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Janice R. Moore

RECENT DEVELOPMENTS IN VIRGINIA WORKERS' COMPENSATION AND OTHER EMPLOYMENT LAWS

*Janice R. Moore**

This survey covers Virginia court decisions affecting the employment relation directly or indirectly, including the Virginia Supreme Court, the Virginia Court of Appeals, and published decisions of various circuit courts. Because this subject area has not been included in earlier surveys of Virginia law, this survey covers the years 1985 and 1986. During this time, Virginia courts have interpreted the rights and duties of employers and employees under the workers' compensation and unemployment compensation statutes; they have examined the remedies available under Virginia law for allegedly tortious conduct in the context of a labor dispute; they have reexamined the employment-at-will doctrine; and they have construed the authority of the Virginia Department of Labor and Industry to monitor compliance with the worker safety laws by inspecting the workplace. Because the Virginia General Assembly has not been as active in these areas, legislative developments are not featured but are noted when significant to the law under discussion.

I. WORKERS' COMPENSATION

Entitlement to benefits under the Virginia Workers' Compensation Act requires that an employee be disabled because of an occupational disease or because of an injury by accident that arises out of and in the course of his employment.[1] The Industrial Commission continues to interpret these basic prerequisites to compensation based on the facts and circumstances in each case. In addition, appellate courts continue to correct the Commission's application of the law and to supervise the Commission's proper exercise of its authority in administering the statutory scheme. During the past

* Associate, Hunton & Williams, Richmond, Virginia; B.A., 1968, Goucher College; J.D., 1981, T. C. Williams School of Law, University of Richmond.

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

two years, the Virginia Supreme Court has rendered decisions to clear its docket; simultaneously, the newly created Virginia Court of Appeals[2] also has rendered decisions on these issues. It is difficult to assess the impact that the Virginia Court of Appeals will have on workers' compensation law. For now, it is clear that the court's decisions are not consistent with those of the Virginia Supreme Court on some issues that both courts have addressed in the past two years. In the future, the Virginia Court of Appeals will have the opportunity to supervise the workers' compensation laws more closely and more frequently, as claimants pursue their right of appeal to that court. Whether the courts will seize that opportunity to be more aggressive in developing the law remains to be seen.

A. *In the Course of Employment*

As a general rule, an injury is not in the course of employment if it occurs while the employee is going to or from work. However, the Virginia Supreme Court has recognized several exceptions to the "to and from" rule, including cases where transportation is provided to the employee by the employer.[3] Based on the Virginia Court of Appeals' decision in *Boyd's Roofing Co. v. Lewis*,[4] it appears that the transportation exception does not require a formal arrangement. Claimant Lewis was injured while being driven to work by his employer. The claimant was a neighbor and a close friend of his employer's son, and his employer drove him to and from work daily in a company-owned truck. The Industrial Commission awarded compensation, finding that the rides, although gratuitous, were a customary practice that was beneficial to both the employer and the employee. The Virginia Court of Appeals af-

2. The Virginia Court of Appeals was created as of January 1, 1985, with the power to review workers' compensation cases. *See generally* Bryson, *Civil Procedure and Practice*, 19 U. RICH. L. REV. 679 (1985). Appeal from the Industrial Commission to the Virginia Court of Appeals is a matter of right. VA. CODE ANN. § 65.1-98 (Repl. Vol. 1985).

3. The recognized exceptions to the "to and from" rule are: (1) transportation provided by employer, or employee paid for travel time; (2) route used is sole means of entry and exit; (3) employee is still required to perform a duty of his employment when injured. *See* Bristow v. Cross, 210 Va. 718, 720-21, 173 S.E.2d 815, 817 (1970) (employee injured during prearranged transportation in employer's truck from central meeting place to work site was in course of employment because transportation was beneficial to employee and employer). *See generally* Ray, Evans & Steele, *Recovery for Accidental Injuries Under the Virginia Workmen's Compensation Act*, 14 U. RICH. L. REV. 659, 680-82 (1980).

4. 1 Va. App. 93, 335 S.E.2d 281 (1985).

firmed.[5] Thus, a customary practice to provide transporation in an employer-owned vehicle should be sufficient to meet the exception.

B. *Injury by Accident*

Under section 65.1-7 of the Virginia Code, only an injury "by accident" or an occupational disease is compensable. The Virginia Supreme Court has defined "accident" to require proof of two elements. A claimant must prove that the injury results from "an identifiable incident that occurs at some reasonably definite time" and that the injury is "an obvious, sudden mechanical or structural change in the body."[6] Recent decisions continue to apply this two-pronged test, and recovery for many injuries is still precluded, no matter how unusual the employee's exertion before the injury or how disabling the result of repetitive trauma.[7]

In *Lane Co. v. Saunders*,[8] claimant Saunders was assigned new duties and suffered lower back pain after working only one full day. Saunders could not identify any specific instant, however, when the pain started during that working day.[9] The treating physician diagnosed a herniated disc, which was ultimately removed. The Virginia Supreme Court reversed and vacated the Industrial Commission's compensation award and entered final judgment for the employer. The Industrial Commission had awarded benefits after analyzing prior Virginia Supreme Court decisions, noting that a distinction exists between back injury cases involving ordinary exertion and those involving unusual exertion. The Industrial Commission concluded that claimants who experienced back injuries after ordinary exertion were required to prove an identifiable event that precipitated their injuries, but that claimants with back injuries after unusual exertion were not so required.[10] Because claimant Saunders' pain followed new duties which amounted to unusual exertion, the Industrial Commission ruled that he had

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5. *Id.* at 95, 335 S.E.2d at 283. In reaching its decision, the court relied on *Bristow*. *See supra* note 3.

6. VEPCO v. Quann, 197 Va. 9, 12, 87 S.E.2d 624, 626 (1955).

7. *See generally* Comment, *Section 65.1-7 of the Virginia Workers' Compensation Act: Do Recent Virginia Supreme Court Decisions Leave the Claimant in No-man's Land?*, 20 U. RICH. L. REV. 209 (1985).

8. 229 Va. 196, 326 S.E.2d 702 (1985).

9. Saunders first noticed the pain when he entered his car to drive home from work. The next morning, he told his supervisor that his back hurt so badly that he had trouble getting out of bed. *Id.* at 197-98, 326 S.E.2d at 702.

10. *Id.* at 198, 326 S.E.2d at 703.

suffered an injury by accident. The Virginia Supreme Court noted that the Industrial Commission's distinction might be highly desirable social policy, but such policy was the sole province of the General Assembly.[11] Because Saunders could not prove any sudden precipitating event for his injury, it might have developed gradually, and the pain might have been the cumulative effect of many incidents. Thus, the Industrial Commission could only have speculated about whether his injury arose from a work-related cause, and speculation is insufficient to support an Industrial Commission finding.

In *Kraft Dairy Group, Inc. v. Bernardini*,[12] claimant Bernardini complained to her supervisor about pain in her arm and shoulder after working for two months at a new job assignment lifting and stacking packages. The treating physician diagnosed strain of the left shoulder and arm resulting from repetitive heavy lifting at work. The Virginia Supreme Court reversed the Industrial Commission's compensation award and dismissed the claim. The court relied on its opinion in *Lane*, holding that the claimant had failed to prove any specific identifiable incident that caused her injury. The court also stated that, even if the claimant had proven such an incident, she failed on the second prong of the accident test because her injury was a "mere strain" and not a mechanical or structural change in the body.[13]

The Virginia Supreme Court explained *Lane* and *Kraft Dairy* in *Seven-Up Bottling Co. v. Moseley*.[14] Claimant Moseley's primary responsibility was public relations, but he occasionally delivered sodas to stores. After delivering sodas to various stores for two hours, Moseley returned to the plant, walking with difficulty because of back pain. Moseley testified that he had felt stress on his lower back while he was bumping a hand truck full of sodas over the curb at a store.[15] The treating physician diagnosed a ruptured

11. The Virginia Supreme Court commented, in a footnote, that a legislative subcommittee had studied gradually incurred injuries and issued its study report in 1983. *See* REPORT OF THE JOINT SUBCOMM. STUDYING THE FEASIBILITY OF COMPENSATING GRADUALLY-INCURRED, WORK-RELATED INJURIES UNDER THE VIRGINIA WORKMEN'S COMPENSATION ACT, H. DOC. NO. 20, Virginia Gen. Assembly app. 1 (1983). Three bills were introduced in the 1983 Session to amend the statute's "accident" requirement, but none were enacted. *Lane*, 229 Va. 196, 326 S.E.2d 702. A similar bill was introduced in the 1986 Session, but also was not enacted. S. 24, 1986 Sess.

12. 229 Va. 253, 329 S.E.2d 46 (1985).

13. *Id.* at 254, 329 S.E.2d at 48.

14. 230 Va. 245, 335 S.E.2d 272 (1985).

15. *Id.* at 247, 335 S.E.2d at 273.

disc, which was repaired surgically. The Virginia Supreme Court affirmed the Industrial Commission's compensation award. The court did not accept the employer's argument that, under *Kraft Dairy*, Moseley's injury was not compensable because it was not a "sudden mechanical or structural change in the body."[16] Instead, the court explained that the *Kraft Dairy* holding supported the Industrial Commission's analysis rather than the employer's.[17] In *Kraft Dairy*, the court denied recovery because the claimant suffered a mere strain, which did not meet the mechanical or structural change prong of the accident test.[18] In *Kraft Dairy*, however, the court contrasted a strain with the herniated disc suffered by claimant Saunders in *Lane*, commenting that Saunders' herniated disc injury would have been compensable if he had proven the identifiable incident prong of the accident test. Claimant Moseley's ruptured disc clearly met the court's standard.[19]

In applying these Virginia Supreme Court decisions, the Virginia Court of Appeals has failed to follow expressly the "mere strain" rule of *Kraft Dairy*, and its decisions are inconsistent.

In *Bradley v. Philip Morris, U.S.A.*,[20] claimant, a floor sweeper, suffered pain in his back after three hours of moving very heavy barrels at work. A doctor diagnosed back strain, and the claimant's x-rays showed no abnormality.[21] The Virginia Court of Appeals affirmed the Industrial Commission's denial of compensation, stating that the elements of an injury by accident are: "(1) an identifiable incident; (2) a sudden mechanical or structural change in the body; and (3) a causal connection between the incident and the bodily change."[22] The court held that claimant had satisfied the first prong of this test because the work activity that he claimed to be the identifiable incident lasted about three hours. The court stated, "We do not understand the term 'identifiable incident' to mean an event or activity bounded with rigid temporal precision. It is, rather, a particular work activity which takes place within a

16. *Id.* at 249-50, 335 S.E.2d at 273-74. The employer also argued that no credible evidence supported the identifiable time prong of the accident test. For a more thorough discussion of competent evidence, see *infra* notes 229-38 and accompanying text.

17. 230 Va. at 250, 335 S.E.2d at 275.

18. *Id.*

19. *Id.*

20. 1 Va. App. 141, 336 S.E.2d 515 (1985).

21. *Id.* at 143, 336 S.E.2d at 516.

22. *Id.* at 144, 336 S.E.2d at 517 (citing *Kraft Dairy*, 229 Va. at 256, 329 S.E.2d at 48; *Lane*, 229 Va. at 199, 326 S.E.2d at 703.)

reasonably discrete time frame."[23] However, claimant failed to prove the third element, the causal connection between the incident and his injury. The physician's opinion that claimant suffered no structural impairment was fatal at the Industrial Commission hearing and on appeal.

The Virginia Court of Appeals could have been more straightforward by following the court's "mere strain" rule from *Kraft Dairy*, which typically causes back strain cases to fail. Another example of this inconsistency is the court's decision in *Russell Loungewear v. Gray*.[24] Claimant felt a sharp pain in her back while lifting a box as part of her normal duties.[25] Her injury was diagnosed as an acute back strain. Without discussion of *Kraft Dairy*, the court affirmed the Industrial Commission's compensation award.

As for the identifiable incident requirement, the Virginia Court of Appeals has begun to draw lines around the "discrete time frame" test that it articulated in *Bradley*. For example, in *Woody v. Mark Winkler Management, Inc.*,[26] claimant, a maintenance employee, suffered a heart attack after working many overtime hours under a great deal of pressure in cold and icy conditions for three weeks.[27] The Virginia Court of Appeals affirmed the Industrial Commission's denial of compensation. The court applied the Virginia Supreme Court's holding in *Lane*, which required claimants to identify a particular incident that causes a sudden mechanical change, even when claiming injury as a result of unusual stress or exertion.[28] The court could not find any exception to the *Lane* test to permit a different analysis for a heart attack victim, although the court noted that other jurisdictions allow such distinctions, and that commentators have criticized application of the accident analysis in such cases.[29] The court relied on its opinion in *Bradley*, holding that *Lane* requires a reasonably discrete time frame for the identifiable incident prong and that cumulative

23. *Id.* at 145, 336 S.E.2d at 517 (citing *Lane*, 229 Va. at 199, 326 S.E.2d at 703).

24. 2 Va. App. 90, 341 S.E.2d 824 (1986).

25. *Id.* at 92, 341 S.E.2d at 824.

26. 1 Va. App. 147, 336 S.E.2d 518 (1985).

27. Although the work was normally performed by three men, claimant and another man had been the only maintenance employees for a 400 unit apartment complex for two weeks, and claimant had been working alone for one week. *Id.* at 148, 336 S.E.2d at 519.

28. *Id.* at 150, 336 S.E.2d at 520.

29. *Id.* at 151, 336 S.E.2d at 520 (citing Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441 (1967)).

buildup over three weeks does not meet the test.[30]

In *Jewell Ridge Coal Corp. v. McGlothlin*,[31] claimant, a heavy equipment operator, suffered pain in his back and legs after being jolted, where floods in the area had created an uneven surface. He told his supervisor about the pain sometime that morning, yet continued to work that day and the next. The treating orthopedist diagnosed a herniated disc as well as degenerative diseases of the spine.[32] The Virginia Court of Appeals affirmed the Industrial Commission's compensation award.[33]

Still another example of the confusion in the Virginia Court of Appeals' application of *Kraft Dairy* is the tortured analysis in *Pendleton v. Flippo Construction Co.*[34] Claimant suffered pain in his back after shoveling asphalt for about two hours in the morning, but continued to work even though the pain worsened. At the end of the day, he felt something in his back when he picked up his shovel. After continuous pain for three weeks, a physician diagnosed back strain related to his work. The Virginia Court of Appeals affirmed the Industrial Commission's denial of compensation. During the Industrial Commission hearing, the claimant conceded that the morning incident did not meet the test of *Lane*, *Kraft Dairy*, and *Bradley*. However, the claimant argued that, when he lifted the shovel at the end of the day, he suffered a new and separate injury or, at least, aggravated the back pain that had developed throughout the day. Because injuries are compensable if they result when pre-existing conditions are aggravated, he argued that compensation should be awarded.[35] In response, the Virginia Court of Appeals noted that an injury is not compensable if it results

30. *Woody*, 1 Va. App. at 152, 336 S.E.2d at 52. The claimant also argued that his pre-existing arterioschlerosis was an occupational disease; however, the Industrial Commission ruled that it was an ordinary disease of life under Ashland Oil Co. v. Bean, 225 Va. 1, 300 S.E.2d 739 (1983). The Virginia Court of Appeals agreed. *Woody*, 1 Va. App. at 149, 336 S.E.2d at 519.

31. 2 Va. App. 294, 343 S.E.2d 94 (1986).

32. *Id.* at 296, 343 S.E.2d at 95 (the diseases included lumbosacral spinal stenosis, osteoarthritis of the lumbar spine, and lumboradicular syndrome).

33. In *McGlothlin* and *Russell Loungewear*, the employers argued that claimants' pre-existing conditions were aggravated by ordinary exertion and that, under Rust Eng'g Co. v. Ramsey, 194 Va. 975, 76 S.E.2d 195 (1953), the injuries were not compensable. The Virginia Court of Appeals affirmed compensation awards in both cases, stating that although *Rust Eng'g* has never been overruled, it is limited to its facts after Ohio Valley Constr. Co. v. Jackson, 230 Va. 56, 334 S.E.2d 554 (1985). For a discussion of *Ohio Valley*, see *infra* notes 212-13 and accompanying text.

34. 1 Va. App. 381, 339 S.E.2d 210 (1986).

35. *Id.* at 383, 339 S.E.2d at 211.

solely from the natural progression of the pre-existing condition. The court held that the Industrial Commission was correct in ruling that only one incident had occurred and that his injury was not compensable because it had developed gradually as a natural progression of that incident.[36]

C. *Arising Out of the Employment: The "Actual Risk" Test*

An injured employee also must prove that his injury arose out of his employment. In several cases, the courts have reaffirmed that, in Virginia, this requirement is judged by the "actual risk" test.[37] However, the courts have not clarified the meaning of that test in any helpful way. Because the courts continue to infuse the "actual risk" test with concepts of proximate cause analysis, the rationale remains confusing.[38]

1. Idiopathic Falls

In *Central State Hospital v. Wiggers*,[39] claimant twisted her ankle while walking on a floor that was level, dry, and unobstructed. At the Industrial Commission hearing, she surmised that the floor might have been slippery because it might have been waxed the previous night. The Virginia Supreme Court reversed and vacated the Industrial Commission's compensation award, which the Commission had based on a finding that the slippery floor caused claimant's injury. The court emphasized that the claimant must demonstrate "a causal connection between the conditions under which the work is required to be performed and the resulting injury . . . . The causative danger must be peculiar to the work and not common to the neighborhood."[40] The claimant only had speculated about the slippery floor, and mere speculation was inadequate to support the Industrial Commission's finding.

In *United Parcel Service v. Fetterman*,[41] claimant sprained his back when he raised his foot to the back of his truck and bent over to tie his shoelace. The Industrial Commission awarded compensa-

36. *Id.* at 384, 339 S.E.2d at 212.

37. *See, e.g.*, Innes & Co. v. Brosnahan, 207 Va. 720, 152 S.E.2d 254 (1967); Park Oil Co. v. Parham, 1 Va. App. 166, 336 S.E.2d 531 (1985).

38. *See* Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1742-45 (1985).

39. 230 Va. 157, 335 S.E.2d 257 (1985).

40. *Id.* at 160, 335 S.E.2d at 259 (quoting Richmond Memorial Hosp. v. Crane, 222 Va. 283, 285, 278 S.E.2d 877, 878-79 (1981)).

41. 230 Va. 257, 336 S.E.2d 892 (1985).

tion, ruling that the work environment contributed to the manner in which he tied his shoelace.[42] However, the Virginia Supreme Court reversed and dismissed the case, relying on *Central State Hospital*.[43] The claimant's act of bending over to tie his shoelace was "unrelated to any hazard common to the workplace."[44] Because "[e]very person who wears laced shoes must occasionally perform the act of retying the laces,"[45] his employment was not the cause of his injury.[46]

The Virginia Court of Appeals applied the holding in *Central State Hospital* in two cases, allowing recovery in only one instance. In *Southland Corp. v. Parson*,[47] claimant hit her head on the wall of a walk-in refrigerator when she fell from an eighteen-inch milk crate on which she stood to shelve cartons of milk. The treating physician opined that Parson's fall was caused by a fainting spell. The Virginia Court of Appeals affirmed the Industrial Commission's compensation award, stating that idiopathic falls are compensable "if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle."[48] The court focused on the stool's eighteen-inch height from the floor, the walls of the refrigerator, and the milk cartons that claimant was lifting when she fell. These "additional risks" clearly were attributable to her employment and made her injury compensable, even though it was impossible to measure accurately the degree to which any of these circumstances might have increased the severity of her injury.[49]

However, the Virginia Court of Appeals held that an idiopathic fall on a level, dry, and unobstructed floor was not compensable in

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42. *Id.* at 258, 336 S.E.2d at 893.

43. 230 Va. 157, 335 S.E.2d 257 (1985). The court also cited *Crane*, 222 Va. 283, 278 S.E.2d 877.

44. *Fetterman*, 230 Va. at 259, 336 S.E.2d at 893.

45. *Id.*

46. The claimant also argued that he should recover under the personal comfort doctrine. However, the court refused to consider that argument because it was not raised at the hearing level. *Id.* (citing Eason v. Eason, 204 Va. 347, 352, 131 S.E.2d 280, 283 (1963)). That argument probably could have won the case. *See, e.g.*, Bradshaw v. Aronovitch, 170 Va. 329, 196 S.E. 684 (1938); Archibald v. Ott, 77 W. Va. 448, 87 S.E. 791 (1916).

47. 1 Va. App. 281, 338 S.E.2d 162 (1986).

48. *Id.* at 284-85, 338 S.E.2d at 164 (quoting 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 12.11 (1985)).

49. *Parson*, 1 Va. App. at 287, 338 S.E.2d at 165.

Winegar v. International Telephone & Telegraph.[50] Claimant fell and broke her patella when she hit the floor. The floor was level, dry, and unobstructed. A doctor testified that a fainting spell was the most likely cause of her accident, but claimant denied that she had fainted. The Virginia Court of Appeals affirmed the Industrial Commission's denial of compensation because her fall was idiopathic and her employment did not contribute to her injury.[51] The claimant argued unsuccessfully that her fall was unexplained and, therefore, that she was entitled to the presumption applied in unexplained death cases that her accident arose out of and in the course of employment.[52] The court ruled that the presumption succeeds only when there is no contrary or conflicting evidence on the cause of the accident.[53] In this case, however, the evidence proved that an idiopathic fall caused the accident.

In *Hercules, Inc. v. Stump,*[54] claimant was injured when he slipped and fell on a stairway that he and other employees used regularly. The wooden stairway was outside the building and provided the only access to the nearest restroom facilities in the area. The Virginia Court of Appeals affirmed the Industrial Commission's compensation award, agreeing that claimant's work required him to use that stairway and assume "a degree of risk inherent in traversing that particular obstacle."[55] The employer argued that claimant's injury was not compensable because the stairway was not unusual or defective, as required by previous Virginia Supreme Court decisions, including *Reserve Life Insurance Co. v. Hosey.*[56] Although the Virginia Court of Appeals agreed that *Hosey* controlled the case, the court held that the employer had misconstrued the rationale. The claimant in *Hosey* was injured while

50. 1 Va. App. 260, 337 S.E.2d 760 (1985).

51. *Id.* at 263, 337 S.E.2d at 762.

52. Claimant relied on Southern Motor Lines Co. v. Alvis, 200 Va. 168, 104 S.E.2d 735 (1958), and Sullivan v. Suffolk Peanut Co., 171 Va. 439, 199 S.E. 504 (1932).

53. *Winegar*, 1 Va. App. at 263, 337 S.E.2d at 762. The court relied on Hopson v. Hungerford Coal Co., 187 Va. 299, 4 S.E.2d 392 (1948), in which the Virginia Supreme Court held that the evidence on which the presumption is based must be so strong that the only rational inference to be drawn is that death arose out of and in the course of employment. In Metcalf v. A.M. Express Moving Sys., Inc., 230 Va. 464, 339 S.E.2d 177 (1986), a claimant who was the victim of an assault also tried to persuade the Virginia Supreme Court to apply this presumption. However, the court expressly refused to hold whether the presumption could apply to a non-death case. *See infra* notes 67-74 and accompanying text.

54. 2 Va. App. 77, 341 S.E.2d 394 (1986).

55. *Id.* at 78, 341 S.E.2d at 396.

56. 208 Va. 568, 571, 159 S.E.2d 633, 635 (1968), *cited in Stump*, 2 Va. App. at 81, 341 S.E.2d at 398.

climbing steps that were "just a little bit higher than usual."[57] The Virginia Supreme Court previously had distinguished *Hosey* in denying compensation in *Richmond Memorial Hospital v. Crane*.[58] Claimant Crane was injured when she slipped and fell while walking in a dry, level, and unobstructed corridor. The Virginia Supreme Court explained that, unlike Crane, Hosey was climbing steps, and "more importantly," the steps were "just a little bit higher than usual."[59] Based on that language in *Crane*, the employer in *Stump* argued that *Hosey* should be limited to its facts: a fall from steps is only compensable if the steps are unusual or defective.[60] The Virginia Court of Appeals disagreed, stating that the height of the steps was only a further distinction between *Hosey* and the level corridor in *Crane*.[61] However, the court concluded the *Stump* opinion by noting that "the nature and location of the outdoor wooden stairway, which was subjected to the elements, constituted an additional factor peculiar to this work environment, similar to the higher steps in *Hosey*."[62]

Despite the final reference to *Hosey*, when the *Stump* opinion is combined with the decisions in *Parson* and *Winegar*, it is apparent that the Virginia Court of Appeals has attempted to "correct" Virginia law to conform to the law in the majority of jurisdictions. Thus, injuries caused by idiopathic falls are compensable only if the employment places the employee in a position that increases the likelihood of a fall, such as on a height, even if the height is only eighteen inches.[63]

2. Pre-existing Conditions

In *Olsten of Richmond v. Leftwich*,[64] the Virginia Supreme Court judged the "arising out of" requirement by applying the standard used to determine whether an alleged change in condition

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57. *Stump*, 2 Va. App. at 81, 341 S.E.2d at 396 (citing *Hosey*, 208 Va. at 571-72, 15 S.E.2d at 634-35).

58. 222 Va. 283, 278 S.E.2d 877 (1981).

59. *Id.* at 286, 278 S.E.2d at 879.

60. *Stump*, 2 Va. App. at 81, 341 S.E.2d at 396.

61. *Id.* at 81-82, 341 S.E.2d at 396-97.

62. *Id.* at 82, 341 S.E.2d at 397.

63. *See* 1 A. LARSON, *supra* note 48, § 12.11. The Industrial Commission has long applied this standard. *See, e.g.*, Eggleston v. Madison Transfer Co., 53 O.I.C. 89 (1971) (injury compensable because laborer suffered blackout and struck jaw on edge of piece of lumber); *see also* Ray, Evans & Steele, *supra* note 3, at 680-82.

64. 230 Va. 317, 336 S.E.2d 893 (1985).

is caused by the original compensable injury.[65] Claimant injured her back while performing special duties. The treating physician diagnosed a severe back sprain exacerbating a back injury that she had suffered in an automobile accident one year earlier. Another physician opined that only the accident at work had caused her injury. The Virginia Supreme Court affirmed the Industrial Commission's compensation award, holding that it was immaterial whether her disability was caused solely by her accident at work or was related also to an earlier injury that was aggravated by her accident at work.[66]

3. Assaults

In *Metcalf v. A.M. Express Moving Systems, Inc.*,[67] claimant, a long-distance truck driver, was shot several times by an assailant while sleeping in his truck waiting for the terminal to open. The assailant shot claimant without any conversation, did not attack claimant's helper, who also was sleeping in the truck, and did not rob claimant or the truck. Claimant had a prison record. He had parked his truck in the same area before without incident, and no similar incidents had occurred in the area.

The Virginia Supreme Court affirmed the Industrial Commission's denial of compensation. The claimant argued that he had met the "accident" and "in the course of" requirements[68] and that,

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65. The court relied on Ohio Valley Constr. Co. v. Jackson, 230 Va. 56, 334 S.E.2d 554 (1985). *See Leftwich*, 230 Va. at 319-20, 336 S.E.2d at 894-95. For a discussion of *Ohio Valley*, see *infra* notes 212-13 and accompanying text.

66. *Olsten*, 230 Va. at 318, 336 S.E.2d at 894 (quoting *Ohio Valley*, 230 Va. at 58, 334 S.E.2d at 555 (aggravation of a pre-existing condition); Lucas v. Lucas, 212 Va. 561, 563, 18 S.E.2d 63, 64 (1972) (the actual risk test). In light of *Ohio Valley* and *Olsten*, it is difficult to understand the opinions of the Industrial Commission and the Virginia Court of Appeals in Shelton v. Ennis Business Forms, Inc., 1 Va. App. 53, 334 S.E.2d 297 (1985). In *Shelton*, claimant was injured when moving a heavy floor jack at work. Claimant had previously suffered a similar tear in his shoulder that was not work-related but had been fully repaired surgically. The treating physician's report stated that, generally, normal wear and tear is more responsible than an injury for the recurrence of such a tear although injury is usually the "final straw" causing the tear. *Id.* at 55, 334 S.E.2d at 298. The Virginia Court of Appeals reversed the Industrial Commission's denial of compensation and remanded the case for new evidence. The Industrial Commission apparently required claimant to prove that his disability was caused by one incident, and it might have confused the "two causes" rule and the "just as probable" rule. Based on the physician's report, however, the Virginia Court of Appeals probably should have reversed and awarded compensation.

67. 230 Va. 464, 339 S.E.2d 177 (1986).

68. *Id.* at 467-68, 339 S.E.2d at 180. The court agreed that the record clearly established these requirements. *Id.* at 467, 339 S.E.2d at 180.

therefore, he was entitled to a presumption that his injuries arose out of his employment. The Virginia Supreme Court noted that it had approved such a presumption in certain cases in which an employee is found dead at or near his place of work because of an unexplained accident.[69] However, the court refused to decide whether the presumption could apply to a non-death case,[70] because claimant's case did not meet the requirements for triggering the presumption as outlined in *Hopson v. Hungerford Coal Co.*,[71] and reaffirmed in *Bagget Transportation Co. v. Dillon.*[72] In those cases, the court held that "there must be an absence of contrary or conflicting evidence . . . and the circumstances which form the basis of the presumption must be of sufficient strength from which the only rational inference to be drawn is that death arose out of and in the course of the employment."[73] The court stated that the facts of this case were just like the facts in *Hopson* and *Baggett* and that, in each case, the assailant appeared to be attempting only to murder the claimant.[74] Because the evidence supported a rational inference that Metcalf was the victim of a purely personal assault, the presumption, even if it were available as a matter of law in a non-death case, would not apply.

In *City of Richmond v. Braxton*,[75] employee Braxton's supervisor grabbed her twice and fondled her breasts. The supervisor kept copies of *Playboy* magazine and other "pornographic" materials in his office.[76] The Industrial Commission awarded compensation, finding that the supervisor "engaged in activities and conversations at the employment site which clearly exhibited a proclivity to engage in aberrant behavior with an emphasis on sexual themes."[77] Thus, Braxton's risk of sexual assault was increased by the continued presence of the supervisor.

The Virginia Supreme Court reversed the award and dismissed the claim, applying an "increased risk" analysis. The court recited

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69. *Id.* at 468, 339 S.E.2d at 180 (citing Motor Lines v. Alvis, 200 Va. 168, 171-72, 104 S.E.2d 735, 738 (1958); Sullivan v. Suffolk Peanut Co., 171 Va. 439, 444, 199 S.E. 504, 506 (1938)).

70. *Metcalf*, 230 Va. at 469, 339 S.E.2d at 180.

71. 187 Va. 299, 305-06, 46 S.E.2d 392, 394-95 (1948).

72. 219 Va. 633, 642, 248 S.E.2d 819, 824 (1978).

73. *Metcalf*, 230 Va. at 467, 339 S.E.2d at 180 (quoting *Baggett Transp. Co. v. Dillon*, 219 Va. 633, 642, 248 S.E.2d 819, 824 (1978)).

74. *Id.* at 469, 339 S.E.2d at 180.

75. 230 Va. 161, 335 S.E.2d 259 (1985).

76. *Id.* at 163, 335 S.E.2d at 260.

77. *Id.* at 163, 335 S.E.2d at 261.

the general rule for assault cases and held that the record contained no evidence that Braxton's supervisor assaulted her because she was an employee or because of her employment.[78] Even though the supervisor displayed sexually explicit materials and discussed sex-related topics, the record contained no evidence that a person who does so is more inclined to commit sexual assaults. Therefore, the record did not support the Commission's ruling that the supervisor's behavior produced a greater risk that he would commit sexual assaults on fellow employees. Braxton's assault, therefore, was a personal assault and not compensable.[79]

After Braxton's assault, section 65.1-23.1 of the Virginia Code[80] was enacted to make certain sexual offenses compensable. Even though the statute was amended in 1986 to include lesser sexual offenses,[81] it imposes an even tougher "increased risk" test: The claimant must prove that the nature of employment "substantially increases the risk of such assault."[82] Compensability seems remote after the *Braxton* decision, and such victims most often will be left without a remedy, particularly since Braxton's attempt to obtain a remedy at common law also was thwarted.[83]

The Virginia Court of Appeals confused the analysis of assault cases in *Park Oil Co. v. Parham.*[84] Claimant, a gas station attendant, was struck by a truck while walking across an open area of the station. The truck was driven by claimant's friend, who had stopped for a social visit. The friend, who had been drinking, intended only to spin his wheels and scare claimant, but instead struck him when the accelerator jammed and the brakes failed. The Virginia Court of Appeals affirmed the Industrial Commission's compensation award, applying both a "street risk" and a "horseplay" analysis.

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78. *Id.* at 164, 335 S.E.2d at 261.

79. *Id.* at 163, 335 S.E.2d at 261 (quoting *R. & T. Invs. v. Johnson*, 228 Va. 249, 321 S.E.2d 287 (1984)).

80. VA. CODE ANN. § 65.1-23.1 (Repl. Vol. 1982) states that victims of sexual assaults are entitled to a presumption that certain sexual assaults are compensable, provided that the "nature of such employment substantially increases the risk of such assault." Even if it had been enacted before her assault, the statute could not have helped Ms. Braxton, because it only referred to Virginia Code §§ 18.2-61 (rape by sexual intercourse) and -67.1 (forcible sodomy).

81. The statute now includes the crimes of sexual battery and aggravated sexual battery in addition to rape and forcible sodomy. *Id.* § 65.1-23.1 (Cum. Supp. 1986).

82. *Id.*

83. *See infra* notes 328-32 and accompanying text.

84. 1 Va. App. 166, 336 S.E.2d 531 (1985).

To determine whether claimant's injury arose out of his employment, the court applied the "street risk" analysis, even though technically, claimant was not injured in the street.[85] The court drew a fair analogy between a service station and a heavily trafficked street. The court noted, "Unlike pedestrians on a street, [claimant] was not protected by crosswalk markings or traffic control lights. While he was working, safety from the threat of traffic could not be his prime concern, as it would be with other pedestrians."[86]

The employer argued, however, that claimant was the victim of a personal assault.[87] In response, the court first attempted to distinguish claimant's accident from an assault in the technical sense, relying on the common-law definition of a criminal assault.[88] The court reasoned that an assault cannot occur by accident or negligence, but requires specific intent to injure, which claimant's friend did not have. Therefore, there was no assault, merely an unintentional battery—a civil wrong. Perhaps realizing the weakness of that distinction, the court held that, even if it were an assault case, it is better analyzed as a "horseplay" incident, for which all jurisdictions allow recovery,[89] especially where, as here, the claimant is an innocent victim. The court recognized that claimant's

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85. *Id.* at 169, 336 S.E.2d at 533. The court applied the test adopted by the Virginia Supreme Court in Immer & Co. v. Brosnahan, 207 Va. 720, 725, 152 S.E.2d 254, 257 (1967) (citing 1 A. LARSON, *supra* note 48, § 9.10). In *Immer & Co.*, the Virginia Supreme Court required that the employment must expose the worker to the particular danger in the street causing his injury, but declared that it is irrelevant whether the general public also is exposed to similar risks. The "street risk" analysis is a special application of the "actual risk" test. *Immer & Co.*, 207 Va. at 725, 152 S.E.2d at 257.

86. *Park Oil*, 1 Va. App. at 170, 336 S.E.2d at 533.

87. *Id.* The employer relied on Industrial Commission decisions denying compensation to assault victims in Mullins v. Paylo Supermarkets, 60 O.I.C. 316 (1981) (employee murdered at work by her boyfriend's wife, but for purely personal reasons), and Kuhn v. Eastern Airlines, Inc., 60 O.I.C. 272 (1981) (airline stewardess injured during an attempted rape while staying at hotel in connection with her job). The court noted that, to satisfy the "actual risk" test, an assault must be aimed at a claimant as an employee; if such proof were not required, the court would be adopting the positional risk doctrine, which the Virginia Supreme Court has refused to do. *See Baggett Transp. Co.*, 219 Va. at 637, 248 S.E.2d at 824, and *Hopson*, 187 Va. at 305-06, 46 S.E.2d at 395 (both Dillon and Hopson were truck drivers who were murdered in the course of their employment, but their deaths were not compensable because nothing showed that they were killed because of their employment as truck drivers).

88. *Park Oil*, 1 Va. App. at 170, 336 S.E.2d at 533.The court defined an assault as attempted battery or causing reasonable fear of receiving bodily hurt, citing a criminal case, Merritt v. Commonwealth, 164 Va. 653, 658, 180 S.E. 395, 397 (1935). *Park Oil*, 1 Va. App. at 170, 336 S.E.2d at 534.

89. *Id.* at 171, 336 S.E.2d at 534 (citing 1 A. LARSON, *supra* note 48, § 23.10).

friend was a licensee rather than a co-worker, but labelled that distinction meaningless.[90]

The court's "horseplay" analysis is probably unsound because, even though Parham was an innocent victim of a prank, recovery for injuries resulting from horseplay is grounded on the conclusive presumption that the work environment is a place that necessarily provides the temptation and opportunity for *co-workers* to engage in "occasional foolery."[91] Although the "horseplay" rationale in *Park Oil* might be dismissed as dicta, the Virginia Court of Appeals has not treated it as such.[92] The court's analysis in *Park Oil* is particularly troublesome in light of the *Braxton* decision by the Virginia Supreme Court. It is difficult to understand how the Virginia Court of Appeals could hold an employer responsible when an employee's personal friend "plays" recklessly with a truck after the Virginia Supreme Court had refused to hold an employer responsible when a co-worker "plays" with the employee.

D. *Occupational Diseases*

Under section 65.1-7 of the Virginia Code, compensable injuries include certain occupational diseases. Section 65.1-46 defines occupational disease as a disease that arises out of and in the course of employment. However, any "ordinary disease of life" is not compensable under section 65.1-46, unless it is incident to a compensable occupational disease or it is an infectious or contagious disease contracted in the course of employment in a hospital or sanatorium or public health laboratory.[93] Therefore, the first step in any occupational disease case is to establish that the claimant's condition is a disease. The next step is to establish either that the disease arose out of and in the course of employment or that, even though an ordinary disease of life, it meets one of the two exceptions. The courts have refrained from providing guidance about what a disease is and have demonstrated that characterization as a disease does not win the case, particularly when the disease is caused or aggravated by repeated, work-related trauma. The courts

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90. *Id.*

91. *Id.* at 171, 336 S.E.2d at 534.

92. The Virginia Court of Appeals relied on its opinion in *Park Oil* to uphold a compensation award in Dublin Garment Co. v. Jones, 2 Va. App. 165, 342 S.E.2d 638 (1986), because claimant was an innocent victim of her co-worker's playful touching.

93. The statute specifies an "ordinary disease of life to which the general public is exposed outside of the employment." VA. CODE ANN. § 65.1-46 (Repl. Vol. 1985).

also have demonstrated that they will continue to defer to the General Assembly to compensate injuries and occupational diseases that are incurred gradually.[94]

1. Occupational Disease or Ordinary Disease of Life

In *Western Electric Co. v. Gilliam*,[95] the Virginia Supreme Court considered whether tenosynovitis[96] could be compensated as an occupational disease. Claimant was an assembly-line worker who developed tenosynovitis in both hands because of the repetitive motions in her job. The Virginia Supreme Court reversed the Industrial Commission's compensation award even though it accepted the Commission's finding that tenosynovitis is a disease. With no supporting analysis or rationale, the court ruled that it is an ordinary disease of life.[97] Thus, the claimant was required to establish that the tenosynovitis was incident to a compensable occupational disease. The court reiterated its previous holding that work-related aggravation of an ordinary disease of life cannot convert an ordinary disease of life into a compensable occupational disease,[98] and that injury from work-related repeated trauma is not compensable.[99]

In *Belcher v. City of Hampton*,[100] the Virginia Court of Appeals considered whether hearing loss is a compensable occupational disease. Claimant was a fireman whose hearing loss was related to noise-induced trauma and whose job exposed him to a variety of loud noises. The Virginia Court of Appeals relied on *Holly Farms v. Yancey*[101] and *Western Electric*, and affirmed the Industrial

94. For an excellent discussion of these issues in Virginia case law, see Scott, *Workers' Compensation for Disease in Virginia: The Exception Swallows the Rule*, 20 U. RICH. L. REV. 161 (1986). The 1986 Virginia General Assembly amended the occupational disease provisions, amending § 65.1-46 and adding § 65.1-46.1, effective July 1, 1986. The statute still precludes compensation for repeated trauma injuries.

95. 229 Va. 245, 329 S.E.2d 13 (1985).

96. Tenosynovitis is defined as "[i]nflammation of the lining of the tendon sheath —[which] may be involved in systemic diseases—[or may be caused by] [e]xtreme or repeated trauma, strain, or excessive [unaccustomed] exercise." THE MERCK MANUAL OF DIAGNOSIS AND THERAPY § 107 (14th ed. 1982).

97. *Western Electric*, 229 Va. at 247, 329 S.E.2d at 14.

98. *Id.* (citing Ashland Oil Co. v. Bean, 225 Va. 1, 300 S.E.2d 739 (1983)).

99. *Western Electric*, 229 Va. at 247, 329 S.E.2d at 14; *see* Holly Farms v. Yancey, 228 Va. 337, 321 S.E.2d 298 (1984). *See generally* Comment, *The Ordinary Disease Exclusion in Virginia's Workers' Compensation Act: Where is it Going After* Ashland Oil Co. v. Bean?, 18 U. RICH. L. REV. 161 (1983).

100. 1 Va. App. 312, 338 S.E.2d 654 (1986).

101. 228 Va. 337, 321 S.E.2d 298 (1984).

Commission's denial of compensation because his hearing loss was an ordinary disease of life. The Virginia Court of Appeals expressed greater concern about whether hearing loss is a disease than the Virginia Supreme Court expressed about whether tenosynovitis is a disease. However, the *Belcher* opinion is still not helpful in explaining the statutory elements of an occupational disease.

In *Washington Metropolitan Area Transit Authority v. Medley*,[102] claimant developed tendonitis in his left knee after he used crutches for two months because of a compensable injury to his right knee. The Virginia Court of Appeals affirmed the Industrial Commission's compensation award. The employer unsuccessfully argued that the tendonitis was an ordinary disease of life, relying on *Western Electric*. However, the physician's reports and claimant's testimony[103] both mentioned that the tendonitis was related to the prescribed treatment (crutches) for claimant's compensable injury. The court distinguished *Western Electric*, in which an ordinary disease of life was not compensable because it was not related to treatment of a compensable injury as required by an exception to section 65.1-46.[104]

2. Statute of Limitations

Before 1983, section 65.1-52 of the Virginia Code barred recovery for an occupational disease if a claim was not filed within two years of communication of a diagnosis of the disease or within five years of the last injurious exposure, whichever occurs first. Effective July 1, 1983, an amendment extended the recovery period for asbestosis victims so that the statute now bars recovery if a claim is not filed within two years of communication of a diagnosis.

The Virginia Court of Appeals construed section 65.1-52 of the Virginia Code and the effect of its 1983 amendment in *Parris v. Appalachian Power Co.*[105] Claimant retired in 1975, and was told in 1981 that he had asbestosis. His 1981 claim for compensation was denied because he failed to prove that his employment had

102. 1 Va. App. 113, 335 S.E.2d 845 (1985).

103. The testimony was all hearsay, repeating what the doctor told him when he stopped using crutches and the pain started. *Id.* at 115, 335 S.E.2d at 846. However, hearsay is admissible at the Industrial Commission's discretion under Industrial Commission Rule 1.

104. *Id.* at 116, 335 S.E.2d at 846.

105. 2 Va. App. 219, 343 S.E.2d 455 (1986).

caused his disease. In 1983, he received another medical diagnosis concluding that his asbestosis definitely was caused by his employment, and he filed another claim.[106] The court held that the claimant's first claim was time-barred because he had filed it more than five years after his last injurious exposure. The court also held that claimant's second claim was time-barred because, even though that claim was based on a new diagnosis communicated after the amendment's effective date, the amendment could not revive an action already barred.[107] However, the court noted that the 1983 amendment would have extended claimant's recovery period and allowed his second claim if his last injurious exposure had occurred within five years before July 1, 1983.[108] The court's interpretation of the 1983 amendment, whether intended by the legislature or not, substantially extends the recovery period for those future victims of asbestosis who left employment after July 1, 1978, and who had not already received an earlier diagnosis.[109]

E. *Medical Expenses*

Under section 65.1-88 of the Virginia Code, an employer must provide a claimant with a physician and all "other necessary medical attention" because of compensable injuries.[110] An injured employee's compensation will be suspended if he refuses proffered medical treatment without justification. In deciding whether to pay for a claimant's medical treatment or to withhold payment and challenge the treatment's validity, employers (and their insurance carriers) should note recent Virginia Supreme Court and Virginia Court of Appeals decisions clarifying the standard for judging medical necessity. These decisions are also important to the claimant in deciding whether to refuse proffered medical treatment.

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106. The court also addressed the employer's arguments that the first unsuccessful claim had a res judicata effect and barred the second claim. *Id.* at 221, 343 S.E.2d at 457.

107. *Id.* at 228, 343 S.E.2d at 460; *see* Kesterson v. Hill, 101 Va. 739, 45 S.E. 288 (1903) (the legislature cannot, whether by repeal or amendment, remove the bar of a statute of limitations that has already run).

108. *Parris*, 2 Va. App. at 229, 343 S.E.2d at 461 (quoting 51 AM. JUR. 2D *Limitation of Actions* §§ 40-41 (1970)).

109. The court inferred that the legislature's amendment was prompted by its recognition that progressive diseases such as asbestosis are not detectable for many years after the victim leaves his employment. *Parris*, 2 Va. App. at 229, 343 S.E.2d at 461.

110. VA. CODE ANN. § 65.1-88 (Cum. Supp. 1986).

1. Medical Necessity and Selection of Treating Physician

In *Jensen Press, Inc. v. Ale*,[111] claimant suffered a compensable neck and shoulder injury. When her pain persisted for three years, her treating physician recommended that she be evaluated and treated at a pain clinic. The physician sent a letter describing that recommendation to the employer's insurer and to the pain clinic. The employer's insurer agreed to pay for the evaluation, but refused to pay for any treatment at the pain clinic, despite the treating physician's and pain clinic's continuing reports about the progress of claimant's case. The Industrial Commission approved the pain clinic treatment as medically necessary to aid the treating physician's continued treatment of claimant.[112] The Virginia Court of Appeals affirmed, holding that the treating physician's letters and reports to the employer's insurer were ample credible evidence to support the Industrial Commission's factual findings, which therefore were binding upon the court on appeal.[113]

In *Daniel Construction Co. v. Baker*,[114] during the three years after claimant Baker suffered a compensable back injury, he had been examined by three orthopedists. The first orthopedist recommended that further treatment by the third might be beneficial. The third orthopedist reported that "psychological considerations play a part in the claimant's symptomology."[115] The Industrial Commission designated the third orthopedist as claimant's new treating physician, thus requiring the employer to pay for treatment by that physician. The Commission also ordered the employer to provide claimant Baker with a panel of three psychiatrists because "the question of causal relationship to the original industrial accident has not been answered to the satisfaction of the Commission."[116]

On appeal, the Virginia Supreme Court affirmed the Commission's designation of the treating physician, but reversed and vacated the Commission's order for a panel of psychiatrists. The

111. 1 Va. App. 153, 336 S.E.2d 522 (1985). In *Jensen Press*, the court of appeals also clarified its standard for reviewing an Industrial Commission discretionary grant of claimant's attorney's fees under VA. CODE ANN. § 65.1-101 (Repl. Vol. 1980). *See infra* notes 312-16 and accompanying text.

112. *Jensen Press*, 1 Va. App. at 158-59, 336 S.E.2d at 525.

113. *Id.*

114. 229 Va. 453, 331 S.E.2d 396 (1985).

115. *Id.* at 457, 331 S.E.2d at 398.

116. *Id.* at 455, 331 S.E.2d at 398.

court held that the third orthopedist's report did not meet claimant's burden of establishing a prima facie case that he suffered from a psychological disability, and that such disability was causally related to his compensable injury. Therefore, the Commission had no authority to order psychiatric medical services for the claimant.[117]

It seems apparent that the Commission could have properly ordered an independent expert examination of Baker at the state's expense.[118] Indeed, the court's decision does not necessarily thwart the Commission's attempt to shift the costs to the employer if Baker's new treating physician (the third orthopedist) recommends such treatment or refers him to a psychiatrist for evaluation and treatment.

In *Rucker v. Thrift Transfer, Inc.*,[119] claimant initially was treated for a compensable back injury by his family physician and several consulting specialists who determined that claimant might have a herniated disc requiring more specialized treatment. Claimant's employer offered him a panel of specialists, and claimant chose one as his treating physician. The treating physician referred claimant to a neurosurgeon, who offered claimant several treatment options. At the claimant's request, the neurosurgeon wrote several letters to the family physician explaining the options, and claimant continued to visit the family physician for advice throughout his treatment by the neurosurgeon. The employer paid the family physician's bills for part of this time, but later stopped paying them and so notified claimant.

The Virginia Court of Appeals affirmed the Industrial Commission's denial of compensation for the family physician's bills during the period after claimant chose another treating physician and before the neurosurgeon's referral back to the family physician. Claimant argued that the employer was estopped from denying payments because it had voluntarily paid for earlier treatment, even though it was unauthorized to do so.[120] However, the court held that claimant knew that he had chosen a specialist to replace his family physician as the treating physician. Therefore, claimant should have known that any other treatment was unauthorized.

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117. *Id.*
118. *See infra* notes 295-301 and accompanying text.
119. 1 Va. App. 417, 339 S.E.2d 561 (1986).
120. *Id.* at 420, 339 S.E.2d at 562.

The neurosurgeon's letters to the claimant's family physician were a courtesy to the claimant, not a referral or a request for consultation or treatment.[121] Section 65.1-88 does not require an employer to pay for such medical treatment, even though it might be reasonable for a claimant to desire advice from a trusted family physician.

The *Rucker* decision seems unduly harsh. Although this counselling is not an emergency, it might constitute an "other good reason," as permitted under section 65.1-88. If the specialist's letters had requested consultation or counselling with the claimant, the Industrial Commission might have approved his expenses and the Virginia Court of Appeals might have upheld it. The result in such cases seems to depend on the language that the treating physician uses in a letter.

2. Refusing Medical Treatment

In *Peninsula Transportation District Commission v. Gibbs*,[122] claimant Gibbs was injured at work on a Saturday and treated at a hospital emergency room. She was released and told to consult her own doctor. On Monday, she made an appointment to see her doctor and then formally reported her injury to her employer. Her employer offered her a panel of physicians,[123] but she went to her doctor because all the doctors on the panel were "too far away."[124] The Industrial Commission awarded compensation for temporary total disability and medical expenses. It found that her refusal of the proffered panel was justified because section 65.1-88 required the employer to provide a medical panel at the time of injury and to choose a doctor from the panel if the employee refuses to do so.[125]

The Virginia Supreme Court reversed the Industrial Commission's award, holding that the Commission had incorrectly interpreted section 65.1-88. The statute does not establish a time within which an employer must furnish a panel of physicians. Therefore, timeliness depends on "a rule of reasonableness," depending on

121. *Id.*

122. 228 Va. 614, 324 S.E.2d 662 (1985).

123. Offering a panel complies with VA. CODE ANN. § 65.1-88 (Repl. Vol. 1980).

124. *Peninsula Transp.*, 228 Va. at 616-17, 324 S.E.2d at 663.

125. *Id.* at 618, 324 S.E.2d at 664 (relying on Dooley v. McCormick Foods, Inc., 56 O.I.C. 97 (1975)).

the circumstances of each case.[126] Although the employer learned about her injury immediately, claimant was treated at a hospital emergency room.[127] The employer offered her a panel on the first date she needed further medical attention. That offer was timely because she could have cancelled her appointment with her own doctor and chosen a doctor from the panel. Furthermore, the statute does not require an employer to choose a physician from a panel if a claimant refuses to do so. Therefore, the Industrial Commission is not authorized to impose that additional burden on employers. The Virginia Supreme Court also noted that claimant could not justify her refusal to see any of the offered physicians because they were "too far away."[128] She did not tell her employer that she could not drive; she did not ask her employer for transportation assistance; after she was able to drive again, she did not choose a doctor from the offered panel.[129]

In *Chesapeake Masonry Corp. v. Wiggington*,[130] claimant was struck by a truck at work, and his back was injured. The employer disputed that the accident caused the employee's injury and therefore did not offer him a panel of physicians. The claimant's family doctor diagnosed a back strain and referred him to an orthopedist, who suggested that claimant might have a disc problem requiring surgery. However, claimant did not want surgery and asked to be referred to a chiropractor. When the orthopedist refused that request, claimant stopped seeing the orthopedist and went to a chiropractor.

The Industrial Commission awarded compensation for disability and medical expenses other than the chiropractor's bills. The Industrial Commission excluded the chiropractor's bills because it found that the orthopedist had not referred claimant to the chiropractor and that claimant unjustifiably had refused the orthopedist's treatment.[131] However, the Industrial Commission did not suspend compensation, ruling that the claimant was entitled to choose his attending physician and that the suspension of compensation does not apply where the employer has never offered the

126. *Peninsula Transp.*, 228 Va. at 618, 324 S.E.2d at 665.

127. The court noted that payment for this treatment was not at issue. *Id.* at 618, 324 S.E.2d at 664.

128. *Id.* at 619, 324 S.E.2d at 664.

129. *Id.* at 619, 324 S.E.2d at 665.

130. 229 Va. 227, 327 S.E.2d 121 (1985).

131. *Id.* at 232, 327 S.E.2d at 123.

claimant a panel of physicians.[132]

On appeal, the Virginia Supreme Court reversed, holding that the Industrial Commission had incorrectly interpreted section 65.1-88. A claimant may select his own attending physician if his employer does not offer a panel. However, that attending physician must then exclusively manage claimant's medical treatment; the claimant may not change physicians nor may he refuse recommended medical treatment, unless the refusal is justified by an emergency, his employer's permission, or the Industrial Commission's approval.[133] The employer also may not interfere in the medical management by offering a panel after the claimant has selected his own attending physician.[134] Thus, the Industrial Commission's ruling would require an employer to take inconsistent positions. If the employer contests a claim and does not offer a panel, the Industrial Commission's ruling permits the claimant to select his own attending physician. The employer then must pay compensation until it offers the claimant a panel, but the employer cannot offer a panel after the claimant has selected his own attending physician. Furthermore, the Industrial Commission's ruling would defeat the purpose of the sanctions imposed under section 65.1-88, which penalize claimants who unjustifiably refuse reasonable and necessary medical treatment. The statute's sanction is mandatory. If the Industrial Commission finds such an unjustifiable refusal, it must suspend compensation and payment of medical expenses during the period of refusal.

3. Independent Examination

In *Volvo White Truck Corp. v. Hedge*,[135] claimant suffered a compensable head injury. When his eyes still hurt two years later, the treating physician recommended an eye examination. An optometrist prescribed new glasses, but the employer refused to pay for them. The optometrist opined that the connection between the claimant's eye problems and his head injury was "extremely remote."[136] Shortly before the Industrial Commission hearing, with-

132. *Id.* at 231, 327 S.E.2d at 122.

133. *Id.* at 231, 327 S.E.2d at 123 (quoting Breckenridge v. Marval Poultry, 228 Va. 191, 194, 319 S.E.2d 769, 770-71 (1984)).

134. *Id.* (citing Crickenberger v. Tacco, Inc., 57 O.I.C. 86 (1976); Walls v. Zayre Corp., 54 O.I.C. 385 (1972)).

135. 1 Va. App. 195, 336 S.E.2d 903 (1985).

136. *Id.* at 199, 336 S.E.2d at 905.

out notifying claimant's attorney, the employer asked claimant to submit to an independent eye examination one-half hour before the scheduled eye examination. The claimant refused. The Industrial Commission ruled that the medical expense for new glasses was compensable because it was caused by the head injury.[137] The court of appeals also held that claimant justifiably had refused the independent examination because he had not received adequate notice.[138] Section 65.1-91 permits a claimant to be accompanied at such an examination by a physician selected and paid by him. Without adequate notice, the claimant could not exercise his rights under the statute, and therefore was justified in refusing to be examined at that time.

4. Emergency

In *Payne v. Master Roofing & Siding, Inc.*,[139] claimant suffered a compensable back injury, received treatment, and returned to work. The claimant continued to suffer pain, but his wife could not reach his treating physician so she took him to a hospital emergency room. The admitting physician opined that claimant's admission was not a life-threatening emergency, but that he suffered from a back strain, "severe anxiety," and probably cervical arthritis. The Industrial Commission denied claimant's request for payment of his hospital treatment and expenses of subsequent medical care, ruling that they were unauthorized because no emergency existed.[140]

The Virginia Court of Appeals reversed and remanded the case for further proceedings before the Industrial Commission because the Commission had applied the wrong standard for an emergency. The court held that, after claimant's wife tried unsuccessfully for several days to reach his treating physician, claimant and his wife reasonably believed that he required emergency treatment to relieve his pain. Thus, claimant met his burden of showing an actual emergency for otherwise unauthorized treatment.[141] On remand, if the Industrial Commission finds that claimant's pain was related to his compensable accident, the Commission must order payment for all medical treatment required by the emergency and all treat-

137. *Id.* at 200, 336 S.E2d at 905.
138. *Id.* at 198, 336 S.E.2d at 904.
139. 1 Va. App. 413, 339 S.E.2d 559 (1986).
140. *Id.* at 415, 339 S.E.2d at 560.
141. *Id.* at 416, 339 S.E.2d at 560.

ment received until claimant reasonably could have contacted his treating physician or his employer for authorization.[142]

F. *Determining the Amount of Compensation*

1. Cost of Living Supplements

Under section 65.1-99.1 of the Virginia Code, compensation awards may be increased by cost of living supplements based on United States Department of Labor statistics. The proper method of calculating cost of living supplements was clarified by a series of cases beginning with *Nelson v. Remor Restaurant, Inc.*,[143] and culminating in an amendment of the statute by the 1986 General Assembly.

In *Nelson*, the Industrial Commission increased claimant's disability award in each of three years under section 65.1-99.1. However, each time that the Industrial Commission increased her award, it applied the cost of living percentage to the amount of her original compensation award. Nelson appealed, arguing that section 65.1-99.1 required that each cost of living supplement be compounded. The Virginia Supreme Court agreed, based on the language of section 65.1-99.1, which provided that the "amounts of supplementary payments provided for herein shall be determined as a percent of the *benefit allowances supplemented hereby.*"[144]

After the Virginia Supreme Court decided *Nelson*, the question asked was whether that decision would be applied retroactively. In *Virginia Department of Highways and Transportation v. Williams*,[145] the Virginia Court of Appeals determined that all supplemented awards had to be recalculated applying the compounding method.[146] *Williams* and *Nelson* have been adopted by the legisla-

142. *Id.* at 415, 339 S.E.2d at 561. The Virginia Court of Appeals applied the same standard in McGregor v. Crystal Food Corp., 1 Va. App. 507, 509, 339 S.E.2d 917, 918 (1986), where the Virginia Court of Appeals held that an employee has the burden of proving that an employer must pay for "other necessary medical care" including emergency treatment by a non-treating physician. *See* Insurance Management Corp. v. Daniels, 222 Va. 434, 438, 281 S.E.2d 847, 849 (1981) (claimant had the responsibility to prove that, considering her industrial injury, her claim qualified as "other necessary medical attention").

143. 228 Va. 607, 324 S.E.2d 658 (1985).

144. *Id.* at 609, 324 S.E.2d at 659 (quoting VA. CODE ANN. § 65.1-99.1 (emphasis added)).

145. 1 Va. App. 349, 338 S.E.2d 660 (1986).

146. Claimant Williams' application to the Industrial Commission for a hearing to force compounding was held in abeyance until the Virginia Supreme Court decided *Nelson*. He renewed his request and the Commission ordered that the compounding method be applied from July 1, 1976, the effective date of the amendment allowing cost of living supplements. *Id.* at 351, 338 S.E.2d at 662.

ture in a 1986 amendment to section 65.1-99.1, which clearly states that cost of living supplements must be compounded annually.[147]

In *Beatrice Pocahontas Co. v. Shortridge*,[148] the Virginia Supreme Court interpreted the effective date provisions for cost of living supplements and increases in the maximum average weekly wage. The Industrial Commission calculated and awarded cost of living supplements, but limited payments to the then current maximum average weekly wage. When the maximum average weekly wage increased on July 1 of the following year, the Industrial Commission allowed payments to increase accordingly.

The Virginia Supreme Court affirmed on appeal. The employer argued that the statute prescribes October 1 as the effective date for cost of living supplements. Regardless, the court held that the Industrial Commission properly awarded each cost of living supplement and properly limited payment of that supplement based on the current maximum average weekly wage.[149] When the average weekly wage increased each July 1, the Industrial Commission did not award any new cost of living supplement, rather it allowed payment of the cost of living supplement previously awarded.[150]

2. Average Weekly Wage

In *Hudson v. Arthur Treachers*,[151] the Virginia Court of Appeals expressly adopted the Industrial Commission's long standing precedent that wages from concurrent, dissimilar employment cannot be included in a claimant's average weekly wage.[152] Claimant, a part-time food frier and a full-time concrete finisher, suffered a compensable injury while working for his part-time employer and received compensation based on his average weekly wage from that part-time employment. He argued that, under section 65.1-6 of the Virginia Code, fairness required that his average weekly wage also must include his wages from his full-time employment because his

147. *See* VA. CODE ANN. § 65.1-99.1 (Cum. Supp. 1986).

148. 229 Va. 80, 326 S.E.2d 677 (1985).

149. *Id.* at 83, 326 S.E.2d at 679.

150. The employer also argued that the 80% test should have considered the federal disability benefits received by claimant's wife and children. However, after including those benefits, the claimant still passed the 80% test and the court would not issue an advisory opinion. *Id.*

151. 2 Va. App. 323, 343 S.E.2d 97 (1986).

152. *Id.* at 325, 343 S.E.2d at 99 (citing Thompson v. Herbert, 4 O.I.C. 310 (1922)).

injury prevented him from engaging in that employment. However, the Virginia Court of Appeals strictly construed the definition of the average weekly wage. The court held that the Industrial Commission's precedent had been approved by the Virginia Supreme Court[153] and had not been changed by the legislature.[154] Although section 65.1-6 allows other methods of calculating the average weekly wage to prevent unfairness, the statute does not permit including wages from dissimilar employment since the statute defines the average weekly wage as "the earnings of the injured employee *in the employment in which he was working at the time of the injury.*"[155]

In *John Driggs Co. v. Somers*,[156] the Virginia Supreme Court confirmed the Industrial Commission's power to alter an agreement between an employer and a claimant stipulating the average weekly wage even in the absence of fraud or mistake. The employer prepared an agreement stipulating an average weekly wage calculated by dividing claimant's previous year's total wages by fifty-two, even though claimant had worked for a different employer for ten months. The Industrial Commission ruled that the agreement violated section 65.1-6 and disregarded it.[157] The Virginia Supreme Court held that, under *Harris v. Diamond Construction Co.*,[158] the Industrial Commission may set aside an award or agreement on proof of fraud, mistake, or imposition.[159] In *Somers*, the court held that the agreement was an imposition on the claimant and the Industrial Commission.[160] The employer had superior knowledge of the law. The claimant was disabled, out of work, and receiving no compensation; therefore, the agreement was an easy way to get money he needed without delay. The agreement was an imposition on the claimant because it did not disclose the actual calculation method nor possible alternatives, but simply resulted in a lower award of actual compensation. The agreement was an imposition on the Industrial Commission because the calcu-

153. *See* Graham v. Gloucester Furniture Corp., 169 Va. 505, 19 S.E. 814 (1938) (Virginia Supreme Court refused to examine the maximum compensation rate because the Industrial Commission had found that claimant's two concurrent jobs did not involve work of the same character).

154. *Hudson*, 2 Va. App. at 327, 343 S.E.2d at 99.

155. *Id.* at 326, 343 S.E.2d at 99 (emphasis added) (quoting *Thompson*, 4 O.I.C. at 316).

156. 228 Va. 729, 324 S.E.2d 694 (1985).

157. *Id.* at 732, 324 S.E.2d at 695.

158. 184 Va. 711, 36 S.E.2d 573 (1946).

159. *Somers*, 228 Va. at 734, 324 S.E.2d at 696.

160. *Id.*

lation method substantially deviated from statutory guidelines and thus disturbed the balance of the compromises of the Workers' Compensation Act. The Industrial Commission, therefore, had the authority to right the imbalance and protect itself and its award from such imposition.

G. *Willful Misconduct*

Section 65.1-38 of the Virginia Code permanently bars a claimant from receiving compensation for injuries or death due to his willful misconduct, including intoxication. The courts have clarified the potential consequences of proving intoxication and the standard used to judge other willful misconduct.

In *Ivey v. Puckett Construction Co.*,[161] claimant was injured when the employer's truck he was driving ran off the road and hit a tree during a snowstorm. Claimant testified that he drank four cans of beer during his drive before the accident, and that he lost control of the truck because of the snow and ice on the road. Claimant's blood test, conducted three hours after the accident, showed an alcohol concentration of .215 percent. An expert also testified that, generally, anyone with an alcohol concentration above .1 percent is too impaired to operate a motor vehicle safely. In addition, claimant had told the emergency room physician that he had drunk two six-packs of beer before driving. The Virginia Supreme Court affirmed the Industrial Commission's denial of compensation, holding that there was "abundant, credible evidence" that claimant was intoxicated and that his intoxication proximately caused his injuries.[162]

In *American Safety Razor Co. v. Hunter*,[163] claimant, a warehouseman, was injured when he fell from a forklift. An admitted alcoholic, claimant had been drinking whiskey and beer during the previous evening and before reporting to work. Claimant's blood tests, conducted about one hour after the accident, showed an alcohol concentration level of .227 percent. However, the plant nurse and claimant's supervisor testified that claimant's condition did not seem unusual.[164] The Virginia Court of Appeals affirmed the Industrial Commission's award of compensation, holding that the

161. 230 Va. 486, 338 S.E.2d 640 (1986).
162. *Id.* at 488, 338 S.E.2d at 641.
163. 2 Va. App. 258, 343 S.E.2d 461 (1986).
164. *Id.* at 260, 343 S.E.2d at 462-63.

Industrial Commission had resolved the conflict in the evidence in the claimant's favor.[165] Based on Industrial Commission precedent,[166] the employer argued that claimant's injury did not arise in the course of his employment because he was so intoxicated that he had abandoned his employment. The Virginia Court of Appeals expressly adopted the Industrial Commission precedent as sound law,[167] but held that it did not apply in this case because the claimant, although intoxicated, continued actively to perform his duties.[168] Because the rule did not apply in this case, the Virginia Court of Appeals refused to refine the rule any further.

In *Uninsured Employers Fund v. Keppel*,[169] claimant, an employee of a roofing contractor, was injured when he fell from a roof on which he and co-workers were installing shingles. The employer testified that he had instructed the claimant and others to finish felting the steepest part of the roof but not to begin installing shingles until the employer returned from a weekend trip out of town. The claimant and others testified that they often worked without their employer's supervision, and had done so on this job.[170] The Virginia Court of Appeals affirmed the Industrial Commission's award of compensation because claimant's conduct was mere negligence and not willful misconduct. The court reasoned that willful misconduct includes disregarding instructions that are issued by employers for safety purposes.[171] However, these instructions could not have been addressed to safety, because the employer also had instructed the employees to felt the steepest part of the roof. Claimant and his co-workers had only disregarded instructions about the time of performance of duties that they otherwise were required to perform. Because they had no reason to believe that installing shingles would be more dangerous to perform before Monday, claimant did not "with knowledge of a known hazard willfully commit an act" that caused his injury.[172]

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165. *Id.* at 263, 343 S.E.2d at 465.

166. *See, e.g.*, Hopkins v. City of Richmond, 58 O.I.C. 187 (1979).

167. *Hunter*, 2 Va. App. at 260, 343 S.E.2d at 463 (citing 1 A. LARSON, *supra* note 48 § 34.21 (1985)).

168. *Id.* at 262; 343 S.E.2d at 464.

169. 1 Va. App. 162, 335 S.E.2d 851 (1985).

170. *Id.* at 164, 335 S.E.2d at 852.

171. *Id.* at 164-65, 335 S.E.2d at 852.

172. *Id.* at 164-65, 335 S.E.2d at 853.

H. *Refusing Selective Employment*

Section 65.1-63 of the Virginia Code suspends an injured employee's compensation benefits if the employer offers suitable employment and the employee unjustifiably refuses the offer or, having accepted suitable employment, is justifiably discharged. The sanction lasts as long as the unjustified refusal. The employer must show that it has offered suitable employment and that the employee has refused the employment or been discharged. If the employer meets its burden, the burden of persuasion shifts to the employee to show that his refusal was justified, or, in a discharge case, that his discharge was not justified.[173] The issues that continue to be litigated are whether the employer obtained the job for the employee, whether the job is suitable, and whether the employee's refusal of a proffered job is justifiable or his discharge is not justifiable. The sanction does not apply if the employee obtains the employment.[174]

1. Offering Selective Employment

In *American Steel Placing Co. v. Adams*,[175] claimant suffered a compensable injury that permanently and totally disabled him from performing his construction job. Claimant enrolled in a training program and paid his tuition with a government loan. When the employer learned about his training, it reimbursed claimant for his tuition. When claimant completed the course, he found a job with the help of the training school's placement office but later was fired because he broke a rule. The Virginia Supreme Court affirmed the Industrial Commission's award of compensation during the full period of claimant's unemployment. The employer argued that the sanction should apply in this case because the employer had paid for the claimant's training school tuition and was jointly responsible for the job.[176] However, the court held that the employee's initiative is more important than the employer's money.[177] Here, the employee was responsible for his training program and, therefore, he also was responsible for his jobs obtained with the training school's assistance. The employer's role in obtaining the

173. Talley v. Goodwin Bros. Lumber Co., 224 Va. 48, 52, 29 S.E.2d 818, 820 (1982).
174. Big D Quality Homebuilders v. Hamilton, 228 Va. 378, 322 S.E.2d 839 (1984).
175. 230 Va. 189, 335 S.E.2d 270 (1985).
176. *Id.* at 192, 335 S.E.2d at 271.
177. *Id.*

job was "merely indirect;"[178] therefore, the claimant's benefits could not be suspended despite his misconduct-related discharge.

After the Virginia Supreme Court's decision in *Washington Metropolitan Area Transit Authority v. Harrison*,[179] it is clear that the employer does not have a duty to offer selective employment, but the injured employee has a duty to seek it on his own. In *Harrison*, claimant suffered a compensable injury and was paid temporary total disability benefits under a memorandum of agreement. Claimant then accepted his employer's offer of selective employment, but was laid off during a general reduction in force. He did not seek new employment, but requested that his benefits be resumed.[180] The Virginia Supreme Court reversed the Industrial Commission's award of compensation from the date of layoff until claimant recovered from the injury or his employer obtained other selective employment for him. The court held that the claimant must show "that he had made a reasonable effort to procure suitable work but was unable to market his remaining work capacity."[181] In establishing this requirement, the Virginia Supreme Court relied on its past decisions defining "disability"[182] and its recent holding that the purpose of section 65.1-63 "is to encourage injured employees to seek selective employment rather than to remain unemployed unless the employer finds such employment for them."[183] However, the Virginia Supreme Court remanded the case for new evidence recognizing that the claimant might have relied on then-existing Industrial Commission precedents.[184]

2. Suitable Employment

In *American Furniture Co. v. Doane*,[185] claimant's treating physician approved a job description for light work offered by her employer. Claimant did not report for work because she developed hand and arm ailments (carpal tunnel syndrome) which were not

178. *Id.*

179. 228 Va. 598, 324 S.E.2d 654 (1985).

180. *Id.* at 600, 324 S.E.2d at 655.

181. *Id.* at 601, 324 S.E.2d at 656.

182. *See* Pocahontas Fuel Co. v. Barbour, 201 Va. 682, 112 S.E.2d 904 (1960); Pocahontas Fuel Co. v. Agee, 201 Va. 678, 112 S.E.2d 83 (1960); Island Creek Coal Co. v. Fletcher, 201 Va. 645, 112 S.E.2d 833 (1960).

183. *Harrison*, 228 Va. at 601, 324 S.E.2d at 656 (quoting *Hamilton*, 228 Va. at 382, 322 S.E.2d at 841).

184. *Harrison*, 228 Va. at 602, 324 S.E.2d at 656.

185. 230 Va. 39, 334 S.E.2d 548 (1985).

related to her back injury or surgery. The Industrial Commission did not suspend her benefits, finding that the offered job was not "suitable" because claimant's physical condition, although not related to her compensable injury, prevented her from performing that job.[186] The Virginia Supreme Court reversed, holding that the Commission had incorrectly interpreted section 65.1-63. Whether offered work is "suitable" depends on the employee's capacity to work, reduced *only* by a compensable injury. Under that standard, the job offered to claimant was "suitable" because her back injury did not prevent her from performing it. Therefore, claimant's refusal to work was unjustified, and her compensation must be suspended under section 65.1-63.[187]

In *Klate Holt Co. v. Holt*,[188] claimant's treating physician approved a job description of lighter work offered by her employer. Claimant refused the job, stating that she had no transportation and that even if she had, she would not accept the job. The Industrial Commission found that the new job required transportation, that claimant had no transportation, and that her employer had made no arrangements for her transportation. Therefore, claimant's refusal of that job was justified and the Commission refused to suspend her compensation.[189] The Virginia Supreme Court reversed. The court held that claimant's "unconditional rejection" of the new job showed that she was unwilling to accept employment within her capacity. Furthermore, the employer is not required to arrange transportation to make a job "suitable."[190]

The Virginia Court of Appeals may have reached a result inconsistent with *Holt* in *Ellerson v. W.O. Grubb Steel Erection Co.*[191] In that case, claimant heard about a job from a friend, but was accompanied to the interview by the employment agent of the claimant's former employer. Claimant was offered the job, which required that he provide his own car. Claimant did not have a car, did not report to work, and the job offer was withdrawn. At the Industrial Commission hearing, there was conflicting evidence

186. *Id.* at 42, 334 S.E.2d at 549.

187. *Id.* at 43-44, 334 S.E.2d at 552. One justice dissented because this holding limits the Industrial Commission's discretion, which the statute does not fetter. The Industrial Commission must be free to deal with the bad faith of employers in offering jobs while an employee is ill. One other justice concurred in the bad faith portion of the dissent.

188. 229 Va. 544, 331 S.E.2d 446 (1985).

189. *Id.* at 546-47, 331 S.E.2d at 447.

190. *Id.* at 547, 331 S.E.2d at 447.

191. 1 Va. App. 97, 335 S.E.2d 379 (1985).

about the employer's efforts to resolve the transportation problem. The Virginia Court of Appeals reversed the Industrial Commission's order suspending compensation. The court held that claimant had procured the job offer himself; therefore, the sanctions of section 65.1-63 did not apply.[192] The court also held that the employer was required to prove that it had made a bona fide offer of suitable employment, and therefore would have had to prove that it had resolved the transportation problem. The court noted the conflicting evidence in the record, concluding that it could only be interpreted as inconsistent with the employer's claim that the transportation problem had been resolved.[193]

The bona fide offer rule in *Ellerson* may be only dicta, because the claimant found the job interview. If not, it is impossible to reconcile *Ellerson*, *Holt*, and *Doane*.

3. Justifying Discharge

In *Richmond Cold Storage Co. v. Burton*,[194] claimant accepted an offer of selective employment with his employer. One month later, he was fired because he allegedly violated a company rule on several occasions. The Virginia Employment Commission denied unemployment compensation, ruling that claimant was disqualified because his rule violation was willful misconduct that justified discharge.[195] The Virginia Court of Appeals affirmed the Industrial Commission's refusal to suspend compensation, holding that the doctrine of collateral estoppel did not make the Virginia Employment Commission's determination under section 60.1-58(b) binding on the Industrial Commission for purposes of suspending compensation under section 65.1-63.[196]

The Virginia Employment Commission's ruling would bind the Industrial Commission only if the issue in each matter were the same. The court noted that, in many cases, the same behavior con-

192. *Id.* at 98, 335 S.E.2d at 380 (citing *Hamilton*, 228 Va. at 382, 322 S.E.2d 841).

193. *Ellerson*, 1 Va. App. at 102, 335 S.E.2d at 381; *see* Jules Hairstylists, Inc. v. Galanes, 1 Va. App. 64, 334 S.E.2d 592 (1985) (claimant did not attend job interviews; compensation not suspended because conflicting testimony about whether claimant had adequate notice or other information about the interviews). Refusing an interview is the same as refusing an offer of suitable employment. Pleasants v. Fairfax County Police Dep't, 58 O.I.C. 289, 293 (1978); Flowers v. Clinebell, 57 O.I.C. 124, 145 (1976).

194. 1 Va. App. 106, 335 S.E.2d 847 (1985).

195. *Id.* at 107-108, 335 S.E.2d at 848.

196. *Id.* The court relied on Bates v. Devers, 214 Va. 667, 671, 101 S.E.2d 917, 921 (1974).

stituting misconduct under subsection 60.1-58(b) also might justify discharge from selective employment under section 65.1-63.[197] However, the court held that it could not "say as a matter of law that the two inquiries will always yield the same result" because the two administrative agencies implement statutory schemes with two different purposes and goals.[198] Thus, collateral estoppel did not bar the claimant's defense.

I. *Change in Condition*

Under sections 65.1-8 and -99 of the Virginia Code, an injured employee or the employer may file an application for a review of the case alleging a change in condition. The Industrial Commission can modify or terminate any award. If the employee files, he must prove that a disability exists and that it was caused by the compensable injury. If the employer files, it has the burden to prove whatever it alleges.[199] Litigation continues about how issues are properly raised, what facts meet those burdens, and how disability is measured.

1. Statute of Limitations

In *Continental Forest Industries v. Wallace*,[200] claimant's benefits were suspended when he refused unjustifiably to return to his treating physician. Claimant filed a change-in-condition request within two years of the last compensation payment, but during the time that his benefits had been suspended. The Virginia Court of Appeals affirmed the Industrial Commission's order to pay for all subsequent medical treatment. The court held that the claimant timely filed his change-in-condition request, because he still was disabled even though his compensation had been suspended because of his refusal of medical treatment. As soon as he cured his refusal, compensation for his medical expenses could resume.[201]

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197. *Burton*, 1 Va. App. at 111, 335 S.E.2d at 850 (citing Marval Poultry Co. v. Johnson, 224 Va. 597, 601, 299 S.E.2d 343, 346 (1983); Goodyear Tire & Rubber Co. v. Watson, 219 Va. 830, 833, 252 S.E.2d 310, 313 (1979)).

198. *Burton*, 1 Va. App. at 111, 335 S.E.2d at 850. *But see* Catlett v. Virginia Employment Comm'n, 4 Va. Cir. 364 (1986) (court applied willful misconduct standard under § 65.1-38 to determine that Virginia Employment Commission had properly denied unemployment compensation under § 60.1-58 (b)). For a discussion of *Catlett*, see *infra* notes 347-52 and accompanying text.

199. VA. CODE ANN. §§ 65.1-8, -99 (Repl. Vol. 1980 & Cum. Supp. 1986).

200. 1 Va. App. 72, 334 S.E.2d 149 (1985).

201. *Id.* at 74, 334 S.E.2d at 150.

In *City of Waynesboro Sheriff's Department v. Harter*,[202] claimant, a deputy sheriff, requested compensation for heart disease after suffering a second heart attack. Claimant's first heart attack had occurred four years earlier; however, he had returned to work after receiving benefits for temporary total disability. Medical evidence showed that both heart attacks were related to progressive coronary artery disease. The employer argued that the second heart attack was therefore a change in condition following an earlier compensable injury. As such, the claim was barred by section 65.1-99, which requires that a change-in-condition application must be filed within two years of the last compensation payment.[203]

Although the Virginia Court of Appeals agreed with the Industrial Commission that the claim was a change-in-condition application, the court reversed the Industrial Commission's award of compensation. The Industrial Commission had interpreted section 65.1-47.1[204] as sufficiently broad to override the limitation period of section 65.1-99, and to allow compensation to claimants entitled to the presumption even though they did not suffer a "new" occupational disease.[205] However, the Virginia Court of Appeals held that, as a matter of law, the claim was time-barred. The court held that the limitation period in section 65.1-99 must be complied with because the General Assembly did not indicate in either statute that claims filed under section 65.1-47.1 have no time limitation. The court recognized the Industrial Commission's duty to construe the statute liberally, but noted that the statute must not become a general health insurance policy.[206]

2. Raising the Causation Defense

In *Celanese Fibers Co. v. Johnson*,[207] the employer stopped paying benefits after several doctors who examined claimant stated that she could return to work. Claimant's treating physician, however, opined that claimant would have difficulty with her normal

202. 1 Va. App. 265, 337 S.E.2d 901 (1985).

203. *Id.* at 267, 337 S.E.2d at 902.

204. VA. CODE ANN. § 65.1-47.1 creates a rebuttable presumption in favor of firefighters and policemen that respiratory and cardiac diseases are compensable occupational diseases. *See infra* notes 239-50 and accompanying text.

205. *Id.* at 269, 337 S.E.2d at 904.

206. *Id.* at 271, 337 S.E.2d at 905.

207. 229 Va. 117, 326 S.E.2d 687 (1985).

duties and suggested either a change of duties or retirement. The Virginia Supreme Court affirmed the Industrial Commission's order to resume compensation, holding that her ability to work was not the test for continued disability. Rather, the claimant must be "able fully to perform the duties of his pre-injury employment."[208] The employer also argued that the claimant showed no causal connection between her compensable injury and her continued disability, which it contended was caused by the natural progression of a degenerative disc disease. The Virginia Supreme Court would not consider that argument because the employer's change-in-condition application alleged only that the claimant was able to work, not that her disability was no longer the result of her compensable injury. Both are proper grounds for a change-in-condition application, but only the former issue had been raised by the employer's application.[209]

The Virginia Court of Appeals applied the rationale of *Johnson* in *Central Virginia Training Center v. Martin*,[210] where the attending physician reported on a standard Industrial Commission form that claimant was able to return to regular employment. The employer filed a change-in-condition application to terminate compensation alleging only that fact. When the physician was deposed, he stated that he had intended to report that claimant could return to light work and that claimant's compensable injury had been short-lived, but that she still suffered from a degenerative condition. The employer did not amend its application, but argued that claimant's continued disability was not caused by her compensable injury. The Virginia Court of Appeals agreed with the Industrial Commission's refusal to consider any evidence on the causation issue since it was not raised by the employer's application. The court held that an injured employee's change-in-condition application only must state the change in condition, because that necessarily raises both continued incapacity and its source. However, Industrial Commission rules and due process rights require that an employer's application must state specific grounds relied on for relief.[211]

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208. *Id.* at 120, 326 S.E.2d at 690 (quoting Sky Chefs, Inc. v. Rogers, 222 Va. 800, 805, 284 S.E.2d 605, 607 (1981)).

209. *Johnson*, 229 Va. at 120, 326 S.E.2d at 689.

210. 2 Va. App. 188, 342 S.E.2d 652 (1986).

211. VA. RULES INDUS. COMM'N 13.

3. Pre-existing Conditions

In *Ohio Valley Construction Co. v. Jackson*,[212] claimant suffered a compensable lumbosacral sprain. After one year, the Industrial Commission halted payments based on a physician's report indicating lack of any evidence of organic injury. More than two years after his injury, claimant was still in pain and filed a change-in-condition application. The treating orthopedist opined that, although claimant's spinal stenosis was not caused by his injury, his stenosis made him much more susceptible to the aching and pain following his injury. The Virginia Supreme Court affirmed the Industrial Commission's award of permanent total disability benefits. The employer argued that claimant should not be compensated for the natural progression of his pre-existing condition of spinal stenosis. However, the court held that the treating orthopedist's report was adequate evidence to support the Industrial Commission's finding that claimant was disabled, because his dormant condition had been aggravated by his compensable injury.[213]

4. Defining Incapacity

In *Baskerville v. Saunders Oil Co.*,[214] after claimant was awarded temporary partial disability benefits, he was arrested, convicted, and sentenced to twenty years in the state penitentiary. He requested reinstatement of total disability benefits, and his employer requested termination or suspension of benefits. The Virginia Court of Appeals affirmed the Industrial Commission's suspension of compensation during the period of his incarceration. Because claimant was partially disabled before his imprisonment, to succeed in renewing total disability benefits, claimant had to show not only total incapacity for work but also a causal connection between his alleged total incapacity and his previous compensable injury. The court held that claimant's total incapacity for work was caused by his incarceration rather than by any physical disability.[215] However, the court limited its holding to claimants who are temporarily partially disabled when they are incarcerated. The court noted that total disability, whether temporary or permanent, reflected a total loss of earning power not affected by

212. 230 Va. 56, 334 S.E.2d 554 (1985).
213. *Id.* at 58, 334 S.E.2d at 555.
214. 1 Va. App. 188, 336 S.E.2d 512 (1985).
215. *Id.* at 193, 336 S.E.2d at 514.

incarceration.[216]

In *Pilot Freight Carriers, Inc. v. Reeves*,[217] claimant, a truck driver, suffered a compensable back injury and received temporary total disability benefits. Before his injury, claimant owned, operated, and drove a tractor-trailer unit hauling freight for his employer. After his injury, claimant could not drive, but continued to operate his business, hiring drivers and financing another trailer and two additional tractors. He hauled freight for another company after his employer cancelled its contract. During the year after his injury, claimant's business lost $40,000. His former employer requested that the Industrial Commission terminate or modify the temporary total award and alleged that claimant was no longer disabled because he had returned to work as the full-time owner and manager of a trucking business at wages greater than his pre-injury amount.

The Virginia Court of Appeals affirmed the Industrial Commission's dismissal of the application. The court held both total[218] and partial disability benefits[219] compensate an injured worker for loss of earning capacity. Partial incapacity is measured by the difference between his average weekly wages before the injury and the average weekly wages he is able to earn thereafter.[220] After a lengthy discussion, the court concluded that the Industrial Commission had made the best possible estimate of claimant's future impairments of earnings with findings supported by credible evidence.[221] The Virginia Court of Appeals noted that its holding in this case should not be construed to mean that "owning and operating a business can never be a sufficient reason to hold that the employee is presently able to return to work."[222] However, in this case, the claimant had tried to rehabilitate himself and was still losing money and living on borrowed funds. The employer had made no effort to employ him or offer him suitable selective employment.

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216. *Id.* at 194, 336 S.E.2d at 515.

217. 1 Va. App. 435, 339 S.E.2d 570 (1986).

218. *See* VA. CODE ANN. § 65.1-54 (Repl. Vol. 1980).

219. *See id.* § 65.1-55.

220. *Reeves*, 1 Va. App. at 440, 339 S.E.2d at 572 (citing Sargent Elec. Co. v. Woodall, 228 Va. 419, 425, 323 S.E.2d 102, 105 (1984); VA. CODE ANN. § 65.1-5).

221. *Reeves*, 1 Va. App. at 440-41, 339 S.E.2d at 572 (citing 2 A. LARSON, *supra* note 48, § 57.21 (1985)).

222. *Reeves*, 1 Va. App. at 442, 339 S.E.2d at 573.

5. Incapacity and Schedule Injuries

In section 65.1-56 of the Virginia Code, compensation is awarded for certain injuries that are deemed to be partially disabling by a schedule of benefits. These so-called "schedule awards" are intended to compensate injured workers for the loss or loss of use of a part of the body without proof of work incapacity; "schedule awards" are the only compensation allowed for such loss.[223]

In *Division of Motor Vehicles v. Williams*,[224] the Virginia Court of Appeals clarified the circumstances under which a claimant receiving a "schedule award" also may receive compensation for total disability under section 65.1-54. In *Williams*, claimant suffered severe leg injuries in an automobile accident in 1982. She developed phlebitis in her leg and received a "schedule award" under section 65.1-56, for loss of use of her leg.[225] In 1984, claimant again was hospitalized, and her physician opined that blood-thinning drugs made another injury at work a life-threatening risk.[226] Accordingly, claimant filed a change-in-condition application,[227] alleging that she again was temporarily totally disabled.

The Virginia Court of Appeals affirmed the Industrial Commission's suspension of her "schedule award" and award of temporary total benefits. The employer argued that, under section 65.1-56, a "schedule award" is in lieu of all other compensation and must be paid completely before the claimant can request, and the Industrial Commission can award, any disability benefits under section 65.1-54. The Virginia Court of Appeals held that section 65.1-56 is not intended to prohibit a claimant from being compensated under section 65.1-54 for a disability resulting from other injuries or effects of the original injury that are not embraced in the "schedule award."[228] Under the employer's interpretation, a claimant who is unable to work because of complications from the original injury would be required to await the end of the "schedule award" period,

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223. *See* Division of Motor Vehicles v. Williams, 1 Va. App. 401, 404, 339 S.E.2d 552, 554 (1986) (citing Nicely v. Virginia Elec. & Power Co., 195 Va. 819, 824, 80 S.E.2d 529, 532 (1954)).

224. 1 Va. App. 401, 339 S.E.2d 552.

225. Calculated benefits were for 35% loss of the use of the left leg for 61 and ¼ weeks. This award was based on a Supplemental Memorandum of Agreement between claimant and her employer. *Id.* at 402-03, 339 S.E.2d at 555.

226. *Id.* at 405-06, 339 S.E.2d at 555. Claimant had phlebitis and was taking the drug Coumadin.

227. *See* VA. CODE ANN. § 65.1-8 (Repl. Vol. 1980).

228. *Williams*, 1 Va. App. at 404, 339 S.E.2d at 556.

receiving no compensation when she experienced the disability. The only question on appeal was whether the record supported a finding that claimant's incapacity was not embraced in her "schedule award." Even though claimant's "schedule award" was related to the phlebitis in her leg; the physician's opinion that she could not work because of her drug therapy was enough evidence that her disability had increased greatly and warranted the section 65.1-54 award and the suspension of the section 65.1-56 award.

J. *Rules of Evidence and Procedural Requirements*

1. Competent Evidence

In *Clinchfield Coal Co. v. Bowman*,[229] claimant's treating physician issued two reports in connection with claimant's change-in-condition application. The first report, based solely on claimant's statements about his medical history, stated, "It is reasonable from his history to medically assume that he sustained this injury in the [accident]."[230] However, the second report was based on the physician's review of claimant's full medical records and opined that a previous knee injury was the source of his continuing problems.[231] The Virginia Court of Appeals reversed, vacating the Industrial Commission's compensation award and dismissing the claim. The court held that the two reports of the treating physician were not conflicting medical evidence for the Industrial Commission to resolve. The first report, based only on an "assumption," was not credible evidence. Only the second report was based on the facts, i.e., claimant's full medical records. Therefore, the Industrial Commission's finding that followed the assumption was not supported by any credible evidence.[232]

In *Seven-Up Bottling Co. v. Moseley*,[233] claimant was the only witness testifying about the facts required to prove that his injury was an accident; his testimony contained several inconsistent statements.[234] The Virginia Supreme Court affirmed the Industrial

229. 229 Va. 249, 329 S.E.2d 15 (1985).

230. *Id.* at 250-51, 329 S.E.2d at 16.

231. *Id.* at 251, 329 S.E.2d at 16.

232. *Id.* at 252, 329 S.E.2d at 17.

233. 230 Va. 245, 335 S.E.2d 272 (1985); *see also supra* notes 14-19 and accompanying text.

234. Claimant said, "If you want an exact date and an exact time I can't give that to you." Later, he said "I really can't pinpoint it; where or which location or whatever." In other testimony, he said, "While moving the drinks . . . I felt some stress on my lower back

Commission's award. The employer argued that the claimant was bound by his own testimony, which negated his case. The court held that its rule that a jury may consider a party's testimony as a whole[235] applies to the trier of fact in workers' compensation cases. Thus, claimant's case was not damaged fatally because his "testimony, when viewed in its entirety, does not clearly and unequivocally establish that his claim is without merit."[236]

The Virginia Supreme Court applied the same rule with the same result in *Olsten of Richmond v. Leftwich*.[237] The Virginia Court of Appeals also applied the same rule in *Jewell Ridge Coal Corp. v. McGlothlin*.[238]

2. Competent Evidence and Presumptions

Section 65.1-47.1 of the Virginia Code creates a rebuttable presumption,[239] in favor of firefighters and policemen, that respiratory and cardiac diseases are compensable occupational diseases. The courts have considered the sufficiency of the employer's evidence to rebut the presumption as well as the scope of the presumption.

In *Doss v. Fairfax County Fire and Rescue Department*,[240] claimant Doss suffered respiratory problems after serving fourteen years as a firefighter. Claimant's medical reports stated that his family members also had respiratory allergies, that claimant had smoked cigarettes for twenty years, and that laboratory tests showed " 'strong evidence' of allergies."[241] The treating physician and a consulting physician opined that claimant's respiratory illness was "related to allergic asthma" and was "more than likely a hereditary phenomenon."[242] A consulting physician opined that claimant's problems "may very well be on a hereditary basis."[243] At

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at that time . . . . At that time I was out at Safeway at Gayton." *Moseley*, 230 Va. at 248, 335 S.E.2d at 274.

235. *See* VEPCO v. Mabin, 203 Va. 490, 125 S.E.2d 145 (1962).

236. *Moseley*, 230 Va. at 249, 335 S.E.2d at 275.

237. 230 Va. 317, 336 S.E.2d 893 (1985); *see also supra* notes 64-66 and accompanying text.

238. 2 Va. App. 294, 343 S.E.2d 94 (1986); *see also supra* notes 31-33 and accompanying text.

239. For a discussion of the effect of this presumption on the statute of limitations on filing a change-in-condition application, see *supra* notes 202-06 and accompanying text.

240. 229 Va. 440, 331 S.E.2d 795 (1985).

241. *Id.* at 441, 331 S.E.2d at 795.

242. *Id.* at 441, 331 S.E.2d at 796.

243. *Id.* at 442, 331 S.E.2d at 797.

the hearing, claimant relied on the statutory presumption and presented no medical evidence.

The Virginia Supreme Court affirmed the Industrial Commission's denial of compensation. The claimant argued that the medical opinions were not sufficient evidence to rebut the statutory presumption.[244] The court disagreed, relying on *Cook v. City of Waynesboro*,[245] in which the court held that the Industrial Commission could give probative weight to a medical opinion that a condition is " 'generally thought to be a congenital anomaly' and one 'probably present in all cases and a familial incidence has been observed.' "[246]

In *Virginia Department of State Police v. Talbert*,[247] the claimant, a state trooper, died from a heart attack while off-duty after moving furniture for a friend. The medical examiner diagnosed coronary arterioschlerosis as the cause of death. There was conflicting medical evidence about the cause of claimant's heart attack.[248] The Virginia Court of Appeals affirmed the Industrial Commission's award. The employer argued that its rebuttal medical evidence in this case was much stronger than the evidence in *County of Amherst v. Brockman*,[249] in which the Virginia Supreme Court had held the evidence insufficient. The court disagreed with the employer's reasoning, because the court reviews a record to determine whether the evidence is sufficient to support the commission's findings, not whether the evidence is sufficient to support a contrary finding.[250]

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244. *Id.* Claimant relied on Page v. City of Richmond, 218 Va. 844, 847-48, 241 S.E.2d 775, 777 (1978) (under VA. CODE ANN. § 65.1-47.1, claimant needs no causation evidence to invoke the presumption; defendant must go forward with evidence of a non-work-related cause to rebut the presumption).

245. 225 Va. 23, 300 S.E.2d 746 (1983).

246. *Doss*, 229 Va. at 443, 331 S.E.2d at 796 (quoting *Cook*, 225 Va. at 30, 300 S.E.2d at 749).

247. 1 Va. App. 250, 337 S.E.2d 307 (1985).

248. A consulting physician testified as the employer's expert witness that Talbert's heart disease was attributable to his family history, smoking, slight obesity, hypertension, and elevated blood sugar. The consulting physician opined that the immediate cause of Talbert's heart attack was heavy exertion and that Talbert would have contracted heart disease regardless of his employment as a state trooper. Talbert's family physician testified that, in addition to the risk factors listed by the consulting physician, he believed that stress was the major contributor to Talbert's heart disease. *Id.* at 252, 337 S.E.2d at 308.

249. 224 Va. 391, 297 S.E.2d 805 (1982).

250. *Talbert*, 1 Va. App. at 253, 337 S.E.2d at 308.

3. Review Procedure Under Section 65.1-97

In *Charcoal Hearth Restaurant v. Kandetzki*,[251] an employee filed a change-in-condition application. A deputy commissioner terminated benefits, but the Industrial Commission restored compensation, relying on a medical report received after the hearing. The Virginia Court of Appeals reversed, holding that Industrial Commission Rule 3[252] and due process require that the Industrial Commission must not take new evidence at a full commission review under section 65.1-97, unless a party petitions properly or the Industrial Commission allows the case to be reopened and additional testimony taken. Rule 3 allows parties to rebut additional testimony and supports finality in the decision-making process. Therefore, the Industrial Commission must insist on compliance with its own rule.[253]

In *Flavin v. J.C. Penney Co.*,[254] the Industrial Commission had reviewed and affirmed a deputy commissioner's order suspending claimant's benefits. During nine minutes of the hearing before the deputy commissioner, the tape recording equipment malfunctioned. The Virginia Court of Appeals vacated the Industrial Commission's order and remanded the case so that the parties could recreate the nine minutes of missing testimony. The Virginia Court of Appeals held, under section 65.1-97, that the Industrial Commission must review all the evidence, not just part of it. Furthermore, the court must review the case on the record, which, under the Virginia Supreme Court Rules, must include the transcript of any hearing.[255]

4. Appeal Procedure Under Section 65.1-98

In *Jewell Ridge Coal Corp. v. Henderson*,[256] an employer was paying compensation awards to two injured workers, each of whom was hospitalized repeatedly. The employer questioned the necessity for treatment and asked the Industrial Commission to refer

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251. 1 Va. App. 327, 338 S.E.2d 352 (1986).

252. VA. RULES INDUS. COMM'N 3.

253. *Charcoal Hearth Restaurant*, 1 Va. App. at 329, 338 S.E.2d at 352 (citing Pittston Co. v. Fulks, 210 Va. 128, 134, 109 S.E.2d 387, 392 (1959)).

254. 1 Va. App. 1, 332 S.E.2d 805 (1985).

255. *Id.* at 3, 332 S.E.2d at 806.

256. 229 Va. 266, 329 S.E.2d 48 (1985).

the issue to a peer review committee.[257] The Industrial Commission answered that the issue of necessity was an Industrial Commission determination. The employer requested a hearing. The Industrial Commission replied by asking the employer to clarify whether it was questioning the fees charged (a proper subject for the peer review committee) or the necessity of the treatment (a proper subject for the Industrial Commission). The employer did not respond, but petitioned and was granted an appeal to the Virginia Supreme Court. The court dismissed the appeal as improvidently granted. The court held that sections 65.1-153 to -163 do not provide for the appeal of an Industrial Commission decision concerning reference of a matter to a peer review committee.[258] Only section 65.1-98 provides for an appeal, and then only for an Industrial Commission "award." Except in rare instances, the court only considers appeals of "final orders" of the Industrial Commission.[259] The court held that a final award of the Industrial Commission is "a decision of the Industrial Commission granting or denying, or changing or refusing to change, some benefit payable or allowable under the Workers' Compensation Act and leaving nothing to be done except to superintend ministerially the execution of the award."[260]

5. Res Judicata

In *K & L Trucking Co. v. Thurber*,[261] claimant suffered a compensable back injury and obtained another job, but could not work because of his injury. However, he was fired because he broke the employer's rule requiring him to call when unable to work. Claimant requested a hearing for his benefits to be resumed. At the hearing, claimant did not present evidence that he had found the job himself and that his back injury caused his absence from work. The deputy commissioner denied benefits because claimant had been discharged for cause from suitable employment. The employer then requested a hearing; and claimant stated at that hearing that he had found the job himself, introduced medical records

257. Peer review of medical costs is provided for under VA. CODE ANN. §§ 65.1-153 to -163 (Repl. Vol. 1980).

258. *Henderson*, 229 Va. at 268-69, 329 S.E.2d at 49.

259. The court also considers appeals from courts of record and the State Corporation Commission. *See* Blue Cross/Blue Shield v. Commonwealth, 218 Va. 589, 598, 239 S.E.2d 94, 98 (1977).

260. *Henderson*, 229 Va. at 269, 329 S.E.2d at 50.

261. 1 Va. App. 213, 337 S.E.2d 299 (1985).

of his back problems, and requested temporary partial benefits effective when he found another job.

The Virginia Court of Appeals reversed the Industrial Commission's compensation award that was based on the second hearing. The court held that the Commission could not, at the second hearing, consider claimant's evidence about how he obtained his job or why his absence was justified, because the first deputy commissioner's order became res judicata on that issue after claimant did not appeal for a review by the full commission within the statutory period.[262] The court would not consider whether claimant had "cured" his constructive refusal of suitable employment and had thereby become entitled to temporary partial benefits after finding another job, because the employer had no notice that the second hearing would consider this issue. However, the court remanded the case to the Industrial Commission and noted that the claimant could still apply to the Industrial Commission for another hearing on the restoration of temporary partial benefits.[263]

In contrast, the Virginia Court of Appeals held, in *Parris v. Appalachian Power Co.*,[264] that a claimant's first unsuccessful claim for an occupational disease does not have a res judicata effect on a later claim based on a new diagnosis. Claimant Parris' first claim had been dismissed by the Industrial Commission because his medical evidence did not prove that his employment had caused his asbestosis. Two years later, he filed another claim after another doctor made an unequivocal finding that claimant's asbestosis was related to his work history. The Virginia Court of Appeals disagreed with the Industrial Commission's ruling that his first claim was res judicata and barred his second claim. The court held that different medical evidence gave rise to a different cause of action, and res judicata would apply only to the same cause of action.[265]

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262. *Id.* at 219, 337 S.E.2d at 302. VA. CODE ANN. § 65.1-97 (Repl. Vol. 1980) allows a petition within 20 days. In the absence of fraud or mistake, after the 20 days pass, the Industrial Commission cannot review the matter or consider new evidence. Harris v. Diamond Constr. Co., 184 Va. 711, 717, 36 S.E.2d 573, 576 (1946).

263. *Thurber*, 1 Va. App. at 221, 337 S.E.2d at 303.

264. 2 Va. App. 219, 343 S.E.2d 455 (1986).

265. *Id.* at 227, 343 S.E.2d at 459.

6. Statutory and Due Process Limits on Industrial Commission's Authority

In *Chavis Transfer v. Dicks*,[266] the Industrial Commission had considered change-in-condition applications of claimants who alleged that they had "cured" earlier refusals of suitable employment and would cooperate with re-employment efforts. To induce the employers to make those efforts, the Commission ordered that the employers must arrange offers of suitable employment within sixty days, or compensation would resume automatically. The Virginia Supreme Court held that no statute authorizes the Industrial Commission to make such prospective awards based on arbitrary time periods. Moreover, section 65.1-63 does not impose an affirmative duty on employers to offer suitable employment, it only encourages such offers.[267] Therefore, the court reversed the awards and dismissed the applications.

In *Sergio's Pizza v. Soncini*,[268] the Virginia Court of Appeals considered the due process limitations on the Industrial Commission's authority to modify an application for benefits to a change-in-condition application[269] and held that the Commission had exceeded its authority.[270] Claimant Soncini received benefits until she recovered from an infection during treatment of her burned arm, and returned to work. Several months later, a physician opined that she had tennis elbow and "a chronic indolent problem which is related to her work."[271] Claimant found another job and applied to the Industrial Commission for disability benefits, alleging an occupational disease and listing the date of injury as one month after her earlier compensable injury. The Industrial Commission did not consolidate claimant's claims before the hearing, and the deputy commissioner framed the issue as whether her occupational disease was attributable to her employment. The deputy commissioner denied benefits, but the full Commission reversed and awarded benefits, finding that, although the tennis elbow was not an occupational disease, it resulted from the infec-

266. 229 Va. 548, 331 S.E.2d 449 (1985).

267. *Id.* at 554, 331 S.E.2d at 452.

268. 1 Va. App. 370, 339 S.E.2d 204 (1986).

269. Under VA. CODE ANN. §§ 65.1-8, -98 (Repl. Vol. 1980), a "change in condition" allows the Industrial Commission to conduct a review on its own motion. *See supra* notes 199-228 and accompanying text.

270. *Soncini*, 1 Va. App. at 377, 339 S.E.2d at 208.

271. *Id.* at 374, 339 S.E.2d at 206.

tion during treatment of her earlier compensable arm injury.[272]

The Virginia Court of Appeals reversed and remanded the case because, at the review level, the Industrial Commission had converted claimant's application for benefits for a new injury into a review of a change in condition related to her earlier injury. Under section 65.9-99 of the Virginia Code, the Industrial Commission may conduct a review of a change in condition on its own motion, but the court held that this authority has due process limitations.[273] The court distinguished *Oak Hill Nursing Home, Inc. v. Back*,[274] in which the Virginia Supreme Court held that the Industrial Commission properly had consolidated a claimant's application for benefits with the file on her earlier compensable injury, and treated the claimant's new request as a change-in-condition application.[275] In contrast to the consolidation of claims before the hearing in *Oak Hill Nursing Home*, the Industrial Commission's procedure in *Soncini* did not give the employer adequate notice to defend the claim at any stage when it could have submitted evidence. Although the court seemed to insist that due process requires consolidation of claims before any hearing, as in *Oak Hill Nursing Home*, the court also suggested that the Industrial Commission could have cured the due process defect by allowing the submission of additional evidence at its review.[276]

In *Board of Supervisors v. Taylor*,[277] claimant suffered a compensable back injury and was awarded temporary disability benefits and medical benefits for as long as necessary. Claimant later sought compensation for a new accident, but the Industrial Commission awarded only his medical expenses, ruling that the claimant's problems were a progression of his earlier injury. The employer had not notified its former insurance carrier about that proceeding because the employer had become self-insured shortly after claimant's first injury. The employer refused to pay the medical expenses, asserting that the insurance carrier was responsible. The insurance carrier also refused to pay the medical expenses, asserting that the treatment was unauthorized, that the evidence was

272. *Id.* at 375, 339 S.E.2d at 207.

273. *Id.*

274. 221 Va. 411, 270 S.E.2d 723 (1980).

275. *Id.* at 415, 270 S.E.2d at 725 (consolidation authorized by VA. RULES INDUS. COMM'N 1).

276. *Soncini*, 1 Va. App. at 377, 339 S.E.2d at 208. The submission of additional evidence is authorized by VA. CODE ANN. § 65.1-97 and VA. RULES INDUS. COMM'N 2.

277. 1 Va. App. 425, 339 S.E.2d 565 (1986).

insufficient to connect the current problems with the earlier injury, and that the carrier was not a party to the proceeding that determined the award and therefore was not required to pay the expenses. The carrier's request for a hearing on those issues was granted. The carrier presented no additional evidence at the second hearing. Accordingly, the deputy commissioner ruled that the medical treatment clearly was authorized and that the carrier was bound by the Industrial Commission's order by operation of law.[278] The deputy commissioner also reviewed the causal connection evidence de novo and found it sufficient. The full Commission affirmed.

On appeal, the Virginia Court of Appeals affirmed the Industrial Commission on all issues. The insurance carrier argued that it had been denied due process of law because it was not notified of the first hearing. However, the court held that the Industrial Commission's actions clearly had provided the carrier with due process.[279] First, when the carrier raised the due process issue, the Industrial Commission had granted a second hearing; however, because the carrier did not present any additional evidence, the carrier's absence from the first hearing could not have harmed the carrier. Second, the deputy commissioner also had conducted a de novo review of the causal connection evidence and found it sufficient.[280]

In *Hudock v. Industrial Commission*,[281] the Virginia Court of Appeals upheld the Industrial Commission's authority to limit a claimant's attorney's fees,[282] even if the claimant has agreed to pay them, and to hold the attorney in contempt until he refunds any excess. In *Hudock*, claimant entered into a compromise settlement of her workers' compensation claim with her employer. Claimant's attorney requested the Industrial Commission to award reasonable attorney's fee for legal services, but did not specify any amount. The Industrial Commission approved the $15,000 settlement, or-

278. *Id.* at 433, 339 S.E.2d at 569; *see* VA. CODE ANN. §§ 65.1-109, -111 (Repl. Vol. 1980).

279. *Taylor*, 1 Va. App. at 433, 339 S.E.2d at 569. The employer also argued that applying VA. CODE ANN. §§ 65.1-109 and -111 in this case violated due process standards, because its interests were adverse to the employer's interests. The Virginia Supreme Court refused to address that argument, because it held that the Industrial Commission's procedures had afforded the employer adequate due process.

280. The Industrial Commission also assessed attorney's fees against the employer and the insurance carrier, and the Virginia Court of Appeals affirmed. *Id.* at 434, 339 S.E.2d at 570; *see also infra* note 319 and accompanying text.

281. 1 Va. App. 474, 340 S.E.2d 168 (1986).

282. *Id.* at 477 n.1, 340 S.E.2d at 170 n.1.

dering $2,500 to be paid to the attorney with the balance paid to claimant. Three years later, claimant informed the Industrial Commission that her attorney had required her to pay him an additional $2,500 fee based on a one-third contingent fee arrangement that she had signed when she retained him.

The Virginia Court of Appeals affirmed both the Industrial Commission's ruling that the attorney was in contempt and the Commissions's order to refund the $2,500 to claimant with interest. The attorney argued that the Industrial Commission had violated his fourteenth amendment right to due process and equal protection of the laws. The Virginia Court of Appeals noted that the Virginia Supreme Court had construed the purpose of section 65.1-102 to protect claimants in workers' compensation cases from being overcharged for legal services.[283] Furthermore, a fifty-four-year-old Industrial Commission opinion[284] that allowed a claimant to repudiate a fifty-percent contingent fee agreement had never been challenged or overruled by the General Assembly.[285] In addition, the United States Supreme Court had upheld a similar statute as a valid exercise of a state's police powers.[286] Other state courts also have upheld agency practices not to require approval of employers' and insurance carriers' attorney's fees, because their economic circumstances do not create the same need for protection that an injured employee has.[287]

As for the contempt powers, the Virginia Court of Appeals relied on the statutory grants of authority to the Industrial Commission as a quasi-judicial body under section 65.1-20,[288] as interpreted by the Virginia Supreme Court in *Harris v. Diamond Construction Co.*[289] As for the three-year delay, the attorney argued that the

283. *Id.* at 477, 340 S.E.2d at 170 (citing Bee Hive Mining Co. v. Industrial Comm'n, 144 Va. 240, 132 S.E. 177 (1926)).

284. Saylor v. Old Dominion Veneer Co., 13 O.I.C. 277 (1931).

285. The court noted the universal rule that legislatures are presumed to know how their statutes are construed by administrative agencies and to have acquiesced if they have not changed the statute. *Hudock*, 1 Va. App. at 478, 340 S.E.2d at 171 (citing Peyton v. Williams, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965) (citing Smith v. Bryan, 100 Va. 199, 204, 40 S.E. 652, 654 (1902))).

286. *See* Yeiser v. Dysart, 267 U.S. 540, 541 (1925).

287. *See* Crosby v. State Workers' Compensation Bd., 57 N.Y.2d 305, 442 N.E.2d 1191, 456 N.Y.S. 2d 680 (1982).

288. *See Hudock*, 1 Va. App. at 481, 340 S.E.2d at 173; *see also* VA. CODE ANN. § 18.2-456(5) (Repl. Vol. 1982) (authorizing a judge to issue attachments for contempt upon "disobedience or resistance of an officer of the court . . . to any lawful . . . order of the court.").

289. 184 Va. 711, 720, 36 S.E.2d 573, 577 (1946) (Industrial Commission has jurisdiction to do "full and complete justice" under the Workers' Compensation Act and has discretion

doctrine of laches should apply. However, the Virginia Court of Appeals held that the Industrial Commission had moved expeditiously upon learning about the additional fee.[290] As between the attorney and the Industrial Commission, laches has no validity even if it may be valid in a civil suit between the attorney and the claimant. The attorney also argued that he was not a party to the Industrial Commission's original order. However, the Virginia Court of Appeals held that the attorney was an officer of the court, had prepared the order, and was a signatory.[291] The attorney also argued that section 65.1-100.1[292] precludes the Industrial Commission from enforcing its own orders. However, the Virginia Court of Appeals held that court enforcement under that statute is permissive and must be read consistently with the section 65.1-20 grant of powers to the Industrial Commission to enforce its own orders.[293]

The court's holding in *Hudock* is consistent with other jurisdictions and, in at least one jurisdiction, double damages could have been awarded to the claimant.[294]

In *Lynchburg Foundry v. Tune*,[295] the Industrial Commission requested a physician, as an independent expert, to examine a claimant and to determine whether claimant suffered from the occupational disease that he alleged.[296] The Commission refused to allow the employer to see that physician's report or the x-rays on which it was based until the deposition. The Commission also refused to admit as evidence the responses of the employer's experts to that physician's report. The Virginia Court of Appeals reversed the Commission's compensation award,[297] holding that the Commission

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to disregard time limit on review petition "to protect itself and its awards from fraud, imposition and mistake.").

290. *Hudock*, 1 Va. App. at 481, 340 S.E.2d at 173.

291. *Id.*

292. VA. CODE ANN. § 65.1-100.1 (Repl. Vol. 1980) provides that Industrial Commission orders or awards "may be recorded, enforced, and satisfied as orders or decrees of a circuit court upon certification of such order or award by the Commission. The Commission shall certify such order or award upon satisfactory evidence of noncompliance with the same."

293. *Hudock*, 1 Va. App. at 482, 340 S.E.2d at 173.

294. *See* ME. REV. STAT. ANN. tit. 39, § 110 (1985). *See generally* 3 A. LARSON, *supra* note 48, § 83.13(a).

295. 1 Va. App. 295, 338 S.E.2d 645 (1986).

296. The Industrial Commission exercised its authority to appoint an independent expert under § 65.1-90 of the Virginia Code, because the x-rays submitted in the case were difficult to read and the medical opinions submitted were "in 'hopeless conflict.' " *Id.* at 301-02, 338 S.E.2d at 649.

297. *Id.* at 303, 338 S.E.2d at 649-50.

had improperly construed *Pittston Co. v. Fulks*.[298] In *Pittston*, the Virginia Supreme Court approved the Commission's authority to appoint an independent expert to examine and evaluate the medical evidence in a case, but held that an employer had the right to see and examine an independent expert and his reports, because they were material and adverse to the employer's interest.[299] The Virginia Court of Appeals held that *Pittston* requires that an independent expert must render an opinion about the evidence on which the claim is based, and that his "work product" must be "subject to the same discoveries, examinations and views as any other witness in the cause being heard."[300] The court held that the Commission had exceeded its statutory authority as limited by *Pittston* when it requested the independent expert to evaluate the claimant's present condition and then precluded the employer's effective challenge of that expert's evaluation. Therefore, the court remanded the case to the Commission, with orders to disregard the evidence related to the independent expert's examination.[301]

K. *Sanctions and Penalties Against the Employer*

1. Late Payment Penalty

In *Audubon Tree Service v. Childress*,[302] the Virginia Court of Appeals established the proper method for calculating the two-week period within which a compensation award must be paid to avoid a twenty-percent late payment penalty under section 65.1-75.1. The court held that compensation is due on the date of the award [303] and that, under section 1-13.3 of the Virginia Code,[304] the day following the award must be the first day counted in calculating the two-week period. The court held that compensation is paid and the two-week period ends when payment is mailed directly to

298. 201 Va. 128, 109 S.E.2d 387 (1959).

299. *Id.* at 132, 109 S.E.2d at 389.

300. *Tune*, 1 Va. App. at 303, 338 S.E.2d at 649-50.

301. *Id.* One justice dissented and would have dismissed the case on the grounds that the Industrial Commission had ruled in claimant's favor only because of the independent expert's testimony and report. *See id.* at 303-04, 338 S.E.2d at 650 (Moon, J., dissenting).

302. 2 Va. App. 35, 341 S.E.2d 211 (1986).

303. *Id.* at 39, 341 S.E.2d at 213. The court held that establishing a uniform time for payment is a legitimate purpose, and therefore does not violate equal protection and due process rights. *Id.*

304. VA. CODE ANN. § 1-13.3 provides that "when a statute requires a notice to be given or any other act to be done within a certain time after any event or judgment, that time shall be allowed in addition to the day on which the event or judgment occurred."

the claimant.[305]

2. Assessment of Claimant's Attorney's Fees

Under section 65.1-101, the Industrial Commission, or any court, may assess the costs of a proceeding, including claimant's attorney's fees, against the employer, if the tribunal finds that the employer defended against a claim without reasonable grounds. The courts' recent decisions have clarified somewhat their standards for exercising this discretionary sanction, revealing that the Industrial Commission is the most generous and the Virginia Supreme Court is the most conservative.[306]

In *City of Norfolk v. Lassiter*,[307] claimant, a firefighter, "felt a sudden surge of pain" and injured his back while stepping down from the fire truck after returning from a fire.[308] At the hearing, he testified that his boot slipped on the step of the fire truck. The Virginia Supreme Court affirmed the Industrial Commission's compensation award but reversed the attorney's fee assessment. The court held that the assessment was unwarranted for the original defense and the full Commission review, because a reasonable mind might have believed that this claim was governed by its previous decisions, including *Richmond Memorial Hospital v. Crane*,[309] which denied compensation to employees injured in the normal course of their duties.[310] Because the employer heard for the first time at the hearing that something unusual occurred when

305. *Childress*, 2 Va. App. at 41, 341 S.E.2d at 215. The Industrial Commission ruled that compensation is due on the date of the award and is paid when actually received by a claimant. The court of appeals disagreed, because the statute does not require that result. Moreover, such a requirement could create delays, because employers would have to use certified mail to prove the claimant's receipt. Injustices could result because injured claimants are often not at home to sign a receipt, and claimants can create a penalty situation intentionally by avoiding their mail. The court also did not agree with the employer that compensation is paid when it is mailed to the claimant's attorney, because compensation is required to be paid "direct[ly] to the beneficiary or beneficiaries" regardless of representation by counsel. *Id.* at 40, 341 S.E.2d at 214-15 (citing VA. RULES INDUS. COMM'N 12). In *Childress*, the Virginia Court of Appeals also held that the employer could not argue that compensation could not be due before the twenty-day appeal period expired, because the employer had not appealed the award. *Childress*, 2 Va. App. at 38-39, 341 S.E.2d at 213.

306. For cases reflecting the disparate standards, see *infra* notes 307-19 and accompanying text.

307. 228 Va. 603, 324 S.E.2d 656 (1985).

308. *Id.* at 604, 324 S.E.2d at 656.

309. 222 Va. 283, 278 S.E.2d 877 (1981) (claimant's injury not compensable because she fell on a dry, level, unobstructed floor); *see also supra* notes 58-62 and accompanying text.

310. *Lassiter*, 228 Va. at 606, 324 S.E.2d at 658.

claimant was injured, compensability appeared at least doubtful, and its defense was reasonable.

Apparently, the Virginia Supreme Court's standard for a reasonable defense is quite low. *Crane* was decided after *Reserve Life Insurance Co. v. Hosey*.[311] In *Crane*, the court distinguished Crane's noncompensable fall on a level floor from Hosey's compensable injury walking on steps. Thus, the Virginia Supreme Court appears even more conservative about attorney's fee assessments than does the Virginia Court of Appeals.

In *Jensen Press, Inc. v. Ale*,[312] the Industrial Commission ordered the employer to pay claimant's attorney's fees for the proceeding, because the treating physician's letters and continuing reports about claimant's treatment gave the employer and its carrier either actual or constructive knowledge that claimant's treatment was authorized. The Commission ruled that the employer has an affirmative duty to clarify any doubt about whether a claimant's treating physician specifically has recommended other medical treatment, rather than simply refusing to pay for that treatment.[313] The Virginia Court of Appeals affirmed the assessment, because the employer's defense against paying for the treatment was so "tenuous" that the Industrial Commission had not abused its discretion.[314] The court distinguished *Sun Oil Co. v. Lawrence*,[315] in which the Virginia Supreme Court vacated the Industrial Commission's assessment of attorney's fees. In *Sun Oil Co.*, the court's grant of certiorari was enough to justify the employer's defense of the claim. In contrast, Jensen Press's appeals to the full Commission and to the Virginia Court of Appeals were not discretionary, but a matter of right.[316]

Notably, the court declined claimant Ale's request that the court grant additional attorney's fees for the appeal. The court's standard for such discretionary awards apparently is more generous

311. 208 Va. 568, 169 S.E.2d 633 (1968); *see also supra* notes 56-62 and accompanying text.

312. 1 Va. App. 153, 336 S.E.2d 522 (1985); *see supra* notes 110-12 and accompanying text.

313. *Jensen Press*, 1 Va. App. at 158-59, 336 S.E.2d at 525.

314. *Id.* at 160, 336 S.E.2d at 526. " '[N]either the employer nor its insurance carrier may limit the treating physician in the medical specialist, or treating facilities to which the claimant may be referred for treatment.' " *Id.* at 158, 336 S.E.2d at 525 (quoting Beauchamp v. Cummins & Hart, 60 O.I.C. 37, 39 (1982)).

315. 213 Va. 596, 194 S.E.2d 687 (1973).

316. *Jensen Press*, 1 Va. App. at 160, 336 S.E.2d at 525.

than the Virginia Supreme Court's, but less generous than the Industrial Commission's standard.

The Virginia Court of Appeals applied *Lassiter* and *Jensen Press* in *Volvo White Truck Corp. v. Hedge*,[317] reversing an Industrial Commission assessment of attorney's fees. Because the employer's investigation before the hearing produced conflicting expert medical opinions about the cause of claimant's eye problems, the employer's defense was reasonable, even though it "later prove[d] to be misplaced or in error."[318]

In *Board of Supervisors v. Taylor*,[319] the Virginia Court of Appeals affirmed an Industrial Commission assessment of attorney's fees against an insurance carrier. The insurance carrier had requested a hearing, alleging denial of due process, because it had not been notified of an earlier hearing; however, the carrier did not present any additional evidence at the second hearing.

L. *Exclusive Remedy*

1. "Other Parties"

Although, generally, workers' compensation is an injured employee's exclusive remedy, he may pursue a common law action if either the cause of his injury or the person who injured him is outside the workers' compensation remedial scheme.

Under section 65.1-40 of the Virginia Code, workers' compensation benefits are an injured employee's only remedy against his employer for an injury that arises out of and in the course of his employment. In addition, under section 65.1-41, an injured employee may sue "any other party" to recover damages. In numerous cases involving employees injured where employees of two or more businesses are working together, the courts have attempted to draw lines between the parties who can be sued and those against whom suit is barred by section 65.1-40. Generally, the legal standard in Virginia has been that only a "stranger" to the employer's business can be sued as an "other party" under section 65.1-41; a business that is engaged in the employer's trade, busi-

317. 1 Va. App. 195, 336 S.E.2d 903 (1985); *see supra* notes 135-38 and accompanying text.

318. *Hedge*, 1 Va. App. at 201, 336 S.E.2d at 907.

319. 1 Va. App. 425, 339 S.E.2d 565 (1986); *see also supra* text accompanying notes 277-80.

ness, or occupation cannot be sued, but is protected under section 65.1-40.

In *Conlin v. Turner's Express, Inc.*,[320] the Virginia Supreme Court clarified its previous decisions about whether another business is engaged in the employer's trade, business, or occupation. In *Whalen v. Dean Steel Erection Co.*,[321] the Virginia Supreme Court clarified the tests applied in the general contractor/subcontractor context.

In *Conlin*, the facts were strikingly similar to the facts in *Floyd v. Mitchell*,[322] in which the Virginia Supreme Court held that a contract motor carrier that shipped the employer's products was engaged in the employer's trade, business, or occupation and, therefore, could not be sued by the injured employee. There was only a slight factual distinction between *Floyd* and *Conlin*. In *Floyd*, the contract carrier's employees assisted the employer's employees in loading the employer's product; in *Conlin*, the contract carrier's employees did not assist in the loading. The court held that such assistance was a meaningless distinction; therefore, plaintiff could not sue the contract carrier, because it was engaged in his employer's trade, business, or occupation.[323]

In *Whalen*, plaintiff was the general contractor's employee on a construction job. He sued a subcontractor, alleging that its employees negligently had positioned the steel girder that injured him when it fell on his legs. The Virginia Supreme Court affirmed the circuit court's dismissal of the action, holding that the subcontractor was engaged in the general contractor's trade, business, or occupation, because it was performing an essential part of the construction work for which the general contractor had overall responsibility.[324] Plaintiff argued that the proper test, in his case, was "whether the subcontractor's activity is one normally carried out by the owner or general contractor through employees, instead of one customarily entrusted to a subcontractor."[325] The court, however, held that plaintiff's test is only appropriate to determine whether a general contractor is the statutory employer of a subcontractor's employee, thus barring suit by the employee against a

320. 229 Va. 557, 331 S.E.2d 453 (1985).
321. 229 Va. 164, 327 S.E.2d 102 (1985).
322. 203 Va. 269, 123 S.E.2d 369 (1962).
323. *Conlin*, 229 Va. at 560, 331 S.E.2d at 454.
324. *Whalen*, 229 Va. at 169, 327 S.E.2d at 105.
325. *Id.* at 170, 327 S.E.2d at 105.

negligent general contractor.[326]

Plaintiff also argued that precluding his suit against the subcontractor deprived him of his constitutional right to due process, equal protection of the laws, and a trial by jury. Although workers' compensation statutes have generally survived constitutional attack because of the quid pro quo (a workers' compensation remedy) exchanged for the exclusive remedy provision, the court's dismissal of plaintiff's case could not survive attack in this instance. He had exchanged a workers' compensation remedy only with his employer and, therefore, he should be barred from suing only his employer, and not the subcontractor, with whom he had exchanged nothing. The Virginia Supreme Court disagreed, holding that the quid pro quo is a "societal exchange" which does not require one-on-one matching of the entitlement to compensation benefits and immunity from suit.[327]

2. Injuries Not Arising Out of and in the Course of Employment

In *City of Richmond v. Braxton*,[328] plaintiff Braxton sued her employer at common law, then filed a workers' compensation claim and pursued it through an unsuccessful appeal to the Virginia Supreme Court.[329] She argued that, because the Virginia Supreme Court had denied her workers' compensation claim, she was free to sue her employer at common law. The court disagreed, dismissing the case for lack of jurisdiction, because workers' compensation is her exclusive remedy. The court stated that success or failure in the Industrial Commission is not controlling. Rather, the issue is whether the facts as pleaded, if proved by her, would entitle her to receive workers' compensation. In the court's opinion, she would be so entitled; therefore, workers' compensation must be her exclusive remedy, and this case must be dismissed.[330]

Victims of sexual assaults or harrassment in the workplace face the same problem as Ms. Braxton; their remedies are severely limited.[331] However, other jurisdictions have begun to allow recovery,

326. *Id.* at 170, 327 S.E.2d at 106 (quoting 1 A. LARSON, *supra* note 48, § 49.12).

327. *Id.* at 171, 327 S.E.2d at 106.

328. 230 Va. 161, 335 S.E.2d 259 (1985).

329. *See supra* notes 75-83 and accompanying text.

330. *Braxton*, 230 Va. at 164, 335 S.E.2d at 261.

331. *See generally* Arnett-Kremian, *Unemployment Compensation Benefits: Part of a Balanced Package of Relief for Sexual Harrassment Victims*, 18 U. RICH. L. REV. 1, 21-22 (1983).

either under the umbrella of workers' compensation or in a tort action, for negligent or intentional infliction of emotional distress.[332] After the *Braxton* decisions, neither victims of a non-criminal sexual assault nor victims of a more subtle offense have much hope of recovery in Virginia, particularly if the trial courts continue to second-guess the results of an employee's workers' compensation contest.

In *Lloyd v. American Motor Inns, Inc.*,[333] plaintiff was injured on a sidewalk on the employer's premises, and filed a workers' compensation claim. The Industrial Commission denied benefits, ruling that her injury did not arise out of and in the course of her employment. The Industrial Commission further ruled that her accident was not the proximate cause of her injuries. Claimant then sued her employer for damages, alleging that the employer was negligent in not maintaining the sidewalk in a safe condition. The trial court granted the employer's motion for summary judgment, holding that the Industrial Commission's ruling on proximate cause was res judicata, barring this action.[334]

On appeal, the Virginia Supreme Court reversed the trial court's dismissal and remanded for a new trial. The court agreed with the plaintiff that the Industrial Commission, having determined that plaintiff's injury did not arise out of and in the course of her employment, lacked jurisdiction to determine causation and, therefore, its ruling could not be res judicata on that issue. The court explained its holdings in previous cases applying the res judicata doctrine to Industrial Commission proceedings[335] and held that the

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332. *See, e.g.*, Hollrah v. Freidrich, 634 S.W.2d 221 (Mo. Ct. App. 1982); *cf.* Paris v. Snappy Car Rental, Inc., 18 Mass. App. Ct. 968, 469 N.E.2d 1293 (1984). *See generally* 2 A. LARSON, *supra* note 48, § 68.34.

333. 231 Va. 269, 343 S.E.2d 68 (1986).

334. *Id.* at 270, 343 S.E.2d at 69.

335. The court explained its holdings in Griffith v. Raven Red Ash Coal Co., 179 Va. 790, 20 S.E.2d 530 (1942), and Raven Red Ash Coal Co. v. Griffith, 181 Va. 911, 27 S.E.2d 360 (1943). These were successive appeals from wrongful death litigation following Griffith's accidental death in a mine explosion, and involved the res judicata effect of Industrial Commission determinations in the widow's workers' compensation claim. In the first *Griffith* appeal, the Virginia Supreme Court held that the Industrial Commission's ruling that Griffith's death did not arise out of and in the course of his employment was not res judicata for purposes of barring the widow's common-law negligence action against his employer. The court remanded the case to the circuit court for a new trial. *Griffith*, 179 Va. at 802, 20 S.E.2d at 536. In the second *Griffith* appeal, the Virginia Supreme Court held that the Industrial Commission's ruling that Griffith was not performing work-related duties when he was killed was res judicata for purposes of precluding proof that he was an invitee to whom the employer owed a duty to maintain safe conditions in the mine. *Raven Red Ash*, 181 Va. at 922, 27 S.E.2d at 365.

plaintiff in this case was not asserting an issue that had been determined properly by the commission.[336]

II. Unemployment Compensation[337]

After a claimant proves that he is eligible for unemployment compensation benefits, he still may be disqualified from receiving benefits on any of several grounds listed in section 60.1-58 of the Virginia Code. Recent court decisions have clarified the standards used to judge whether a voluntary termination is based on good cause and whether an involuntary termination is based on misconduct.

A. *Voluntary Termination "Without Good Cause" Under Subsection 60.1-58(a)*

In *Lee v. Virginia Employment Commission*,[338] claimant resigned after he was transferred to a new job, which he believed had no promotion possibilities. Earlier, he had settled a grievance with his employer, the General Services Administration (GSA), in an agreement providing for an individual training and career development plan. The GSA did not comply with the agreement because of budget cutbacks, and also stated that it did not consider the agreement legally binding. After his transfer, claimant had complained, but did not file another grievance, because he did not want it reflected in his personnel record. The Virginia Employment Commission (VEC) denied benefits under subsection 60.1-58(a) of the Virginia Code, finding that he had not made every "reasonable" effort to resolve his problem before quitting, because he had not filed a grievance to try to enforce the agreement.[339] Both the circuit court and the Virginia Court of Appeals upheld the Commission, deferring to the Commission's standard for disqualification based on a voluntary termination "without good cause."[340]

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336. *Lloyd*, 231 Va. at 271-72, 343 S.E.2d at 70.

337. The Virginia Code Commission recently has completed revision of title 60.1 of the Virginia Code. However, the Code volume containing the new sections was not to be published until December, 1986. The new sections become effective June 1, 1987. A close review of these new sections reveals no substantive changes; however, there has been significant reorganization. *See* H. Doc. 11, 1986 Session of the General Assembly.

338. 1 Va. App. 82, 335 S.E.2d 104 (1985).

339. *Id.* at 84, 335 S.E.2d at 105.

340. *Id.* at 85, 335 S.E.2d at 106.

Claimant argued that he should not be required to pursue any administrative remedies, because the GSA did not consider the agreement binding. The Virginia Court of Appeals held that, even if the GSA had breached the agreement, claimant might have had a remedy under federal regulations governing such agreements,[341] had he elected to pursue it.

B. *Misconduct under Subsection 60.1-58(b)*

In *Brady v. Human Resource Institute of Norfolk, Inc.*,[342] claimant, a staff nurse, was terminated by her employer because she attempted to have her employer's pharmacy fill a prescription[343] that had been written for her by her personal physician. Her physician, who was also her part-time employer, testified that she was authorized to use his name and call in prescriptions for herself or any other patient. The Virginia Supreme Court upheld the VEC's award. The employer argued that the claimant was discharged because she knowingly violated its personnel policy when she ordered the pharmacy to fill her personal prescription when that pharmacy had no prescription on file. The court held that the Commission correctly ruled that the employer had the burden of proving misconduct under the standard of *Branch v. Employment Commission*,[344] namely, that the employee *deliberately* had violated a company rule or shown a *willful* disregard of the employer's legitimate business interests and her duties and obligations to her employer.[345] The court held that the testimony of her physician and part-time employer supported the Commission's conclusion that she may have exercised "extremely poor judgment,"[346] but she was not guilty of misconduct.

The recent decisions of Virginia circuit courts also have applied the *Branch* standard to measure willful misconduct, but the legal analyses are rather disturbing.

In *Catlett v. Virginia Employment Commission*,[347] claimant, a truck driver, was discharged after an accident because he was driv-

341. *Id.* at 86, 335 S.E.2d at 106-07; *see* 5 C.F.R. § 2423.11(b)(1) (1986).

342. 231 Va. 28, 340 S.E.2d 797 (1986).

343. The prescription was for thyroid drugs, a controlled substance. *Id.* at 31, 340 S.E.2d at 799.

344. 219 Va. 609, 611, 249 S.E.2d 180, 182 (1978).

345. *Brady*, 231 Va. at 32, 340 S.E.2d at 798.

346. *Id.*

347. 4 Va. Cir. 364 (Rockingham County 1986).

ing too fast for road conditions. The employer's rules clearly stated that an accident which a driver could have prevented will result in a pay reduction or termination. The circuit court reversed the VEC's denial of benefits. The court applied *Branch*, and held that claimant's negligence or recklessness was not a recurrent course of conduct after warnings from his employer; nor did the claimant deliberately or willfully cause the accident. In addition, the court held that it was bound by *Uninsured Employer's Fund v. Keppel*,[348] in which the Virginia Court of Appeals held that willful misconduct imports a wrongful intention and cannot be based on negligence, no matter how gross.[349]

The court's use of *Keppel* was probably inappropriate. *Keppel* was decided under section 65.1-38, which requires a very high standard for barring an employee injured by his own misconduct from receiving workers' compensation benefits. Furthermore, in *Richmond Cold Storage Co. v. Burton*,[350] the Virginia Court of Appeals held that section 65.1-63, which has a lower standard for suspending workers' compensation benefits of an injured employee who is discharged from suitable employment for misconduct, does not always yield the same result as the *Branch* standard.[351] The Virginia Court of Appeals based its holding in *Burton* on the differences in the underlying purposes of the unemployment compensation statutes and the workers' compensation statutes. Thus, the circuit court's statement in *Catlett* that "the same principles apply" to unemployment compensation and workers' compensation cases[352] is inconsistent with the law established by the Virginia Court of Appeals in *Burton*.

Although the circuit court applied the *Branch* standard in *Mullinex v. Winchester Memorial Hospital*,[353] the court apparently misallocated the burden of proving misconduct. In *Mullinex*, claimant was discharged for many reasons, including excessive ab-

348. 1 Va. App. 162, 164, 335 S.E.2d 851, 853 (1985).

349. *Id.* at 165, 335 S.E.2d at 853.

350. 1 Va. App. 106, 335 S.E.2d 847 (1985). The Virginia Court of Appeals held that collateral estoppel did not prevent claimant from asserting that his discharge from suitable employment was not for misconduct, even after the Virginia Employment Commission (VEC) had already applied *Branch*, denied unemployment compensation benefits, and found that he was discharged for misconduct. *Id.* at 111, 335 S.E.2d at 850; *see supra* notes 194-98 and accompanying text.

351. *Burton*, 1 Va. App. at 111, 335 S.E.2d at 849.

352. *Catlett*, 4 Va. Cir. at 368.

353. 4 Va. Cir. 205 (Winchester 1984).

sences from work.[354] The circuit court affirmed the VEC's denial of benefits. The court cited *Branch* and held that the evidence supported the VEC's finding of misconduct, "most particularly as the claimant for unemployment benefits bears the burden of proving entitlement to them."[355]

The claimant's only burden is to prove eligibility for benefits, which does not involve the reason for a claimant's discharge. Misconduct is a disqualifying event and, thus, the employer must prove it under the *Branch* standard before the claimant must go forward with evidence of mitigating circumstances.[356]

III. Labor Relations

The Virginia Supreme Court recently applied Virginia law to claims arising from a hotly contested labor dispute and severely limited the possible state law remedies for egregious behavior in such contexts. In *Crawford v. United Steel Workers*,[357] the Virginia Supreme Court addressed multiple claims arising from a long and violent strike and, in a divided opinion, held that the plaintiffs had no remedies under either Virginia's defamation and labor laws or the common law. The court dismissed their action under Virginia's "insulting words" statute,[358] holding that the statute's application was preempted by national labor policy as articulated by the United States Supreme Court.[359] The court held that, although the words complained of were repulsive,[360] they were not knowing falsehoods and therefore were not actionable in the context of a labor dispute.[361] The court also dismissed plaintiff's action under

354. *Id.* at 206 (testimony indicated that petitioner was rude and callous to patients, that she produced no medical excuses for two-thirds of her absences, and that most absences occurred before and after her regular off-duty days).

355. *Id.* at 207 (citing Virginia Employment Comm'n v. Coleman, 204 Va. 18, 129 S.E.2d 6 (1963) (holding that claimant had not proved availability for work, a condition of eligibility for which he bears the burden of proof)).

356. *See Branch*, 219 Va. 609, 249 S.E.2d 180.

357. 230 Va. 217, 335 S.E.2d 828 (1985).

358. *See* Va. Code Ann. § 8.01-45 (Repl. Vol. 1984). The trial court held that the words were actionable because they tended to violence and breach of the peace.

359. *See* Old Dominion Branch No. 496, National Ass'n Letter Carriers v. Austin, 418 U.S. 264 (1974); Linn v. United Plant Guard Workers, Local 1114, 383 U.S. 53 (1966). In these cases, the United States Supreme Court established the bounds of federal labor policy and the first amendment in state regulation of speech used in labor disputes.

360. *Crawford*, 230 Va. at 229, 335 S.E.2d at 835 (the two words complained of were "cocksucker" and "motherfucker").

361. *Id.* at 234, 335 S.E.2d at 838-39. One justice concurred in the result, but would have dismissed the case because the trial court incorrectly construed § 8.01-45 of the Virginia

Virginia's picketing and right-to-work laws, upholding the trial court's factual finding that plaintiffs had failed to prove their case. The court dismissed their common-law action based on intentional infliction of emotional distress for the same reason. The court had reviewed the conflicting evidence on these issues and decided that the trial court's factual findings were not plainly wrong.[362]

As the dissenting justices noted, the majority destroys a civil remedy and offers no substitute.[363] The United States Supreme Court has recognized several exceptions to the preemption rule, and has upheld certain state law claims arising from labor disputes.[364] However, those exceptions are drawn very narrowly. It is clear that state law claims based on "outrageous"[365] behavior can survive preemption but that state law claims cannot be based on "the type of robust language and clash of strong personalities that may be commonplace in various labor contexts."[366] Since this standard is so subjective and difficult to apply, as evidenced by the division in the Virginia Supreme Court in *Crawford*,[367] a jury is the appropriate body to make such distinctions. In view of the harshness of its result, the majority might have been less strict in con-

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Code to allow recovery for words that incite violence or breach of the peace. In his opinion, the statute is identical with the common-law actions for libel and slander, and allows actions only for defamation, regardless of the context. *See id.* at 237-38, 335 S.E.2d at 840-41 (Cochran, J., concurring).

362. *Id.* at 236, 335 S.E.2d at 840.

363. Three justices dissented, stating that the majority destroys the state's ability to maintain public order, which the United States Supreme Court has upheld in more recent decisions, and that the concurring justice was incorrect because § 8.01-45 of the Virginia Code retains the remedy for "fighting words" as an independent remedy, even in the context of a labor dispute. *Id.* at 239, 335 S.E.2d at 841 (Russell, J., dissenting).

364. *See, e.g.*, Farmer v. United Bhd. of Carpenters & Joiners, Local 25, 430 U.S. 290, 296-97 (1977) (United States Supreme Court upheld a state law claim for intentional infliction of emotional distress by a dissident worker because it was based on "interests so deeply rooted in local feeling and responsibility.") However, *Farmer* might be distinguishable from *Crawford*, because the worker's suit in *Farmer* was a state common-law claim for intentional infliction of emotional distress, and the standard for liability was conduct "that no reasonable man in a civilized society should be expected to endure." *Id.* at 294.

365. *Id.* at 305.

366. *Id.* at 306.

367. The dissenting justices apparently reacted quite strongly to the words and found them much worse than "repulsive," stating:

> The words spoken by the defendants were like physical blows. They were, in themselves, foul-mouthed violence tantamount to an assault. No free man or woman should be expected to endure them without redress. Language of this kind, even in a relatively permissive age, may be expected to incite prompt retaliation.

Crawford, 230 Va. at 239, 335 S.E.2d at 841 (Russell, J., dissenting). Apparently, this reaction would come within the *Farmer* legal standard of "outrageous." *See Farmer*, 430 U.S. at 294, 305-07.

struction of the United States Supreme Court preemption decisions that it applied and, at least, considered other decisions that recognize exceptions and seem to warrant a jury's involvement.[368]

IV. EMPLOYMENT CONTRACTS

The Virginia Supreme Court recognized a narrow public policy exception to the employment-at-will doctrine[369] in *Bowman v. State Bank of Keysville*.[370] Plaintiffs, who were former employees and also shareholders of a bank, were threatened with discharge if they did not vote their shares in favor of a pending merger. Plaintiffs voted to approve the merger but later revoked those votes, and the merger failed. Shortly thereafter, plaintiffs were discharged. The Virginia Supreme Court reversed the trial court's dismissal of the action and held that the plaintiffs had stated a cause of action in tort for wrongful discharge. The court held that the employment-at-will rule does not protect the bank and named directors when they threaten employee-shareholders with discharge in an attempt to influence their votes. Such conduct violates a strong public policy that shareholders must exercise voting rights free from duress or fear of reprisal from corporate management.[371] Therefore, the court remanded the case for further proceedings.[372]

The Virginia Supreme Court did not mention the employment-at-will doctrine or any exceptions in dismissing breach of contract actions by former employees against a local government agency in

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368. *Compare* Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957) *with* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). The National Labor Relations Board has no jurisdiction to award individuals any damages. *See* 29 U.S.C. § 185 (1975).

369. Virginia has not varied from the employment-at-will rule since Stonega Coal and Coke Co. v. Louisville & N.R.R., 106 Va. 223, 55 S.E. 551 (1906). For an excellent discussion of Virginia law on employment contracts, see Marshall & Wicker, *The Status of the At-Will Employment Doctrine in Virginia after* Bowman v. State Bank of Keysville, 20 U. RICH. L. REV. 267 (1986).

370. 229 Va. 534, 331 S.E.2d 797 (1985).

371. *Id.* at 540, 331 S.E.2d at 800.

372. The Virginia Supreme Court affirmed the trial court's dismissal of plaintiffs' second count alleging a tortious conspiracy to induce breach of contract. The court held that the bank directors were a unified group acting as the corporation, which cannot conspire with itself, and the pleadings did not describe such third party involvement as was necessary to form the alleged conspiracy. *See id.* at 540-42, 331 S.E.2d at 801-02. One justice dissented from this part of the court's opinion. *See id.* at 542-43, 331 S.E.2d at 802-03 (Poff, J., dissenting). It is interesting that the court seemed to have no trouble with the potential application of this tort in the employment context, although the employment-at-will rule, which generally negates any underlying contract that could be breached, would probably defeat recovery in most cases.

Fairfax-Falls Church Community Services Board v. Herren.[373] Plaintiffs had three-year employment contracts with the agency but were discharged earlier when the agency wanted to convert them to salaried employees and they refused to waive their contractual rights.[374] The Virginia Supreme Court reversed the trial court's award of damages for anticipatory repudiation of the contracts. The court held that the plaintiffs could not recover as a matter of law. If their contracts were within the debt clause of the Virginia Constitution,[375] which prohibits local governments from incurring obligations beyond the current year, the contracts were void after the first year. If the contracts were within the continuing-services exception to the debt clause, they are essentially one-year contracts for the payment of services after the services are rendered; therefore, the plaintiffs have no damages, and cannot sue for anticipatory repudiation.[376]

Recent circuit court decisions have applied the employment-at-will doctrine consistent with Virginia Supreme Court decisions. In *Smith v. Arthur H. Fulton, Inc.*,[377] plaintiff and his employer had an oral employment contract, under which plaintiff could be fired during a six-month probationary period for any reason. After that, he was to be employed for so long as he performed satisfactorily. Plaintiff was discharged shortly after his probationary period for no reason, and he sued for wrongful discharge, alleging breach of contract and tort. The circuit court overruled the employer's demurrer, holding that the contract provision concerning the employee's satisfactory performance fixed a period of employment which removed the contract from the general employment-at-will

373. 230 Va. 390, 337 S.E.2d 741 (1985).

374. Both plaintiffs were told that they would be transferred into the county's merit system and become salaried employees effective July 1, 1981. One contract had about four months remaining and the other about one year and nine months. Plaintiffs filed their suit alleging anticipatory breach of their contracts, and the agency responded by offering them a choice between a "voluntary" transfer into the merit system or pursuing their contract rights. They did not withdraw the suit, and were terminated on June 30, 1981. *Id.* at 392, 337 S.E.2d at 742.

375. *See* VA. CONST. art. VII, § 10(b). The debt clause limits obligations of local governments to the current fiscal year, in the absence of a referendum.

376. In stating that the one-year contract segments must be essentially unilateral and therefore allow no cause of action for their anticipatory breach, the court relied on Beaman v. Pacific Mut. Life Ins. Co., 369 F.2d 653, 655-56 (4th Cir. 1966), and General Amer. Tank Car Corp. v. Goree, 296 F. 32, 36 (4th Cir.), *cert. denied*, 266 U.S. 610 (1924). The court did not cite or mention *Bowman* or any employment-at-will contract cases. *See Herren*, 230 Va. at 395, 337 S.E.2d at 744.

377. 4 Va. Cir. 244 (Frederick County 1984).

rule. Therefore, a jury must decide what the parties intended about the period of employment.[378] The court did not reach the tort issue.

Although decided before *Bowman*, the circuit court's decision in *Johnson v. S.E. Nichols, Inc.*[379] seems consistent with the *Bowman* standard. Plaintiff, a security officer and store detective, based a claim for wrongful discharge solely on tort grounds, alleging that her discharge violated public policy interests in preventing shoplifting and detaining suspected shoplifters.[380] The court sustained the employer's demurrer, finding that plaintiff failed to allege violation of a clear mandate of public policy and that it was the employer's "prerogative . . . to balance his losses from 'inventory leakage' against his loss of goodwill from vigilant surveillance of honest customers."[381] The court noted the trends in the courts and legislatures eroding the employment-at-will doctrine,[382] but the court deferred to the legislature to fashion a general remedy for allegedly wrongful discharge.

V. Worker Safety Laws

The Virginia Department of Labor and Industry (the "Department") is charged with the enforcement of Virginia's occupational safety and health laws.[383] Under section 40.1-49.8 of the Virginia Code, the Department is authorized to conduct inspections of workplaces either with consent or pursuant to an appropriate inspection warrant.[384] Inspection warrants require a showing of probable cause, which exists if either reasonable legislative or administrative standards for inspections are satisfied, or if the inspection

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378. *Id.* at 247. The court relied on Norfolk S. Ry. Co. v. Harris, 190 Va. 966, 59 S.E.2d 110 (1950) (definite term of employment implied from "just cause" requirement for its termination), and Twohy v. Harris, 194 Va. 69, 80, 72 S.E.2d 329, 335 (1952) (definite term of employment because "just cause" requirement was inferred from agreement that employee continue as long as employer required his services).

379. 4 Va. Cir. 218 (Rockingham Co. 1984).

380. *Id.* at 219. The court declined to await the outcome of *Bowman*, although that case was appealed on a similar issue of law and the Virginia Supreme Court had already granted the appeal.

381. *Id.* at 220.

382. *Id.* at 221-22.

383. Va. Code Ann. §§ 40.1-22 to -28.7, -41 to -51.4 (Repl. Vol. 1986).

384. Section 40.1-49.8 of the Virginia Code provides that such warrants are obtained under the procedures in §§ 19.2-393 to -397 (relating to inspections in connection with laws regulating toxic substances), except that such warrants will not be limited to instances involving toxic substances.

is otherwise legally justified.[385] In *Mosher Steel-Virginia, Inc. v. Teig*,[386] the Virginia Supreme Court applied several United States Supreme Court decisions[387] to invalidate an inspection warrant issued to the Department under section 40.1-49.8. The court afforded substantial protection to employers and imposed substantial additional cost burdens on administrative agencies seeking such warrants.

In *Mosher*, the employer refused to allow an inspection of its steel plant, challenging a warrant that had been issued on the basis of affidavits of Department employees. One affidavit stated that Mosher was selected for inspection because it was the only remaining uninspected steel plant listed in a certain category of hazardous industries by a federal Occupational Safety and Health Act (OSHA) report.[388] The employer sought a declaratory judgment that the warrant was unconstitutional.

The Virginia Supreme Court held that the employer had standing to seek a declaratory judgment.[389] The Department argued that the employer had an adequate remedy in challenging any citation that the Department might issue and that the employer's only proper challenge to the warrant was through an evidentiary hearing on the truth of the underlying affidavits, which affidavits were true in this case.[390] The court disagreed, because if the employer exhausted its administrative remedies and the Department issued no citations, the employer's constitutional rights would have been violated, but the case would be moot.[391] Evidentiary hearings are appropriate only for warrants alleging specific violations because,

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385. VA. CODE ANN. § 19.2-394 (Repl. Vol. 1986).

386. 229 Va. 95, 327 S.E.2d 87 (1985).

387. The United States Supreme Court decided in Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), that valid administrative searches required warrants to protect fourth amendment rights. In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the Court prescribed minimum standards for an inspection warrant issued to enforce the federal occupational safety and health laws. *See* Occupational M. Ed. Safety and Health Act of 1970, Pub. L. 91-596, 29 U.S.C. §§ 651-78 (1982). The Court held that such inspections must be reasonable, authorized by statute, pursuant to an administrative plan supported by specific neutral criteria, and properly limited in scope and purpose.

388. *Mosher*, 229 Va. at 97-98, 327 S.E.2d at 89-90. The report was the United States Department of Labor Occupational Safety and Health Act Planning Guide for Safety.

389. *Id.* at 100, 327 S.E.2d at 91.

390. *Mosher*, 229 Va. at 101, 327 S.E.2d at 92. Such hearings are based on Franks v. Delaware, 438 U.S. 154 (1978).

391. The court noted many cases in which courts have not required exhaustion of administrative remedies. *See Mosher*, 229 Va. at 101, 327 S.E.2d at 92.

in those cases, a court can balance the urgency of executing the warrant to control alleged dangers against the constitutional rights of the challenger. This warrant did not allege specific violations, thereby making a declaratory judgment action the employer's only effective means to challenge it.

The court then held that the warrant was invalid, but provided guidance for procedures to issue valid inspection warrants. The court held that administrative warrants not alleging specific violations must, nonetheless, be based on factual allegations sufficient for the issuing judicial officer to form his own conclusions about probable cause.[392] Sufficient factual allegations also must support an underlying inspection plan to assure that it is neutral and nondiscriminatory and not left to the unrestrained discretion of field officers. The factual allegations must demonstrate that the inspection plan is not only neutral on its face but also applied neutrally. To show that the inspection plan is neutral on its face, specific facts must justify each categorization and each step of the selection process within each category.[393] To show that the inspection plan is applied neutrally, specific facts must describe the total pattern of inspections and the inspection history of the selected employer. In this case, the Department's affidavits did not justify any aspects of its inspection plan, but simply deferred to the high-hazard categories of the federal OSHA report. The affidavits also did not state whether any higher priority inspections remained to be done in the area, nor did they disclose the inspection history of this employer. Therefore, the inspection warrant issued based on those affidavits was invalid.

392. *Id.* at 103, 327 S.E.2d at 93.

393. The court required more on this issue than other courts. *Id.* at 103 n.3, 327 S.E.2d at 93 n.3.