrial Commission once again awarded compensation to an ordinary disease of life in *Yancy v. Holly Farms*. An appeal to the Virginia Supreme Court was filed, and the court has granted review.

In *Yancy*, the claimant, a poultry inspector, sustained back strain from the repetitive twisting motions related to her work. She asserted both "injury by accident" and occupational disease as grounds for compensation. The Commission, following Virginia Supreme Court decisions, denied compensation on the "injury by accident" claim, but nonetheless awarded compensation on the grounds of occupational disease, even though back strain is an ordinary disease of life. Since the majority found all six elements of the causative test to be satisfied, compensation was causally related to the employment. See, e.g., *Bean v. Ashland Oil Co.*, No. 100-79-01 (Indus. Comm'n Jan. 21, 1982). Commissioner James, on the other hand, advocates the more conservative approach. Under this view, no ordinary diseases of life are compensable unless they fall within one of the two enumerated statutory exceptions. See, e.g., *Yancy v. Holly Farms*, No. 106-63-71 (Indus. Comm'n July 26, 1983) (James, Comm'r, dissenting).

Not only is *Yancy* important for the clarification of the ordinary disease exclusion, but it may also be a pivotal decision in the compensation of cumulative injuries. See supra notes 119-21 and accompanying text. Since the court has already refused to treat cumulative injuries as accidents, see supra notes 113-14 and accompanying text, the only remaining possibility for compensation is to treat such injuries as occupational diseases. *Yancy* should determine whether or not cumulative injuries can be compensated under Virginia's existing Workers' Compensation Act.


150. Interview with Andrew Edelstein, Claims Manager, Virginia Industrial Commission, in Richmond, Va. (Sept. 20, 1983).

151. The claimant was required to move packages of chicken, each weighing approximately five pounds, from her work station to a rack. In so doing, she had to turn her body to the left and then to the right. The claimant then had to move the racks, which weighed about 40 pounds, onto a conveyor belt. In an average eight-hour shift, the claimant was required to twist her body from 4,000-4,800 times. No. 106-63-71 at 1-2.

152. Id.

153. See cases cited supra note 113.

The Industrial Commission seems to have interpreted the court's first and third holdings in Bean in conjunction with each other. This reading results in compensation for ordinary diseases as long as they are, first, causally connected to the employment and, second, not aggravations of pre-existing conditions.

The dissenting Commissioner argued that once it is found that an employee's disease is ordinary and that it does not fit either exception, compensation must be denied. He added that the six requirements of the "arising out of" test should not even be considered once the disease is initially determined to be ordinary.

The court's ruling in Yancy may clarify the Bean decision and establish a definitive rule applicable to ordinary diseases. Since the court in Yancy has only two alternatives, denying or affirming the award of compensation, it will almost certainly follow one or the other of the Bean holdings.

The court may deny compensation on the basis of the ordinary disease exclusion, thereby upholding the second rule in Bean. The court could find that back pain, which is an ordinary disease of life to which the general public is exposed, is excludable under the Code. By denying compensation, the court would essentially be upholding the traditional approach. As a result, compensation for all ordinary diseases of life would be denied, unless one of the two exceptions apply.

On the other hand, the court may affirm the award on the basis of the "arising out of" test, thus following the first holding in Bean. The court

155. Id. at 7-8. See supra text accompanying note 53.
156. See supra text accompanying notes 134-38.
157. Writing for the majority in Yancy, Commissioner O'Neill states that an ordinary disease fits into the "incident to occupational disease" exception by fulfilling the six statutory requirements of the "arising out of" test. No. 106-63-71 at 4-5. This position had never before been advanced by the Commission and was strongly objected to in the dissent. Id. at 10 (James, Comm'r, dissenting). This new justification for compensating an ordinary disease of life by fitting it into the "incident to occupational disease" exception will not, in all probability, be favorably received by the Virginia Supreme Court. See Van Geuder v. Commonwealth, 192 Va. 548, 65 S.E.2d 565 (1951) (narrowly interpreting the "incident to occupational disease" exception). This prediction is supported by the court's decision in Ashland Oil Co. v. Bean, 225 Va. 1, 3-4, 300 S.E.2d 739, 740 (1983) (per curiam). See also supra note 86 (concerning the Commission's previous treatment of these two ordinary disease exceptions).
158. Yancy, No. 106-63-71, at 9-11 (James, Comm'r, dissenting).
159. Id. at 10.
160. The second holding in Bean denied compensation to all ordinary diseases of life which did not fall within one of the two exceptions. See supra text accompanying note 141.
161. The first holding in Bean granted compensation to all ordinary diseases of life so long as they met the six statutory requirements of the "arising out of" test. See supra text accompanying note 139.
could find the back pain causally related to the employment if the facts satisfy the six causation requirements. By affirming the award, the court would be supporting the expansive view of disease compensation. This approach could result in compensation for all ordinary diseases of life, as long as they are traceable to the employment.

The Virginia Supreme Court's decision in Yancy will almost inevitably have to follow one of its three findings in Bean.162 In doing so, the court will perhaps clarify its earlier decision and provide a clear answer to the question of ordinary disease compensability.

IV. Conclusion

Ordinary disease compensation has been in a state of uncertainty and fluctuation for the past decade. The repeal of the schedule-type coverage, the ambiguity of the ordinary disease exclusion, and the Commission's desire to expand compensation have resulted in conflicting treatment of ordinary diseases. The Virginia Supreme Court's effort to clarify the law in Bean has proved fruitless, because the court provided three conflicting rules of law rather than a single clear standard which could be applied to ordinary diseases.

The Yancy appeal presents the court with another opportunity to resolve this confusion. Either ordinary diseases will be compensable under the "arising out of" test, or they will not be compensable under the Code's exclusion clause. The importance of Yancy is that the court has the opportunity to articulate a uniform standard for all ordinary diseases.

If the Industrial Commission's conflicting interpretations of the statute are to be resolved, the court must take the responsibility for setting forth a rule which the Commission can consistently apply to ordinary diseases. Absent this court guidance, the decision to compensate ordinary diseases will remain with the Commission, and the contradictory treatment of ordinary diseases may continue.163

At present,164 ordinary diseases may be compensable if they are causally traced to the employment; in other cases, because of the exclusionary clause, they are not. Until the court intervenes and articulates a standard

162. The third holding in Bean is inapplicable to Yancy since there is no evidence in the record that the claimant's back injury resulted from aggravation of a pre-existing condition.

163. The legislature could intervene and amend § 65.1-46 of the Virginia Code to obtain a uniform treatment of ordinary diseases. See supra notes 115-18 and accompanying text. However, this intervention is unlikely since the prevailing attitude of the legislature is that such changes should come from the court and not from the General Assembly. See supra note 117.

164. Although it is still too early to reach a firm conclusion, it appears that Commissioner O'Neill's appointment to the Industrial Commission has provided the vote needed to make a majority favoring compensability of ordinary diseases. See supra note 68.
by which to gauge the compensability of ordinary diseases, confusion will continue to prevail.

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