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WORKERS' COMPENSATION FOR DISEASE IN VIRGINIA: THE EXCEPTION SWALLOWS THE RULE

Elizabeth V. Scott*

I. INTRODUCTION

In the last fifteen years, "occupational disease" has become a household word. Thanks to "Sixty Minutes" and Ralph Nader, most Americans have been made aware of the hazards of coal dust, kepone, and vinyl chloride in the workplace. Numerous books have chronicled the plight of affected workers.¹ A specialty in occupational medicine is now offered for physicians, who before had little or no training in recognizing work-related disease. In spite of this increased awareness, most occupational diseases still go unrecognized, both by physicians and by the legal system.²

Those workers who do receive a diagnosis of a work-related disease and file for workers' compensation face little or no chance of obtaining benefits in Virginia. Compensation laws for affected

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2. In 1972, a Presidential Report on Occupational Safety and Health estimated that 390,000 cases of illness and 100,000 deaths were occurring annually as a result of workplace conditions. See OSHA Injury and Illness Information System: Hearing Before a Subcomm. of the House Comm. on Government Operations, 98th Cong., 2d Sess. 33 (1984) (statement of Karl Kronebusch, Office of Technology Assessment) [hereinafter cited as OSHA Hearings]. This figure is highly speculative, but no method has yet been devised to accurately calculate the number of people disabled or killed by work-related diseases. P. Barth & A. Hunt, WORKERS' COMPENSATION AND WORK-RELATED ILLNESSES AND DISEASE 15-27 (1980). See generally OSHA Hearings, passim.

There are no comprehensive figures for the incidence of work-related disease in Virginia. Those estimates that are available from the Virginia State Health Department and the Industrial Commission fall far short of this national figure. The Department of Health has documented between 293 and 357 reported cases of occupational disease each year for the last several years. Physicians and hospitals report certain occupational illnesses to the Department of Health as patients are seen for treatment. Operating on a calendar year of July 1 to June 30, the Department of Health has documented 321 cases for 1979-80, 325 for 1980-81, 293 for 1981-82, 311 for 1982-83, and 357 for 1983-84. However, the Virginia State Industrial Commission reported 789 claims for compensation for occupational disease in 1984. See INDUSTRIAL COMMISSION OF VIRGINIA, NATURE OF INJURY REPORT (1984).
workers have been slow to change and have not kept pace with medical advances and increased public awareness. Definitions written sixty years ago are still used to describe diseases. Many diseases are arbitrarily excluded by this restrictive language. In fact, Virginia has the dubious distinction of having "the most elaborate statutory definition" of occupational disease in the United States. The definition, contained in section 65.1-46 of the Virginia Code Annotated, first excludes compensation for all "ordinary diseases of life" (except those falling within two narrow exceptions), and then sets out a detailed six-part definition for those diseases that will be compensated as occupational.

A recent line of cases interpreting this complicated definition has construed this statutory language so narrowly that now only a very few work-caused diseases will be compensable. These cases culminated in April of 1985 with the Virginia Supreme Court's decision in Western Electric Co. v. Gilliam. Gilliam, which reversed years of Industrial Commission decisions, held that no disease which is found both inside and outside of the workplace is compensable. Such diseases are explicitly barred by the "ordinary dis-

4. The Code states:
   "Occupational disease" is defined as follows:
   Unless the context clearly indicates otherwise, the term "occupational disease" means a disease arising out of and in the course of the employment. No 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.
   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.

ease of life” exclusion of section 65.1-46.7.

The Virginia General Assembly has passed legislation which, after July of 1986, will remedy some of the exclusions created by Gilliam, but other problems with the statute remain.

This article will analyze the current status of Virginia’s workers’ compensation law for occupational diseases first by tracing the history of disease coverage in the state. The Gilliam line of cases will then be discussed, as well as the remedial legislation passed by the 1986 General Assembly. In conclusion, this article will propose other changes to make the statute more equitable and better able to keep pace with the rapid technological advances which create new diseases and with the medical advances which increase our ability to diagnose the work-relatedness of these ailments.

II. HISTORY OF DISEASE COVERAGE IN VIRGINIA

A. Diseases as Accidental Injuries

Virginia’s first workers’ compensation act was passed in 1919 (the “1919 Act”). The 1919 Act compensated only victims of “injuries by accident.” Occupational diseases were expressly excluded unless the disease resulted from the accident. Under this rule, compensation was awarded to an employee who developed sarcoma, a cancer of the bone, after a fall at work which injured his ribs and to an employee who died of “septic pneumonia” after a splinter which entered his arm at work became badly infected.

The 1919 Act also allowed compensation for aggravation of a pre-existing disease by a compensable workplace injury. Thus, a widow of a miner with pre-existing lung problems was awarded compensation after his death from pneumonia. He had been

7. Id. at 247, 329 S.E.2d at 14.
8. Va. Code Ann. § 1887(2)(d) (1942). This section reads in part: “‘Injury’ and ‘Personal Injury’ shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.” Id.
9. Id.
12. “The general rule . . . is that causal connection is established when it is shown that an employee has received a compensable injury which materially aggravates or accelerates a pre-existing latent disease which becomes the direct and immediate cause of death.” Hall's Bakery v. Kendrick, 176 Va. 346, 350, 11 S.E.2d 582, 583 (1940); Liberty Mut. Ins. Co. v. Money, 174 Va. 50, 57, 4 S.E.2d 739, 741 (1939).
trapped by falling slate in a mine and suffered a fractured pelvis. Once he was freed, he was carried down a mountain on a stretcher in a cold, drizzling rain. He developed pneumonia several days later and died.\textsuperscript{13}

All other diseases were excluded by the 1919 Act unless they resulted from a single identifiable incident in the workplace. A clear line was thus drawn between those diseases which were "occupational" and not compensable and those which could be called "accidents" for which compensation was available.\textsuperscript{14} The Industrial Commission in \textit{Fultz v. Virginia Fireworks Co.}\textsuperscript{15} said:

An occupational disease is a diseased condition arising gradually from the character of the work in which the employee is engaged. It does not occur sudden [sic]. It is a matter of slow development. An occupational disease is not an accident. An accident . . . arises from some definite event, the date of which can be fixed with certainty but which cannot be fixed in the case of occupational diseases.\textsuperscript{16}

This distinction was clarified by a number of cases where claimants were poisoned by escaped gas on the job. If the injured worker inhaled fumes at a particular time on a particular occasion, the resulting illness was compensable as an "accident."\textsuperscript{17} If, on the other hand, the illness was the result of inhalation of poisonous fumes over a long period of time, this was considered an occupational disease not compensable under the 1919 Act.\textsuperscript{18}

The arbitrary distinction made in these decisions was criticized by commentators. One such commentator, discussing \textit{Clinchfield Carbocoal Co. v. Kiser},\textsuperscript{19} noted:

The court held that a disease caused by inhaling gas which for a time was escaping from a pipe in the employee's face is not compen-

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\textsuperscript{16} Id. (quoting Peru Plow & Wheel Co. v. Industrial Comm'n, 311 Ill. 216, ---, 142 N.E. 546, 548 (1924)).
\textsuperscript{19} 139 Va. 451, 124 S.E. 271 (1924) (claimant exposed to escaping gas suffered nose bleeds and developed a severe cold and tuberculosis).
sable, but that a disease which results from an accident which breaks the skin is compensable. That is to say, it makes a great difference to the employee, as far as compensation is concerned, whether the germ entered the body through a natural opening or through a wound or abrasion in the skin caused by an accident. It is unfortunate that the employee cannot control the entry of an attacking germ. The situation is clearly illogical and unjust . . . . The fault here, of course, lies primarily with the statute which denies compensation for occupational disease.\textsuperscript{20}

The 1919 Act was further criticized by commentators who noted that there was no theoretical difference between industrial accidents and diseases and further, that "the border line between industrial accidents and occupational diseases is so indistinct, both should receive the same treatment as to indemnity and prevention."\textsuperscript{21}

This criticism came at a time when other states were moving towards amending their workers' compensation acts to include occupational diseases. This movement gained momentum in the 1930's because of a disaster in Gauley Bridge, West Virginia, where hundreds of workers died of silicosis.\textsuperscript{22} These cases were not covered by the workers' compensation act of West Virginia, so the only remedy available to the decedents' survivors was at common law.\textsuperscript{23} In 1930, only seventeen states compensated victims of occupational disease.\textsuperscript{24} By the early 1940's, this number had risen to about twenty-five states.\textsuperscript{25}

B. A definition of "Occupational Disease"

The Virginia General Assembly appointed a committee in 1942 to study the possible coverage of occupational diseases by Virginia's Act. In its study report, issued in 1943, the committee agreed with the commentators that such coverage was necessary

\textsuperscript{22} P. Barth & A. Hunt, \textit{supra} note 2, at 6.
\textsuperscript{23} Jones v. Rinehart & Dennis Co., 113 W. Va. 414, 168 S.E. 482 (1933).
\textsuperscript{24} C. Hulvey & W. Wandel, \textit{supra} note 21, at 74.
and that "industry should pay for the damage it causes." The committee recommended that the General Assembly should not adopt a blanket coverage for all occupational diseases found in some states, but should instead adopt a list or "schedule" of diseases which would be compensable under the Act.

The 1944 General Assembly did not adopt the committee's recommendations in full; instead it adopted both a schedule of compensable diseases and a catch-all definition. Under the amended statute, a compensable disease was defined under two criteria: first it had to be listed in the schedule; and second it had to satisfy the six-part test for an occupational disease laid out in the blanket definition now found in section 65.1-46.

The source of the blanket definition has never been documented, but it appears to have been taken from similar definitions previously adopted by Indiana and Illinois. These states took their wording from a 1913 Massachusetts case, In re McNicol. McNicol involved an accident case in which a worker was beaten to death by an intoxicated co-worker. The Massachusetts court, in an attempt to determine if this type of accident "arose out of and in the course of" his employment, set out a series of tests which courts had used to determine the compensability of accidental injuries.

In 1938, Virginia, by judicial decision, adopted the series of tests which the McNicol court used to determine whether an accident "arose out of employment." Virginia still uses the tests today in accident cases. There is no legislative history describing the General Assembly's 1944 adoption of the McNicol's "arising out of" test to describe occupational diseases. We do not know where the General Assembly looked in its search for a definition of occupa-

26. Id.; see also C. HULVEY & W. WANDEL, supra note 21, at 76.
27. 1943 VIRGINIA SENATE REPORT, supra note 25.
29. See supra note 4 and accompanying text.
30. See Angerstein, Legal Aspects of Occupational Disease, 18 ROCKY MTN. L. REV. 240, 258 (1946); see also Note, Legislation-Indiana Workmen's Occupational Diseases Act, 14 IND. L.J. 542, 547 (1939) (noting that Indiana took its statutory wording from the Illinois Act).
32. Id.
33. Bradshaw v. Aronovitch, 170 Va. 329, 196 S.E. 684 (1938) (delivery boy killed while getting a soft drink from the back of his employer's truck while truck was moving).
tional disease or whether the wisdom of adopting an accident definition to describe a disease was ever discussed.

The 1944 Act covering occupational diseases remained virtually unchanged until 1970. In 1969, another study committee recommended the abolition of the schedule of occupational diseases, leaving only section 65.1-46's blanket definition, in order to "insure the most comprehensive coverage of occupational diseases." The Virginia General Assembly adopted this recommendation and deleted the schedule of diseases during its 1970 Session.

C. Interpretation of Section 65.1-46

After 1970, a disease was compensable if it met the requirements of section 65.1-46. The Industrial Commission interpreted this section to mean that any disease which satisfied the six-part definition of an "occupational disease" was compensable, and any disease which did not was an "ordinary disease of life" and was not compensable unless it fell within the statute's two exceptions. The inquiry was not whether the disease was one to which the general public could be susceptible outside of work but whether the occupation put the affected employee at a higher risk of contracting the disease than the general public. Under this analysis, the Industrial Commission compensated victims of many diseases which are also seen outside of the employment where proof was presented that the employment in fact caused the claimant's illness. They awarded compensation for dermatitis, brucellosis, 

35. Several procedural changes were made to the occupational disease sections of the Workers' Compensation Act in 1948, and a provision exempting diseases which pre-existed the Act was deleted. 1948 Va. Acts 243.

The General Assembly amended the blanket definition in 1952 to allow compensation for an ordinary disease of life which is "an infectious or contagious disease contracted in the course of employment in a hospital or sanitarium." 1952 Va. Acts 603. This section was again broadened in 1970 when the General Assembly added "public health laboratories" to the included employments. 1970 Va. Acts 470.


38. See cases cited infra notes 41-48.
39. Id.
40. Id.
hearing loss, malignant hypertension, chemical hepatitis, leukopenia and granulocytopenia, Raynaud's syndrome, and numerous types of repetitive motion traumas.

On the other hand, compensation was denied for ordinary diseases of life where the claimant failed to show a causal connection between the employment and the disease, including coccygodynia (painful tailbone), various mental problems, psoriasis, and Rocky Mountain Spotted Fever. The difficult cases for the Industrial Commission after the 1970 amendment were those involving lung diseases. Allergies, asthma, asthmatic bronchitis, raw pork sausage at work).


50. Woods v. United Va. Bank, 58 O.I.C. 363 (1979) (job stress allegedly causing heart attack is not compensable in absence of medical documentation of effect of stress on claimant's health); Pleasants v. Fairfax County Police Dep't, 58 O.I.C. 289 (1978) (paranoia, anxiety, and depression are ordinary diseases of life and are not compensable where the evidence fails to show a connection between work and disease); Kaufman v. Star Band Co., 56 O.I.C. 190 (1974) (job stress causing duodenal ulcer to recur is not compensable); Fuller v. M & C Coal Co., 56 O.I.C. 119 (1974) (headaches, nervousness, and anxiety attributed to a noisy work environment are complaints common to the general public, not peculiar to job).

51. Left v. Owen, 55 O.I.C. 223 (1973) (psoriasis is an ordinary disease of life where physician fails to causally relate disease to the employment).

52. Rothgeb v. Shoosmith Bros., 59 O.I.C. 269 (1980) (disease is not compensable where claimant had contact with ticks both at home and on job, and no medical evidence attributed disease to ticks at work).


bronchial asthma,\textsuperscript{56} bronchitis and emphysema\textsuperscript{57} were all held to be ordinary diseases of life where there was no medical evidence establishing work-causation. Yet, those same diseases were held to be compensable where evidence showed the claimant to have had an exposure to some substance in the workplace to which the general public was not exposed. "Meat-wrappers' asthma" caused by exposure to melting plastic fumes,\textsuperscript{58} bronchitis caused by chemical fumes or dust\textsuperscript{59} or by frequent temperature changes at work,\textsuperscript{60} and emphysema of a fire fighter\textsuperscript{61} were all held compensable as occupational diseases under the definition of section 65.1-46.

Prior to 1983, compensation in ordinary disease cases was denied primarily for "failure to meet the burden of proof" of work-causation.\textsuperscript{62} The Virginia Supreme Court reviewed several cases of this type, but the burden of proof under section 65.1-46 was never discussed.\textsuperscript{63}

\textsuperscript{60} Jones v. Giant Food, 57 O.I.C. 201 (1977).
\textsuperscript{61} Williams v. City of Chesapeake/Div. of Fire, 57 O.I.C. 383 (1976).
\textsuperscript{62} Two of these cases involved dual causation problems where the claimant had both a work-related and a non-work related cause of disability. The court said in these cases that the Industrial Commission need not find that the employment was the sole cause of the claimant's disability. So long as the employment was a contributing cause of the disability, the claimant was entitled to full benefits. See Smith v. Fieldcrest Mills, I.C. Claim No. 660-914 (March 25, 1983); Thomas v. Dan River Mills, I.C. Claim No. 104-73-01 (Dec. 22, 1982); Williams v. Dan River Mills, I.C. Claim No. 104-57-66 (Aug. 31, 1982); Adkins v. Dan River Mills, 60 O.I.C. 9 (March 21, 1981).
\textsuperscript{63} Two other cases, both involving byssinosis, reviewed the Industrial Commission's determination that the claimant had failed to establish work-causation, again in cases where the medical testimony was conflicting. The court found the Industrial Commission's decision in
The Industrial Commission found very few cases where the disease may have arisen out of and in the course of employment but was not compensable. Compensation was denied only in the case of infectious diseases that were contracted in places other than a hospital, sanitarium, or public health laboratory. The employee who contracted paratyphoid fever after working in flood waters in his employer's plant and the workers who caught tuberculosis from co-workers at a printing press were found to be beyond the reach of the statute, as was the nursing director of a county nursing home who developed hepatitis. Because her disease was not contracted in one of the facilities designated by the statute, her "ordinary disease of life" was not compensable.

III. A Change of Interpretation

A. Ashland Oil and Aggravation of Ordinary Diseases of Life

The Industrial Commission's interpretation of section 65.1-46 began to change in 1983 after the Virginia Supreme Court's decision in Ashland Oil Co. v. Bean. In Ashland Oil, the claimant both cases to be supported by credible evidence and let the decisions stand. The court did not discuss the applicable burden of proof under § 65.1-46 in either case. Caskey v. Dan River Mills, 225 Va. 405, 302 S.E.2d 507 (1983); Barrington v. Dan River, Inc., 225 Va. 240, 302 S.E.2d 505 (1983); see Great Atl. & Pac. Tea Co. v. Robertson, 218 Va. 1051, 243 S.E.2d 234 (1978) (where the supreme court affirmed the award of compensation for "meat-wraper's" asthma, saying that the Industrial Commission's determination that the claimant was totally disabled from an occupational disease was based on credible evidence).

64. The seminal case for this doctrine was Van Geuder v. Commonwealth, 192 Va. 548, 65 S.E.2d 565 (1951). A registered nurse employed by the Medical College of Virginia contracted tuberculosis and was denied compensation under an older version of § 65.1-46 which compensated victims of infectious diseases only where the diseases were incurred "in the course of employment in or in immediate connection with a hospital or sanitarium in which persons suffering from such diseases are cared for and treated." Id. at 551, 65 S.E.2d at 567. MCV did not normally treat tuberculosis patients, so the court decided her case did not fall into the narrow category of infectious diseases compensable under the Act. Id.


68. Id. at 225.
69. 225 Va. 1, 300 S.E.2d 739 (1983). For a comprehensive discussion of this case, see
alleged that a small bunion on her foot had become inflamed as a result of repeated trauma on her job, which required her to wear hard shoes and to remain on her feet constantly. She developed disabling bursitis, a deformed bone, and an inflamed joint in her foot, requiring an operation to remove both the bunion and part of a foot bone. The Industrial Commission found that she had a compensable disease aggravated by her employment. The Virginia Supreme Court, however, overruled the Industrial Commission and noted that the small bump on her foot was pre-existing, and "[t]here is no provision under the occupational disease law of our Act permitting recovery for aggravation of ordinary diseases of life." The court reasoned that section 65.1-45 provides that a disease only arises out of the employment if its origin was in a risk connected with the employment. Thus, any disease, however slight, the origin of which pre-dates the employment cannot be an occupational disease but is an ordinary disease of life which is not compensable.

The court, by this reasoning, seemed to sanction the Industrial Commission's method of distinguishing between "ordinary" and "occupational" diseases by saying that since the sixth test for an occupational disease (having its origin in an employment risk) was not met, the disease must be an ordinary disease of life. Indeed, after Ashland Oil the Industrial Commission continued to differentiate between compensable and non-compensable diseases in this way. In Wakelyn v. Badische Corp., the claimant, after exposure to chemical irritants, developed an inflammation of his respiratory


71. *Ashland Oil*, 225 Va. at 3, 300 S.E.2d at 740. This is a long standing rule, often applied by the Industrial Commission as an alternative ground of denying cases where work-causation of an "ordinary disease of life" was not established. In most of these cases, a physician was not willing to say the work "caused" the condition but would say it "aggravated" it to the point where it became disabling. There is no compensation under Virginia's Act for such aggravation. See Terrell v. White Packing Co., 61 O.I.C. 377 (1982) (osteoarthritis aggravated by constant standing at work); Hatfield v. Safeway Stores, 60 O.I.C. 192 (1981) (pre-existing arthritis aggravated by cold temperatures and heavy lifting at work); Pleasants v. Fairfax County Police Dep't, 58 O.I.C. 289 (1978) (pre-existing psychiatric problems aggravated by work); Kaufman v. Star Band Co., 56 O.I.C. 190 (1974) (duodenal ulcer aggravated by work); Bailey v. Virginia Limestone Corp., 55 O.I.C. 19 (1973) (bronchitis, emphysema, and asthma that might have been aggravated by work).

72. *Ashland Oil*, 225 Va. at 3, 300 S.E.2d at 740.

73. Id.


system which caused a temporary disability. The lung specialist who examined him performed allergy tests and determined that the claimant was mildly allergic to a number of substances but had no history of allergies. He further found that the claimant was hyper-reactive to an ammonia compound which was present at work. The Industrial Commission determined, by reference to the section 65.1-46 test of work-connection, that this exposure to chemicals in the workplace had caused his lung condition. The Industrial Commission further held that "[w]e do not find that susceptibility to a disease process, either through genetically based allergic reaction or through direct physical reaction to chemical irritants, constitutes a pre-existing or on-going disease process, which brings this case within the ambit of Ashland Oil Co. v. Bean."76

B. Holly Farms and the Exclusion of Back Strains

The next occupational disease case reviewed by the Virginia Supreme Court was an abrupt departure from the Industrial Commission's traditional analysis. In Holly Farms/Federal Co. v. Yancey,77 the claimant developed a lumbosacral strain at work. Her job involved constant repetitive twisting, loading racks with packages of chicken parts. The Industrial Commission awarded her compensation for an occupational disease. The supreme court reversed this decision.

First, the court stated that a back injury is not an occupational disease but an injury, and gradually incurred injuries are not compensable in Virginia. For an injury to be compensable, it must occur "by accident," involving a "sudden, obvious, mechanical or structural change in her back."78 The court did not discuss the early Virginia compensation cases which distinguished between an injury and a disease by whether it developed slowly or as a result of a definite event.79 Instead, the court cited a 1964 Industrial Commission decision which held that "[b]ack strain is not a dis-

76. Id. at 363.
78. Id. at 340, 321 S.E.2d at 300 (citing VEPCO v. Cogbill, 223 Va. 354, 356, 288 S.E.2d 485, 486 (1982)); see also Badische Corp. v. Starks, 221 Va. 910, 914, 275 S.E.2d 605, 607 (1981) (intense pain over a two-day span was not attributable to a specific event on either day); VEPCO v. Quann, 197 Va. 9, 14, 87 S.E.2d 624, 627 (1955) (the claimant must prove that the injury by accident arose from an identified incident that occurred at some reasonably definite time).
79. See supra notes 14-21 and accompanying text.
ease” and that a “[s]train of the muscles or tendons in the back is due to a single or repeated physical trauma which injures the muscles or tendons.”

The court then noted that the Industrial Commission, in its review of Yancey’s case, had ignored its 1964 Hensley decision by finding lumbar strain to be an ordinary disease of life. An ordinary disease of life, the court held, is not compensable unless it fits into one of the two exceptions of section 65.1-46. A back strain is clearly not an infectious disease; therefore, unless it “follows as an incident of an occupational disease” it is not covered by workers’ compensation. The court discussed this exception and found it inapplicable:

In our opinion, the first exception does not apply because Yancey’s back pain did not “follow as an incident of occupational disease.” Yancey contends that this language is ambiguous and that it could be read in such a way that the back pain need not follow some other occupational disease but merely follow from the demands of the occupation. We think Yancey’s reading of the statute is contrived and unreasonable. In our view, the plain meaning of the language set forth above is that before an ordinary disease of life can be excepted, and thus made compensable, the claimant must first establish the existence of an “occupational disease” and then establish that the ordinary disease of life of which she complains followed “as an incident of” that occupational disease. The six remaining factors referred to in the last part of Code [section] 65.1-46 have nothing whatever to do with proving an excepted ordinary disease of life.

This decision clearly stated that an ordinary disease of life would not be compensable but left ambiguous how the distinction should be made between an occupational disease and such an ordinary disease. The court said that the six factors of section 65.1-46 were irrelevant in determining if a disease already determined to be “ordinary” would be excepted, but did not say that these factors could not be used to make the initial determination.

The Industrial Commission understood this decision to mean that its prior method of distinguishing between the two types of diseases would still stand. Shortly after Holly Farms, the Indust-

81. Holly Farms, 228 Va. at 341, 321 S.E.2d at 300.
82. Id. at 342, 321 S.E.2d at 300-01 (emphasis added).
trial Commission faced a case of repetitive motion trauma. In *Lamberson v. Phillips Automobile, Inc.*, the claimant developed carpal tunnel syndrome, a repetitive motion disorder, from the constant lifting and moving of heavy automobile parts. The Industrial Commission found that carpal tunnel syndrome was not an ordinary disease of life as was the back strain in *Holly Farms* but was an occupational disease "as it had its origin in the employment and meets the six requirements which are used to determine whether the disease arose out of employment." The Industrial Commission further noted that carpal tunnel syndrome is a form of tenosynovitis, which was one of the diseases previously listed in the original occupational disease schedule and thus has been compensable in Virginia since 1944.

C. Gilliam and Exclusion of Ordinary Diseases of Life

The Industrial Commission's reading of the Virginia Supreme Court's definition of ordinary disease in *Holly Farms*, as demonstrated by its analysis in *Lamberson*, was incorrect. In April of 1985, the court clarified its interpretation of section 65.1-46 with the case of *Western Electric Co. v. Gilliam*. The court in *Gilliam* considered whether tenosynovitis which had been gradually incurred as a result of work-related trauma was, as the Industrial Commission had decided, a compensable occupational disease. The court noted that the back strain suffered by the claimant in *Holly Farms* had been called an ordinary disease of life by the Industrial Commission and was not compensable as it did not fall within the exceptions of section 65.1-46. While they "accepted" the Industrial Commission's finding in *Gilliam* that tenosynovitis was a disease, they found that it was not "occupational." The court noted that "[i]n terms of cause and effect, we find no legally significant difference between Yancey's back strain and Gilliam's tenosynovitis." The court in effect ruled that any disease "to which the general public is exposed outside of employment" cannot be an "occupational disease" but is an ordinary disease of life which is not compensable unless it fits in the statute's two exceptions. Further,

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84. Id. at 214.
85. Id.; see also supra notes 28-29 and accompanying text.
87. Id. at 247, 329 S.E.2d at 14.
88. Id.
if, as the court said in *Holly Farms*, the disease is "ordinary," in
that members of the general public are also susceptible, the six
tests of section 65.1-46 are irrelevant.\(^8\) The *Gilliam* court did not
address the Industrial Commission's traditional analysis of occupa-
tional diseases. Instead, it looked first to the six tests of section
65.1-46 to determine if the disease was occupational or ordinary
and then applied the exceptions only if the disease failed to meet
one of those six tests.

Gilliam argued that the legislative intent of the 1970 abolition of
the schedule of occupational diseases was to broaden the scope of
occupational disease coverage,\(^9\) and the General Assembly cer-
tainly did not intend that diseases covered by the old schedule
would be excluded by the revision of the Act. The court mentioned
in a footnote that the claimant made this argument and that the
employer disagreed.\(^9\) The court itself took no position on the is-
 sue, but it noted that a decision whether to compensate gradually
incurred injuries or diseases was a matter of public policy, better
left to the jurisdiction of the General Assembly.\(^9\)

In 1985, two additional cumulative trauma cases hammered
home the message of *Holly Farms* and *Gilliam*. In *Kraft Dairy
Group v. Bernardini*,\(^9\) an employee suffered a chronic muscle
strain loading bundles of ice cream containers onto a pallet. The
court found the muscle strain was a gradually incurred injury
which was not compensable. There was no doubt that the condi-
tion was caused by her work, but under the new interpretation of
the Act developed in *Gilliam* and *Holly Farms*, such a work-re-
lated disease was no longer covered by the Workers' Compensation
Act.\(^9\) The second case, *Lane Co., Inc. v. Saunders*, \(^9\) involved a
claimant with a herniated disc which developed gradually from re-
peated bending, twisting, and lifting on the job. The claimant had
no pre-existing back problems and was doing a job different from
her regular one when the pain first developed. The Industrial Com-
misson found this evidence sufficient to establish work-causation,
but the supreme court reversed. Because the claimant could not

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\(^8\) See supra note 84 and accompanying text.

\(^9\) See 1969 *Virginia House Report*, supra note 36, at 6. ("The elimination of the sched-
ule insures the most comprehensive coverage of occupational disease . . . .")

\(^9\) *Gilliam*, 229 Va. at 247 n.2, 329 S.E.2d at 14 n.2.

\(^9\) *Id.* at 248, 329 S.E.2d at 15.


\(^9\) *Id.*

identify a particular injury-causing incident which occurred at a particular time, she had not suffered a compensable injury by accident, and after Holly Farms she could not argue that her back problems were an occupational disease.

IV. Gilliam’s Fallout

A. The Industrial Commission’s Response

The most obvious result of Ashland Oil, Holly Farms, and Gilliam has been the exclusion of all repetitive motion traumas from the workers' compensation system. The fact that the evidence establishes work-causation is irrelevant. In Davidson v. Kool-Dri, Inc., a post-Gilliam case involving tenosynovitis, the full Industrial Commission held with seeming regret that:

The evidence in the case before us clearly shows that the claimant’s tenosynovitis is a disease to which members of the general public may be exposed under conditions and circumstances which are not employment related. We find that although the claimant’s disease is not one which is attributed to conditions outside of the employment... [it still] is one which must under the interpretation of the Supreme Court in Gilliam meet one of the two exceptions applicable to ordinary diseases of life under [section] 65.1-46 of the Act. The claimant’s disease, tenosynovitis, meets neither of the exceptions in that it is not an incident of an occupational disease as defined nor is it an infectious or contagious disease. Therefore, under the law as it exists today, the claimant’s condition is not compensable as an occupational disease under the Act and her claim must fail.

All of the Industrial Commission’s prior decisions finding repetitive motion traumas compensable are now overruled, and since April of 1985, the Industrial Commission has denied compensation

96. Id. at 200, 326 S.E.2d at 704.
97. See Meade v. Russell County Bd. of Supervisors, I.C. Claim No. 116-26-89 (Aug. 21, 1985) (a synovitis case). Discussing the holding of Gilliam, the Industrial Commission said that “[a]lthough the evidence in Gilliam clearly showed relationship between the employment and the disease process, the Court found that Gilliam’s disease did not fall within the statutory exceptions which would allow compensation for an ‘ordinary disease of life’ under section 65.1-46.” Id. at 3.
99. Id. at 3.
100. See supra note 48.
for cases of carpal tunnel syndrome,\textsuperscript{101} tendonitis,\textsuperscript{102} tenosynovitis,\textsuperscript{103} synovitis,\textsuperscript{104} degenerative cervical disc disease,\textsuperscript{105} arthritis,\textsuperscript{106} cervical radiculopathy,\textsuperscript{107} epidermoid cyst,\textsuperscript{108} bursitis,\textsuperscript{109} trigger finger,\textsuperscript{110} and back strain.\textsuperscript{111} Because these conditions can no longer be compensated as “diseases,” they are only compensable now if they can be classified as “accidents,” occurring as the result of an injury at a specific, identifiable time.\textsuperscript{112}

The Industrial Commission has, in at least one case, expressed dissatisfaction with this interpretation of section 65.1-46. In \textit{Meade v. Russell County Board of Supervisors},\textsuperscript{113} the Industrial Commission noted that prior to \textit{Gilliam}, it had always interpreted the legislative intent of the 1970 amendments to the occupational disease law to be a broadening of coverage. Not only were those diseases formerly covered by the schedule compensable, but also those ad-

\begin{itemize}
\item \textsuperscript{103} Davidson v. Kool-Dri, Inc., I.C. Claim No. 116-13-41 (July 10, 1985).
\item \textsuperscript{104} Meade v. Russell County Bd. of Supervisors, I.C. Claim No. 116-26-89 (Aug. 21, 1985).
\item \textsuperscript{105} Donchatz v. AT&T Consumer Prod., I.C. Claim No. 114-74-00 (June 21, 1985). In this case, the medical evidence relative to the work causation of the claimant’s disc disease seemed to indicate that work had aggravated a pre-existing condition, which itself is not compensable under \textit{Ashland Oil}. \textit{Id.}
\item \textsuperscript{106} Kinowski v. Holly Farms, I.C. Claim No. 118-63-48 (Sept. 27, 1985) (claimant developed arthritis after eleven years of plucking pin feathers off of chickens); see also Dolberry v. Mica Co., I.C. Claim No. 114-85-71 (June 20, 1985). In \textit{Dolberry}, the claimant’s job involved constant repetitive use of a foot pedal and flexing her knee. She missed a step leaving work and injured her knee. The condition was diagnosed as arthritis, which is an ordinary disease of life. \textit{Id.}
\item \textsuperscript{107} Kronk v. The Frame Gallery, I.C. Claim No. 116-13-86 (June 20, 1985) (job cutting picture frames caused condition to develop in arm and hand).
\item \textsuperscript{108} Washington v. Merillatt Indus., I.C. Claim No. 118-29-30 (July 10, 1985) (claimant developed cyst on hand after repetitive impact of staple gun against palm of hand at work).
\item \textsuperscript{110} Hawkins v. Merillatt Indus., Inc., I.C. Claim No. 118-00-24 (Sept. 10, 1985) (claimant developed trigger finger using power screwdriver at work).
\item \textsuperscript{111} Almond v. United Parcel Serv., I.C. Claim No. 118-38-16 (Sept. 24, 1985).
\item \textsuperscript{112} Jenkins v. National Serv. Co., I.C. Claim No. 119-28-30 (Sept. 5, 1985). In \textit{Jenkins}, the claimant was struck on the wrist by a metal sprinkler and reported the accident immediately. When she saw the doctor the following week, the doctor diagnosed tenosynovitis and de Quervain’s Syndrome. The commission found the case compensable as an injury by accident. \textit{Id.}
\item \textsuperscript{113} I.C. Claim No. 116-26-89 (Aug. 21, 1985).\end{itemize}
ditional diseases which met the six requirements of section 65.1-46 were now included. This was the interpretation of the Industrial Commission, and the expectation of claimants, for fifteen years until the supreme court's decision in Gilliam. The Industrial Commission, in Meade, commented on the effect of the decision:

Hence, after many years of dependence by injured workers upon a schedule of occupational disease and, thereafter, upon applicability of section 65.1-46 to certain specific diseases such as tenosynovitis and tendonitis which commonly result from repetitive trauma in the workplace, the theory supporting past awards of compensation has been determined to be beyond statutory authority to enter an award, despite evidence which may clearly show that a disease process has had its origin and development in the workplace.114

Gilliam's effect has not only been felt in the repetitive motion trauma cases; it has affected other types of disease cases as well. The first case decided by the full Industrial Commission after Gilliam was a hearing loss case, Belcher v. City of Hampton.115 Belcher was a firefighter exposed to loud noises on a daily basis. He had previously worked for the railroad and had attended mortar school in the military. The Industrial Commission discussed the holdings in Gilliam and Holly Farms and concluded:

Applying that standard to this case, it must be fairly said that hearing loss is also an ordinary disease of life suffered by much of the population for a variety of reasons, including but not limited to noise exposure both on and off the job, injury or infection, as well as the aging process. We therefore hold that hearing loss, like tenosynovitis, is not compensable as an occupational disease.116

Belcher has been affirmed by the Virginia Court of Appeals.117 The court first analyzed the evidence presented to the Industrial Commission and commented that the record was devoid of any evidence that the claimant's hearing loss was a disease.118 Then, however, the court seemed to contradict itself when it agreed with the Industrial Commission's finding that hearing loss, like back strains

114. Id. at 5.
116. Id. at 4.
118. Id. at 4.
or tendonitis, is an ordinary disease of life. Following the supreme court's rationale in *Holly Farms* and *Gilliam*, the court then denied the claim.

The pre-*Gilliam* cases awarding compensation for hearing loss are no longer good law, and benefits must be denied even in those cases where the connection between the employment and the hearing loss is undisputed. *Gilliam*'s rationale has also been employed to deny benefits for hypertension and emotional disability.

The immediate impact of *Gilliam* will be a dramatic drop in the number of disease cases now covered by the Workers' Compensation Act. Of the 789 occupational disease cases filed in Virginia in 1984, 221 were cumulative trauma cases and 75 were hearing loss cases. More far-reaching effects will be seen as claims for other diseases shared with the general population are filed. Such diseases could include most cancers and respiratory diseases, dermatitis, heart disease, and the slowly developing effects of toxic chemicals on the central nervous system, the liver, the kidneys, or any other internal organ. In fact, the National Institute of Occupational Safety and Health has stated that there are probably only eleven diseases that are uniquely occupational in origin; most others have "multiple etiologies" and are seen both within and without the workplace.

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119. *Id.* at 6.
120. *Id.* at 6-7.
121. See supra note 43.
122. See Jenkins v. Rocco Enter., I.C. Claim No. 115-99-56 (June 4, 1985). The claimant in *Jenkins* was employed in a noisy poultry factory for fourteen years. The Industrial Commission denied benefits saying "it appears the claimant suffers from an ordinary disease of life and as such would not be compensable even assuming the medical evidence established such causal connection." *Id.* at 2.
126. For example, workers in Hopewell, Virginia, who were exposed to kepone in the early 1970's developed tremors, blackouts, chest pains, and blindness from exposure to the chemical. These are all ordinary diseases of life, occasionally seen in the general population, capable of being caused by exposure to substances outside of work. Under the *Gilliam* rule, the workers who received compensation for these ailments in the 1970's would be ineligible for benefits today. See generally Lowery, *Kepone: A New Way of Life*, Richmond News-Leader, Dec. 22, 1975, at A1.
127. *OSHA Hearings*, supra note 2, at 23. These eleven diseases include silicotuberculosis (silica dust), hemangiosarcoma of the liver (vinyl chloride), mesothelioma (asbestos), malig-
B. The Ordinary Disease of Life Exclusion in Other States

The Virginia Supreme Court, by its strict mechanical reading of section 65.1-46, has failed to recognize that an "ordinary disease of life" can become an "occupational disease" when its origin lies in the conditions of the employment. Virginia's interpretation of the ordinary disease of life exclusion is unique. Of the seventeen states expressly excluding such diseases,\(^{128}\) Virginia is the only one to read its statute in this restrictive manner.

Four of these seventeen states, Florida, Minnesota, North Dakota, and South Carolina, have modified the ordinary disease of life exclusion by statute to make compensable those diseases caused by some hazard of the employment.\(^{129}\) Florida's wording is typical, excluding "all ordinary diseases of life to which the general public is exposed, unless the incidence of the disease is substantially higher in the particular trade, occupation, process, or employment than for the general public."\(^{130}\) North Carolina achieves a similar result from the addition of a single word; it excludes only those diseases to which the public is equally exposed outside of the employment.\(^{131}\) The North Carolina Supreme Court has interpreted this to mean that an ordinary disease of life is compensable where the employee has a greater risk of exposure to the disease than the general public.\(^{132}\) The greater risk in such cases provides


the nexus between the disease and the employment which makes them an appropriate subject for workmen’s compensation.”

At least eight of these states have reported cases compensating victims of repetitive motion traumas, either as occupational diseases or as injuries. In one such case, *Sanyo Manufacturing Co. v. Leisure*, the Arkansas Court of Appeals found tenosynovitis and carpal tunnel syndrome compensable as occupational diseases. The court held:

As we construe [section] 81-1314(a)(5)(iii) [exclusion of ordinary diseases of life] the fact that the general public may contract the disease is not controlling. The test of compensability is whether the nature of employment exposes the worker to a greater risk of that disease than the risk experienced by the general public or workers in other employments.

Missouri, a state with an occupational disease statute which mirrors Virginia’s, has also compensated carpal tunnel syndrome as an occupational disease where the disease is clearly linked to the employment. The state’s court of appeals outlined the inquiry:

[W]hat is distinctively occupational in a particular employment is the peculiar risk or hazard which inheres in the work conditions,

133. *Id.* at ___, 256 S.E.2d at 200.
136. *Id.* at ___, 675 S.W.2d at 844.
and a disease which follows as a natural result of exposure to such occupational risk, an exposure which is greater or different than affects the public generally, is an occupational disease, not an ordinary disease of life . . . . Whether a disease is occupational is not to be determined by whether the disease is literally peculiar to an occupation, but whether there is "a recognizable link between the disease and some distinctive feature of the claimant's job which is common to all jobs of that sort."¹³⁸

These states have also compensated victims of other diseases common to the general public, including dermatitis, lung disease, back injury, serum hepatitis, cancer, and gradual hearing loss.¹⁴⁴

Virginia, as mentioned earlier, probably based the statutory language of section 65.1-46 on the occupational disease definition of Illinois and Indiana. These two states, however, have not interpreted the "ordinary disease of life" language as a complete bar to compensation. The Illinois Supreme Court, for example, found dermatitis to be a compensable occupational disease.¹⁴⁸

[The occupational disease statute] does not place all ordinary diseases of life in a non-compensable status, but only those to which "the general public is exposed outside of the employment." The next paragraph, in turn, speaks of a disease which follows "as a result of the exposure occasioned by the nature of the employment." In each instance "exposure" is a predominant factor. We believe it was the legislative intent that where an employee contracts a disease, due to exposure to hazards of a peculiar or unusual condition of work in a greater degree and in a different manner than the pub-


¹⁴⁵. See supra note 30 and accompanying text.

¹⁴⁶. Illinois has since amended its statute to remove the ordinary disease of life exclusion. Compare ILL. ANN. STAT. ch. 48, § 172.36(d) (Smith-Hurd 1966) with id. ch. 48m, § 172.36(d) (Smith-Hurd Cum. Supp. 1985).

¹⁴⁷. IND. CODE ANN. § 22-3-7-10 (Burns 1974).

¹⁴⁸. Allis-Chalmers, 33 Ill. 2d at ___ , 211 N.E.2d at 278.
lic generally, he is deemed to be suffering from a compensable occupational disease.\textsuperscript{149}

Indiana employs a similar analysis in "ordinary disease" cases. Indiana's Court of Appeals, in \textit{Schwitzer-Cummins Co. v. Hacker},\textsuperscript{150} recognized that a disease may also be contracted by the general public "under usual and ordinary circumstances"; still if the particular claimant's disease did \textit{not} arise from such usual and ordinary circumstances but instead was due to hazards of the employment, his disease is compensable. "The question is not whether the workman has a disease which is more or less common to others of the general public, but whether the \textit{particular conditions} of his work were such as to cause and did cause him to acquire the disease."\textsuperscript{151}

These cases point out how far Virginia has strayed from the rest of the United States in disease coverage. In all states except Virginia, the prime determinant of compensability is work-relatedness. If the disease, be it "ordinary" or "occupational," is caused by the claimant's work, it will be compensated. In Virginia, however, this test is no longer relevant. Compensability is instead measured by whether the disease is also seen in the general population. This works a grave injustice on many workers who become disabled, can no longer work, yet are ineligible for the benefits they deserve.

\section*{V. RECOMMENDED CHANGES}

\subsection*{A. Common Law Remedies and the Exclusivity of the Workers' Compensation Act}

When a Virginia employee receives a compensable injury or illness arising out of and in the course of his employment, his sole remedy against the employer is through workers' compensation. Section 65.1-40 of the Act provides that "[t]he rights and remedies herein granted to an employee . . . to . . . accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee . . . at common law or otherwise, on account of such injury, loss of service, or death."\textsuperscript{152}

\begin{thebibliography}{99}
\bibitem{149} \textit{Id. at} ---, 211 N.E.2d at 278.
\bibitem{150} 123 Ind. App. 674, 112 N.E.2d 221 (1953).
\bibitem{151} \textit{Id. at} ---, 112 N.E.2d at 225 (emphasis in original).
\bibitem{152} VA. CODE ANN. § 65.1-40 (Repl. Vol. 1980).
\end{thebibliography}
This exclusive remedy provision, however, does not apply to injuries or death for which no right of recovery is granted. The Virginia Supreme Court has interpreted the provision to eliminate the common law remedies of an employee only for those injuries covered by the Act. The court stated the rule in Griffith v. Red Raven Ash Coal Co.: 153

Our conclusion is that the Workmen's Compensation Act is exclusive in so far as it covers the field of industrial accidents, but no further. To the extent that the field is not touched by the statute, we think that the legislature intended that the employee's common law remedies against his employer are to be preserved unimpaired. 154

This distinction was made in Virginia around 1970, when an employee working around nerve gases developed chronic bronchitis and suffered a pneumothorax (a collapsed lung). The Industrial Commission denied benefits, saying that there was no compensation available in Virginia for aggravation of bronchitis, an ordinary disease of life, by the work environment. 155 The claimant then filed a civil action against the employer. The employer filed a motion to dismiss, claiming that the employee's sole remedy was the Workers' Compensation Act. The federal district court disagreed and allowed the case to go forward to trial. The court cited the holding in Griffith and concluded that “[i]n view of the finding of the Industrial Commission that bronchitis is an ordinary disease of life which is not compensable under the Virginia Workmens' Compensation Act, Perrin's common law remedies are preserved unimpaired, since this condition is not touched by the statute.” 156

Similar results have been reached in other states where claimants have been barred by statute from receiving compensation benefits for diseases caused or aggravated by the employment. 157

154. Id. at 798, 20 S.E.2d at 534.
155. Perrin v. Brunswick Corp., 333 F. Supp. 221 (W.D. Va. 1971); see also Ashland Oil, 225 Va. at 3, 300 S.E.2d at 740 (pre-existing bunion became bursitis and was not compensable). See generally Comment, supra note 69.
At common law, an employer has a duty to warn an employee of any health risks known to the employer but not to the employee. A violation of either of these duties could give rise to a common law right of action if an employee develops a disease as a result of the employer's negligence.

Do workers now barred by Gilliam from receiving workers' compensation for an "ordinary disease of life" caused or aggravated by the work environment have such a common law remedy? The issue has yet to be considered in a Virginia court, but Griffith and Perrin seem to indicate that employees do have such a right of action. In both Griffith and Perrin the employee developed a disability caused by the work environment but was barred from compensation by restrictive language in the Workers' Compensation Act. The field of injuries and illnesses covered by the statute did not include the work-related complaints of these employees. Hence, their common law rights against the employer remained intact.

An action at common law has one major benefit to employees—they are not limited to recovery of the benefit levels set out in the Workers' Compensation Act. Unfortunately, they face other barriers in a civil action that are not present in a workers' compensation case. The employee must establish the employer's knowledge of the hazard and his failure to warn of or to correct the danger. He must also establish his own freedom from contributory negligence or assumption of the risk. This may prove difficult if the risk is one known to all employees. Finally, a civil action is also time-consuming and expensive; benefits could be years away. In addition, the claimant may be barred by the tort statute of limitations which could, in some cases, be shorter than the limitation for workers compensation.

158. Atlantic Coast Line R.R. Co. v. Wheeler, 147 Va. 1, 132 S.E. 517 (1926) (employer's failure to warn new employee of dangers of inhaling fumes from lead-based paint resulted in the employee's developing lead poisoning which led to optic neuritis and blindness).

159. See Perez, 428 Pa. at ___, 237 A.2d at 228.


B. The Case for Legislative Action

In 1944, a commentator criticized the Virginia Workers' Compensation Act's exclusion of diseases and called the exclusion "clearly illogical and unjust."162 Paraphrasing his criticism, it is unfortunate that the employee cannot control the type of disease he contracts from his work because it makes a great difference, as far as compensation is concerned, whether the disease is one of the eleven unique occupational diseases or is an "ordinary disease of life."

The exclusion of ordinary diseases of life, as the court now interprets it, will produce a plethora of arbitrary distinctions and inequitable results. To illustrate, a claimant who contracts mesothelioma from asbestos exposure could be compensated, while his co-worker who contracts a more common type of lung cancer from the same exposure will not. The cotton textile worker who receives a diagnosis of byssinosis will receive compensation, but if the same worker's disease is diagnosed as chronic bronchitis caused by dust exposure at work, his claim will fail.

A strict analysis of diseases to determine whether they are common to the general public could further exclude cases from compensation. The above-mentioned cancer called mesothelioma is also seen in spouses and children of asbestos workers who bring the fibers home on their clothes.163 Does the worker's disease then become an ordinary disease of life because people outside of the work environment are also susceptible? Lead poisoning is found in children who have chewed paint chips containing lead-based paint. Does this make the lead smelter employee's lead poisoning an ordinary disease of life? A strict interpretation of Gilliam would say yes. Mesothelioma and lead poisoning are gradually incurred illnesses, and are "common" to the general public.

The best route out of this dilemma is not to rely on an em-

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162. See Pate, supra note 20, at 377 and accompanying text.
163. See, e.g., Vandike v. Newport News Shipbuilding & Dry Dock Co., No. 307/S (Newport News Cir. Ct. filed May 9, 1980). Vandike was a case of "secondary exposure" where a pipefitter brought asbestos fibers home on his clothes and exposed his wife who developed mesothelioma. The case was settled and no opinion issued.
ployee's right to pursue a common law remedy, but to seek a change in the workers' compensation statute—at least to seek a return to the interpretation of the Act prior to Gilliam. Workers' compensation should be a remedy available to any person who has suffered an injury or illness "arising out of and in the course of employment." Anything less creates injustice and inconsistency and ignores the remedial nature of the Act.

Legislation has just passed the Virginia General Assembly which would, in part, return the Act to a pre-Gilliam status. House Bill 466, introduced in January of 1986, provides:

§ 65.1-46. "Occupational disease" defined.—As used in this Act, unless the context clearly indicates otherwise, the term "occupational disease" means a disease arising out of and in the course of the employment, but not an ordinary disease of life to which the general public is exposed outside of the employment.

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 is neither a disease to which an employee may have had substantial exposure outside of the employment, nor any condition of the neck, back or spinal column,

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

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

§ 65.1-46.1. "Ordinary disease of life" coverage.—An ordinary disease of life to which the general public is exposed outside of the employment may be treated as an occupational disease for purposes of this Act if it is established by clear and convincing evidence, to a reasonable medical certainty, that it arose out of and in the course of employment as provided in § 65.1-46 with respect to occupational diseases and did not result from causes outside of the
employment, and that:

1. It follows as an incident of occupational disease as defined in this title;

2. It is an infectious or contagious disease contracted in the course of one's employment in a hospital or sanitarium or public health laboratory or nursing home as defined in § 32.1-123 (2) of this Code, or in the course of employment as emergency rescue personnel and those volunteer emergency rescue personnel as are referred to in § 65.1-4.1 of this Code; or

3. It is characteristic of the employment and was caused by conditions peculiar to such employment. 164

The bill restores compensation to most employment-caused diseases, except for conditions of the neck, back and spinal column. 165 The bill retains the Virginia Supreme Court's distinction between "occupational" and "ordinary" diseases, but such "ordinary" diseases may now be compensated if an affected employee can establish work-causation. The burden of proof for the employee, however, will be much more difficult than it was before Gilliam. The employee afflicted by an "ordinary" disease must prove causation by clear and convincing evidence and establish that the disease did not result from a non-work cause. 166 Finally, language granting compensation for infectious diseases has been broadened and now includes diseases contracted by volunteer rescue personnel in the course of their employment. 167

Even though the bill has passed the 1986 General Assembly a question remains about those claims that arise between April of 1985, when Gilliam was decided, and the enactment of the reme-


165. An amendment was introduced in the House Labor and Commerce Committee to exclude all injuries of the muscular, ligamentous, and skeletal systems. This restrictive amendment, which would in effect have endorsed the supreme court's ruling in Gilliam, was narrowly defeated by a vote of 11 to 9. 1986 House Journal ______.

166. This language may mean that if any part of the disease arose outside of the employment, compensation will be denied. Testimony of Lawrence Pascal before a joint House-Senate Subcommittee on the Gilliam case, January 22, 1986. This could well create another dichotomy between "ordinary" and "occupational" diseases, since there is no requirement that "occupational" diseases be caused solely by the employment. Smith v. Fieldcrest Mills, 224 Va. 24, 294 S.E.2d 801 (1981); Bergmann v. L. & W. Drywall, 222 Va. 30, 278 S.E.2d 801 (1981).

167. House Bill 466, 1986 House Journal _____.
dial legislation in July of 1986. Any disease which is not diagnosed until after the statute goes into effect will be covered by the new law but those diagnosed in the intervening period will fall between the cracks unless the General Assembly expressly makes any such amendment retroactive to April of 1985.

C. A Look to the Future

This change in the statute will remedy the most immediate problem with disease compensation. The majority of workers suffering from occupation-caused diseases will again be entitled to compensation benefits. However, many problems still exist with section 65.1-46 and its six-part definition of an occupational disease. It is archaic, drawn from a 1913 Massachusetts case, and it does not reflect any of the advancements in law or medicine since that time. Many of the chemicals now in use, and the diseases they can cause, were unknown in 1913. Furthermore, the definition was never intended by the Massachusetts court to describe a disease; it was descriptive of an injury whose connection to the employment was in doubt.

A careful reading of section 65.1-46's six elements shows that the section is repetitious, and some sections are virtually meaningless. A similar section was strongly criticized by the Indiana Court of Appeals, which noted: "The act is poorly drafted . . . . Its sentences are grammatically intolerable and its sections are inordinately long, all resulting in confusions and contradictions . . . . The statute's high purpose deserves a better mold than that in which it has been cast."

Further, the last of the six requirements—that the disease have

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170. See In re McNichol, 215 Mass. 497, 102 N.E. 697 (1913); see also supra notes 31-34 and accompanying text.

171. See supra notes 30-32 and accompanying text.


173. Id. at ___, 112 N.E.2d at 225.
its origin in an employment risk—excludes all aggravation of diseases by the work environment.\textsuperscript{174} This produces yet another inequitable distinction. Under other sections of the Act, aggravation of a pre-existing disease is compensable if the aggravation or acceleration was a result of an industrial accident.\textsuperscript{175} For instance, if the claimant in \textit{Ashland Oil}\textsuperscript{176} had dropped a heavy wrench on her foot, aggravating a pre-existing "small bump" and causing the ensuing disease and disability, she could have been compensated. Unfortunately, the aggravation was gradually caused by repeated trauma, so her work-caused disability was beyond the scope of the Act.

The General Assembly needs to take a long, hard look at section 65.1-46. The section's six criteria should be individually analyzed. The definitions of other states' workers' compensation acts should be surveyed.\textsuperscript{177} The definition of "occupational disease" should be concise and clear enough to make the burden of proof understandable to both claimants and employers. It should also clearly exclude any disease for which a work connection is not established.

Such a change cannot happen in the next General Assembly session; it will require study and input from a large number of sources. However, such a change will be necessary to complete the job of correcting the inequities of the Act. W.L. Robinson, a long-time employee of the Industrial Commission, said in 1935 that "[t]he principle of social justice and right which underlies and which, in fact, is the foundation of workmen's compensation is that industry should bear the burden of its accidents."\textsuperscript{178} This statement is no less true today. The cost of work-related disease is a cost of doing business. It should be the burden of industry, \textit{not} the burden of the taxpayer, to pay for the damage done to the health of its workforce.

\textsuperscript{176} \textit{See supra} notes 69-73 and accompanying text.
\textsuperscript{177} Currently, only four other states (Indiana, Missouri, Utah, and West Virginia) have a definition of occupational disease with the same provisions as Virginia which exclude ordinary diseases of life and require a six-part inquiry into whether a disease arose out of and in the course of employment. \textit{See supra} note 128 and accompanying text.
\textsuperscript{178} D. Ratcliff, Workmen's Compensation Insurance Handbook 2-3 (1952).