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WORKERS' COMPENSATION

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There have been significant developments in the law of workers' compensation since 1995, when the *Annual Survey of Virginia Law* last included this topic. The past two years have seen many changes in Virginia workers' compensation through legislation by the General Assembly and by Virginia appellate court decisions. This article focuses on some of the most significant developments with respect to (I) occupational disease claims, (II) injury by accident claims, (III) benefits and coverage under the Workers' Compensation Act, (IV) third party claims, (V) the termination of wage benefits, and (VI) new legislation affecting workers' compensation.

I. OCCUPATIONAL DISEASE CLAIMS

A. *Cumulative Trauma Claims*

Perhaps the most significant development in Virginia Workers' Compensation law in recent years was the Supreme Court of Virginia decision in *Stenrich Group v. Jemmott*.[1] *Jemmott* involved three separate cases (two carpal tunnel syndrome claims and one tenosynovitis, or "trigger thumb" claim) in which the Virginia Court of Appeals had held that these cumulative trauma conditions were compensable diseases, as each case had medical evidence that the claimant's condition was a "disease."[2] In *Jemmott*, the supreme court reversed the three decisions of the court of appeals and held that gradually

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1. 251 Va. 186, 467 S.E.2d 795 (1996).
2. *Id.* at 191-92, 467 S.E.2d at 798.

incurred physical impairments are not diseases under the Workers' Compensation Act.[3]

The decision in *Jemmott* came after the Supreme Court of Virginia's 1993 decision in *Merillat Industries, Inc. v. Parks.*[4] In *Merillat*, the supreme court held that in order for a condition to be an occupational disease, the claimant's condition must first qualify as a disease.[5] While the supreme court in *Merillat* failed to define the term "disease," the Virginia Court of Appeals did so in *Piedmont Manufacturing Co. v. East.*[6] In *Piedmont*, the court of appeals held that de Quervain's tenosynovitis, a condition caused by cumulative trauma, was a disease and adopted the following definition for "disease:" "any deviation from or interruption of the normal structure or function of any part, organ, or system (or combination thereof) of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown."[7]

In *Jemmott*, however, the supreme court declared that the *Piedmont* definition of disease was too broad and was therefore improper.[8] Chief Justice Carrico, writing for the unanimous court in *Jemmott*, concluded his opinion by emphatically stating that "job-related impairments resulting from cumulative trauma caused by repetitive motion, however labeled or however defined, are, as a matter of law, not compensable under the present provisions of the Act."[9] Following *Jemmott*, it was clear that unless the General Assembly enacted legislation to change the relevant provisions of the Act, any condition resulting from cumulative trauma caused by repetitive motion, including carpal tunnel syndrome and tenosynovitis, would not be compensable.

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3. *See id.* at 199, 467 S.E.2d at 802.

4. 246 Va. 429, 436 S.E.2d 600 (1993).

5. *See id.* at 432-33, 436 S.E.2d at 601.

6. 17 Va. App. 499, 438 S.E.2d 769 (1993).

7. *Id.* at 503, 438 S.E.2d at 772 (quoting SLOANE-DORLAND ANN. MEDICAL-LEGAL DICTIONARY 209 (1987)).

8. *See Jemmott*, 251 Va. at 198, 467 S.E.2d at 801-02.

9. *Id.* at 199, 467 S.E.2d at 802.

Subsequent to *Jemmott*, the Virginia Court of Appeals decided the case of *Allied Fibers v. Rhodes*.[10] In *Allied Fibers*, the Workers' Compensation Commission had awarded benefits to a claimant for permanent hearing loss caused by noise exposure.[11] In reversing the full Commission decision and denying the claim, however, the court of appeals concluded that "the holding in *Jemmott* logically leads to the conclusion that a hearing impairment resulting from cumulative trauma is not a disease under the Act."[12] Accordingly, it was held that "hearing loss caused by prolonged exposure to noise at work is a non-compensable gradually incurred injury,"[13] although the court recognized that prior to *Jemmott*, the Virginia Workers' Compensation Commission and the court of appeals considered hearing loss caused by exposure to noise at work to be a compensable disease.[14]

As discussed later in this article, in response to *Jemmott*, the 1997 General Assembly amended the Act to include carpal tunnel syndrome and hearing loss as compensable ordinary diseases of life, provided that the requisite causal connection with the employee's employment is established by clear and convincing evidence.[15]

B. *Asbestos Claims*

A more recent published opinion by the Virginia Court of Appeals concerning an occupational disease claim was in *Jones v. E. I. DuPont De Nemours & Co.*[16] In *Jones*, the claimant filed a claim for an occupational disease contracted as a result of his exposure to asbestos in the course of his employment. Following a hearing, the Deputy Commissioner made a factual determination that the claimant had an occupational disease, although the disease had not reached a ratable stage of asbestosis for an award of permanent scheduled loss, pursuant to

10. 23 Va. App. 101, 474 S.E.2d 829 (1996).
11. *Id.* at 102-03, 474 S.E.2d at 830.
12. *Id.* at 104-05, 474 S.E.2d at 831.
13. *See id.* at 105, 474 S.E.2d at 831.
14. *See id.* at 104, 474 S.E.2d at 830-31.
15. *See* VA. CODE ANN. §§ 65.2-400, -401 (Cum. Supp. 1997).
16. 24 Va. App. 36, 480 S.E.2d 129 (1997).

Virginia Code section 65.2-503(B)(17). Nevertheless, lifetime medical benefits were awarded to the claimant for his occupational disease.[17] The full Commission reversed the Deputy Commissioner's award, finding that since the claimant's asbestosis had not reached a ratable level under Virginia Code section 65.2-503, it therefore had not reached a compensable level, and as such, medical benefits could not be awarded.[18]

The court of appeals reversed the full Commission opinion in *Jones*, noting that "[s]imply because the disease fails to rise to the level of a permanent loss on the schedule of Code § 65.2-503 does not automatically preclude an award of medical benefits."[19] Accordingly, the Court held that the claimant had a compensable occupational disease, and was therefore entitled to medical benefits. The court of appeals stated in *Jones* that "[w]hether a permanent loss compensable under Code § 65.2-503 accompanies the disease has no impact upon an award under Code § 65.2-403."[20]

II. INJURY BY ACCIDENT CLAIMS

A. *Causation*

In *Dollar General Store v. Cridlin*,[21] the Virginia Court of Appeals affirmed the decision of the full Commission which held that the claimant sustained a compensable injury by accident.[22] In *Cridlin*, the claimant had assisted with the unloading of a delivery truck over a "three-to-four-hour period, during which time the claimant estimated that she unloaded close to 1,000 boxes."[23] The claimant testified to a specific, identifiable incident, involving a particular box, at the hearing. In reports to her treating physicians and supervisor, in her claim for benefits, and in a conversation with the insurance carrier's claim representative, however, the claimant merely described her inju-

17. *Id.* at 38, 480 S.E.2d at 130.
18. *See id.* at 37-38, 480 S.E.2d at 129-30.
19. *Id.* at 38, 480 S.E.2d at 130.
20. *Id.* at 39, 480 S.E.2d at 130.
21. 22 Va. App. 171, 468 S.E.2d 152 (1996).
22. *See id.* at 174, 468 S.E.2d at 152.
23. *Id.* at 174, 468 S.E.2d at 153.

ry as occurring while she was unloading boxes.[24] The claimant's condition was diagnosed by medical personnel at the hospital as an "overuse injury/bursitis right shoulder," and her treating physician gave a diagnosis of "trapezius strain" and "tendinitis of the right shoulder."[25]

In *Cridlin*, the court of appeals affirmed the credibility determination made by the Commission with regard to the claimant's description of a compensable incident, further noting that "the Commission was free to credit claimant's testimony at the hearing as a basis for its finding of causation,"[26] even though the medical records did not causally relate the claimant's condition to an identifiable incident. The court of appeals disagreed with the employer's contention that the Commission must look to the medical evidence in order to determine the cause of the claimant's injury. The court noted that the testimony of a claimant may be considered in determining causation, particularly where the medical testimony is inconclusive, and that "[m]edical evidence is not necessarily conclusive, but is subject to the Commission's consideration and weighing."[27]

B. *Unexplained Fall*

The Virginia Court of Appeals distinguished between an idiopathic fall and an unexplained accident in the April 2, 1996 decision in *PYA/Monarch & Reliance Insurance Co. v. Harris*.[28] In *Harris*, the claimant, a truck driver, "encountered freezing rain and ice while making deliveries."[29] At his last delivery stop, the claimant opened the truck door, reached for the grab bar on the outside of the truck's cab, and that was the last that he could recall upon waking up on the pavement beside the truck, approximately seven feet below the driver's seat.[30]

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24. *Id.* at 175, 468 S.E.2d at 153-54.
25. *Id.* at 175, 468 S.E.2d at 154.
26. *Id.* at 177, 468 S.E.2d at 155.
27. *Id.* at 176, 468 S.E.2d at 154 (quoting Hungerford Mechanical Corp. v. Hobson, 11 Va. App. 675, 677, 401 S.E.2d 213, 215 (1991)).
28. 22 Va. App. 215, 468 S.E.2d 688 (1996).
29. *Id.* at 219, 468 S.E.2d at 690.
30. *See id.* at 219, 468 S.E.2d at 690.

In awarding this claim, the Commission was "persuaded that the fall was precipitated by the design or icy condition of the cab or both."[31] The court in *Harris* discussed the three categories of risks causing injury to a claimant: (1) risks distinctly associated with the employment; (2) risks personal to the claimant; and (3) neutral risks, or risks having no particular employment or personal character.[32] The court noted that an unexplained fall or accident is encompassed in the neutral risk category,[33] and that while Virginia recognizes a presumption that an unexplained injury by accident in the course of employment which results in the death of an employee "arose out of" the employment,[34] the Supreme Court of Virginia has refused to extend the unexplained death presumption to the unexplained accident case.[35]

In reversing the full Commission's decision which found this claim to be compensable, the court of appeals in *Harris* held that this was an unexplained fall, and that the claimant failed to prove by a preponderance of the evidence that his fall "arose out of" his employment by establishing a causal connection between his employment and the fall.[36] According to the court, the fact that the truck cab was icy, or that the cab was approximately seven feet from the ground, was insufficient to establish the basis for the fall, even though the Commission was "'persuaded' by the claimant that the icy condition and the design of the truck caused the claimant's fall."[37] The claimant in *Harris* could not remember any of the details of the accident, and the last thing that he recalled was reaching for the grab bar on the side of the truck cab. He did not testify that he slipped or tripped on one of the ladder rungs, or that he lost his grip on the grab bar. Accordingly, the court found that the claimant failed to prove the requisite causal connection between his employment and his fall.[38]

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31. *Id.* at 220, 468 S.E.2d at 690.
32. *See id.* at 221-23, 468 S.E.2d at 691-92.
33. *See id.* at 223, 468 S.E.2d at 692.
34. *See* Southern Motor Lines v. Alvis, 200 Va. 168, 104 S.E.2d 735 (1958).
35. *See* Pinkerton's, Inc. v. Helms, 242 Va. 378, 410 S.E.2d 646 (1991).
36. *Harris*, 22 Va. App. at 224, 468 S.E.2d at 692.
37. *Id.*
38. *Id.* at 225, 468 S.E.2d at 692.

In *Harris*, the court of appeals also stated that it was improper to extend the "increased effects analysis" used in idiopathic fall cases to an unexplained fall situation.[39] While "the effects of [an idiopathic] fall 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,"[40] the court noted that the consequences of an unexplained fall are not compensable.[41]

III. BENEFITS AND COVERAGE UNDER THE WORKERS' COMPENSATION ACT

A. *Compensable Consequences Doctrine*

The doctrine of compensable consequences is well-established in Virginia Workers' Compensation jurisprudence. This doctrine states: "[w]hen the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct."[42]

In *Williams Industries, Inc. v. Wagoner*,[43] decided February 11, 1997, the Virginia Court of Appeals applied the compensable consequences doctrine in finding the employer responsible for the claimant's avascular necrosis (AVN) in both hips. The claimant sustained a compensable back injury, although he was diagnosed with AVN in his hips three years later.[44] The medical evidence established that the claimant's bilateral hip condition was made worse by the back injury and related medical treatment, and that the claimant's back condition had caused wear and tear in his hips, aggravating the AVN condition.[45] The court of appeals held that since the medical evidence estab-

39. *See id.* at 225, 468 S.E.2d at 693.

40. *Id.* at 222-23, 468 S.E.2d at 691 (quoting Southland Corp. v. Parson, 1 Va. App. 281, 284-85, 338 S.E.2d 162, 164 (1985) (citation omitted)).

41. *See id.* at 225, 468 S.E.2d at 693.

42. Morris v. Badger Powhatan/Figgie, Int'l, 3 Va. App. 276, 283, 348 S.E.2d 876, 879 (1986) (citation omitted).

43. 24 Va. App. 181, 480 S.E.2d 788 (1997).

44. *See id.* at 183-84, 480 S.E.2d at 789.

45. *See id.* at 184-85, 480 S.E.2d at 789.

lished that the claimant's increasingly debilitating AVN was a natural consequence that flowed from and was a direct result of his back injury, the bilateral AVN was a compensable consequence of the back injury.[46]

B. *Permanent and Total Disability*

The Virginia Court of Appeals spoke also with respect to claims for permanent and total disability benefits pursuant to Virginia Code section 65.2-503(C).[47] In *LesCallett v. Rozansky & Kay Construction Co.*,[48] the claimant filed a claim for permanent and total disability benefits alleging the loss of use of both of his legs as a result of a back injury sustained at work. Although the claimant did not produce any evidence showing a quantifiable loss of use to his legs, he produced medical evidence showing he was industrially disabled and that the impairment in his legs was a significant contributing factor to this disability.[49] In affirming the Commission's denial of this claim for permanent and total disability benefits, the court of appeals reasoned that the claimant failed to quantify a functional loss of his legs that could be translated into loss of both members pursuant to Virginia Code section 65.2-503(C).[50] As stated in *LesCallett*, a claimant first must present evidence rating the extent of disability of the affected members in order to qualify for permanent and total disability benefits for the loss of use of two members.[51]

C. *Dependency*

In *Oil Transport, Inc. v. Jordan*,[52] the Virginia Court of Appeals addressed the issue of dependency in the context of a parent seeking to recover benefits due to the death of a child. In *Jordan*, the claimant was a mother whose son was killed in

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46. *See id.* at 189, 480 S.E.2d at 792.
47. VA. CODE ANN. § 65.2-503(C) (Cum. Supp. 1997).
48. 23 Va. App. 404, 477 S.E.2d 746 (1996).
49. *See id.* at 405-07, 477 S.E.2d at 747-48.
50. *See id.* at 407, 477 S.E.2d at 748.
51. *See id.* at 406, 477 S.E.2d at 747.
52. 22 Va. App. 633, 472 S.E.2d 291 (1996).

a work-related accident. The Commission awarded dependency benefits to the claimant pursuant to Virginia Code sections 65.2-512(A)(2) and -515(A)(4)[53] because it determined that she was a parent in destitute circumstances.[54]

Virginia Code section 65.2-515(A)(4) provides that "[p]arents in destitute circumstances, provided there be no total dependents pursuant to other provisions of this section," are "conclusively presumed to be dependents wholly dependent for support upon the deceased employee."[55] The court in *Jordan* expanded on the definition of destitute by stating that: "[a] parent with 'only the earning potential sufficient to provide no more than a bare existence with no resources to provide against reasonably anticipated or inevitable financial emergencies' is deemed 'financially vulnerable' and, therefore, destitute for the purposes of Code § 65.2-515(A)(4)."[56]

In reversing the Commission's award of benefits and in dismissing this claim, the court of appeals in *Jordan* held that the claimant "failed to meet her burden of proving dependency, whether actual or as a result of being financially vulnerable."[57] The court noted that at the Commission's hearing, the claimant failed to provide even approximate dollar amounts of her son's contributions to her expenses: she produced no tax returns, no documentation of bills being paid by her son, nor did she produce any other tangible objective evidence of dependency.[58] Moreover, she "testified to no reasonably anticipated or inevitable financial emergency at the time of her son's death."[59] Accordingly, since the Commission had insufficient evidence to determine that the claimant was in destitute circumstances, the court of appeals reversed the award of benefits, finding that the claimant failed to meet her burden of proving her entitlement to dependency benefits.[60]

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53. VA. CODE ANN. §§ 65.2-512(A)(2), -515(A)(4) (Repl. Vol. 1995 & Cum. Supp. 1997).

54. *See Jordan*, 22 Va. App. at 634-35, 472 S.E.2d at 292.

55. VA. CODE ANN. § 65.2-515(A)(4) (Repl. Vol. 1995 & Cum. Supp. 1997).

56. *Jordan*, 22 Va. App. at 636, 472 S.E.2d at 292 (quoting Roanoke Belt, Inc. v. Mroczkowski, 20 Va. App. 60, 71, 455 S.E.2d 267, 272 (1995)).

57. *Id.* at 636, 472 S.E.2d at 292-93.

58. *See id.*

59. *Id.*

60. *See id.* at 636-37, 472 S.E.2d at 292-93.

D. *Employee vs. Independent Contractor*

In *County of Spotsylvania v. Walker*,[61] decided July 15, 1997, the Virginia Court of Appeals reversed the full Commission's determination that the claimant was an employee, finding instead that the claimant was an independent contractor and, therefore, not entitled to receive benefits pursuant to the Workers' Compensation Act.[62] In *Walker*, the claimant had entered into an "Individual Vendor Agreement" with the County's Department of Social Services. She entered the County's companion services program, which was designed to assist low income elderly or disabled individuals with their daily living skills.[63] The claimant suffered an accidental work-related injury. The issue presented was whether the claimant was an employee as set forth in the Act, or whether she was an independent contractor.[64]

In finding that the claimant was an independent contractor, the majority of the court recognized that the power or right of control is the most significant factor in determining whether a claimant is an employee or an independent contractor, and that the primary inquiry focuses on the power or right to control the means and methods by which the result is to be accomplished. The court reasoned that since there was no evidence indicating that the County of Spotsylvania had the right of control over the means and methods by which the claimant performed her services, she was, therefore, an independent contractor.[65] The court concluded that "[t]here is no evidence that the County directed or controlled how services were to be performed" or that the County had "day-to-day supervisory responsibility."[66] Moreover, the claimant controlled the number of hours that she worked. She could freely accept or decline an offer from the

61. 25 Va. App. 224, 487 S.E.2d 274 (1997).

62. *See id.* at 224-26, 487 S.E.2d at 274-75. Judge Benton authored a dissenting opinion because he agreed with the full Commission's determination that the claimant was an employee and not an independent contractor. *See id.* at 239, 487 S.E.2d at 281.

63. *See id.* at 226, 487 S.E.2d at 275.

64. *See id.* at 226-27, 487 S.E.2d at 275.

65. *See id.* at 231, 487 S.E.2d at 277.

66. *Id.* at 232, 487 S.E.2d at 277.

County to provide services to a particular client, and the County did not retain the absolute right to discharge claimant.[67] Relying upon the Supreme Court of Virginia's decision in *Richmond Newspapers, Inc. v. Gill*,[68] the court of appeals in *Walker* concluded that the claimant retained the right to control the means and methods in order to provide the desired services to the County of Spotsylvania.[69]

IV. THIRD-PARTY CLAIMS

A claim against an employer for benefits under the Virginia Workers' Compensation Act "operate[s] as an assignment to the employer of any right to recover damages which the injured employee, his personal representative or other person may have against any other party for such injury or death, and [the] employer shall be subrogated to any such right" to recover damages.[70] In Virginia, an employee's benefits under the Worker's Compensation Act are terminated "[w]hen an employer's right to subrogation is defeated by an employee's settlement with a third party without the knowledge or consent of the employer" and/or insurance carrier.[71] Two recent decisions from the Virginia Court of Appeals have further clarified the law in this regard.

In *White Electric Co. v. Bak*,[72] it was held that where the facts established that the amount of benefits that an employer is entitled to recover under Virginia Code section 65.2-309 is limited, and a compromise settlement unilaterally agreed to by the claimant in his third party suit is sufficient to compensate the employer for the benefits paid, the claimant's unilateral settlement does not prejudice the employer and the claimant's entitlement to future benefits is not terminated.[73] In *Bak*, the claimant was involved in an automobile accident subsequent to

67. *See id.*

68. 224 Va. 92, 294 S.E.2d 840 (1982).

69. *See Walker*, 25 Va. App. at 234, 487 S.E.2d at 278-79.

70. VA. CODE ANN. § 65.2-309 (Repl. Vol. 1995 & Cum. Supp. 1997).

71. Green v. Warwick Plumbing & Heating Corp., 5 Va. App. 409, 412, 364 S.E.2d 4, 6 (1988); *see also* Safety-Kleen Corp. v. Van Hoy, 225 Va. 64, 300 S.E.2d 750 (1983).

72. 22 Va. App. 17, 467 S.E.2d 827 (1996).

73. *See id.* at 22-23, 467 S.E.2d at 829-30.

his industrial accident and it was alleged in his Motion for Judgment that he suffered an aggravation of the injuries previously sustained in his industrial accident.[74] The claimant settled his motor vehicle claim without notifying the employer or insurance carrier.[75] The Commission determined that the third party settlement was sufficient for the employer to fully recover the costs of medical care attributable to the intervening accident and that, therefore, the claimant's benefits under the Act for treatment of the work injury were not forfeited.[76] The Virginia Court of Appeals affirmed the full Commission decision, finding that "the aggravation of claimant's condition was short-lived and insufficient to justify a finding that the third-party settlement prejudiced employer's subrogation rights."[77]

The employer's subrogation rights were also found not to have been prejudiced in *Overhead Door Co. of Norfolk v. Lewis*.[78] In *Lewis*, the claimant employed an attorney to represent him with respect to a third party claim. The employer was aware of the suit that had been filed against the third parties and advised claimant's counsel, orally and in writing, that the employer relied upon the attorney to protect its subrogation rights.[79] Because counsel failed to comply with certain procedures, the third party case was dismissed, with prejudice, before the claim could be heard on its merits.[80] The employer filed an application for a hearing with the Commission, requesting that the claimant's benefits be terminated, contending that the claimant impaired its right of subrogation against the third parties.[81]

In affirming the Commission, which had dismissed the employer's application for a hearing, the court of appeals in *Lewis* held that the employer was not entitled to the relief requested.[82] The court held that a claimant is not barred from receiving workers' compensation benefits when his attorney

74. *See id.* at 20, 467 S.E.2d at 829.
75. *See id.*
76. *See id.* at 22, 467 S.E.2d at 829-30.
77. *Id.* at 23, 467 S.E.2d at 830.
78. 22 Va. App. 240, 468 S.E.2d 700 (1996).
79. *See id.* at 242, 468 S.E.2d at 701.
80. *See id.*
81. *See id.*
82. *See id.* at 242, 468 S.E.2d at 701-02.

negligently caused his third party action to be dismissed with prejudice, finding that there is no support in the Act for the employer's assertion that unauthorized acts or omissions of the claimant's attorney which result in the loss of the employer's subrogation rights will relieve the employer/carrier of paying further compensation benefits.[83]

V. THE TERMINATION OF WAGE BENEFITS

A. *Full Duty Release*

In *Fingles Co. v. Tatterson*,[84] the employer sought to terminate the claimant's wage benefits on the basis of a full duty release. The uncontradicted medical evidence established that the claimant had no physical limitations or restrictions, and that the claimant could return to full activities, including work.[85] While the Deputy Commissioner held that the employer met its burden of proof, and terminated wage benefits, the majority of the full Commission reversed the Deputy Commissioner, noting that nothing in the record indicated that either of the claimant's treating physicians was familiar with the claimant's pre-injury duties, and that, therefore, "the employer . . . presented no evidence that [the] claimant had been unequivocally released to return to unrestricted work."[86]

The court of appeals reversed the Commission's decision in *Tatterson*, finding that an employer has met its burden of proving that the claimant is able to return to pre-injury work by presenting uncontradicted evidence which establishes that no restrictions have been placed on the claimant's ability to return to work.[87] Accordingly, it was held that "where uncontradicted medical evidence does not suggest any physical limitation on a

83. *See id.*
84. 22 Va. App. 638, 472 S.E.2d 646 (1996).
85. *See id.* at 641, 472 S.E.2d at 647.
86. *Id.* at 640-41, 472 S.E.2d at 647.
87. *See id.* at 642, 472 S.E.2d at 647.

claimant, the employer need not also show that the physician was familiar with the physical requirements of the job."[88]

B. Chesapeake & Potomac Telephone Co. v. Murphy: *Forfeiture Rule*

In the March 11, 1997 opinion of the Virginia Court of Appeals in *Walter Reed Convalescent Center/Virginia Health Services, Inc. v. Reese*,[89] the court had an opportunity to discuss the forfeiture rule enunciated in *Chesapeake & Potomac Telephone Co. of Virginia v. Murphy*.[90] The court in *Reese* applied the applicable law on forfeiture as set forth in *Eppling v. Schultz Dining Programs/Commonwealth of Virginia*,[91] where the court of appeals noted that "in order to work a [*Chesapeake & Potomac Telephone Co. v. Murphy*] forfeiture, the 'wage loss [must be] properly attributable to [the employee's] wrongful act . . . [for which t]he employee is responsible.'"[92] The court in *Reese* noted that, as stated in *Eppling*, the forfeiture rule applies when a disabled employee is discharged from selective employment, and whether the reasons for the discharge are justified for purposes of forfeiting benefits "must be determined in the context of the purpose of the Act and whether the conduct is of such a nature that it warrants permanent forfeiture of those rights and benefits."[93]

In *Reese*, the claimant, a licensed practical nurse, returned to work for her employer in a light duty capacity. The records

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88. *Id.* at 642, 472 S.E.2d at 648.

89. 24 Va. App. 328, 482 S.E.2d 92 (1997).

90. 12 Va. App. 633, 406 S.E.2d 190 (1991), *aff'd en banc*, 13 Va. App. 304, 411 S.E.2d 444 (1991). According to the forfeiture rule as set forth in *Murphy*, a disabled employee forfeits his wage benefits when he is terminated for cause from selective employment procured by the employer. *See id.* at 639, 406 S.E.2d at 193. The court noted that where a disabled employee is terminated for cause from light duty work procured by the employer, any subsequent wage loss is attributable to the wrongful act and not his disability, and that the claimant, not the employer, is responsible for that loss. *See id.* at 639-40, 406 S.E.2d at 193.

91. 18 Va. App. 125, 442 S.E.2d 219 (1994). A disabled employee who is discharged for cause from selective employment procured by the employer will permanently forfeit wage benefits only when the employee's dismissal for cause is justified. *See id.* at 129-30, 442 S.E.2d at 221-22.

92. *Id.* at 129, 442 S.E.2d at 222.

93. *Reese*, 24 Va. App. at 336, 482 S.E.2d at 96-97 (quoting *Eppling*, 18 Va. App. at 128, 442 S.E.2d at 221).

showed that the employer disciplined the claimant upon her returning to light duty work numerous times for, among other things, failing to complete forms, failing to transcribe orders, placing a physician's order in the wrong book, erroneous transcriptions of forms or orders, improperly placing an order, and failing to hang up door cards.[94] The claimant was also disciplined for "failing to transcribe a physician's orders to the medication administration record, causing a patient not to receive his medication."[95] The claimant was eventually terminated. The court of appeals held that the evidence established as a matter of law that the claimant's wrongful acts, which jeopardized the employer's patients, caused her wage loss, and that the claimant's termination was unrelated to her injury and was due solely to her misconduct.[96] Since "credible evidence established that [the] claimant's failure to properly perform her job was caused by her incompetence, [and] not her injury . . . [and since n]o *credible* evidence showed that claimant's mistakes were caused by her injury or its residual effects,"[97] the court held that the claimant's wage benefits were forfeited pursuant to *Chesapeake & Potomac Telephone Co. v. Murphy*.[98]

C. *Claimant's Return to Work*

In *Odin, Inc. v. Price*,[99] the Virginia Court of Appeals held that the Commission correctly assessed a twenty percent penalty against an employer, where the employer unilaterally ceased payment of temporary total disability wage benefits based upon the claimant's return to work at a wage less than his pre-injury wage, without filing an Agreed Statement of Fact or a change in condition Application for Hearing.[100] The court noted that Rule 1.4(C)(1) of the Rules of the Virginia Workers' Compensation Commission allows an employer to cease payment of compensation on the date that an employee returns to work only when the employer files an application alleging that the em-

94. *See id.* at 331-32, 482 S.E.2d at 94.
95. *Id.* at 332, 482 S.E.2d at 94.
96. *See id.* at 338, 482 S.E.2d at 97-98.
97. *Id.* at 338-39, 482 S.E.2d at 98 (emphasis added).
98. *See id.* at 338-39, 482 S.E.2d at 97-98.
99. 23 Va. App. 66, 474 S.E.2d 162 (1996).
100. *See id.* at 72-73, 474 S.E.2d at 164.

ployee returned to work.[101] In *Odin*, the employer never filed an application alleging that the claimant returned to work. The employer unilaterally stopped paying compensation to the claimant, even though the employer conceded that the claimant was entitled to some form of compensation subsequent to the date that wage benefits were terminated.[102] The court of appeals affirmed the assessment of a penalty for the late payment of compensation pursuant to Virginia Code section 65.2-524.[103]

VI. LEGISLATIVE CHANGES AFFECTING WORKERS' COMPENSATION

A. *Legislative Changes in 1997*

The most significant legislative change of 1997 concerns carpal tunnel syndrome and hearing loss claims, as the Workers' Compensation Act was amended to include carpal tunnel syndrome and hearing loss as compensable ordinary diseases of life, provided that the requisite causal connection with the employee's employment is established by clear and convincing evidence.[104] This legislation was enacted in response to the Supreme Court of Virginia's decision in *Stenrich Group v. Jemmott*, discussed earlier in this article. Pursuant to *Jemmott*, all other job-related impairments resulting from cumulative trauma caused by repetitive motion are not compensable.[105] This amendment pertains only to hearing loss and carpal tunnel syndrome claims.

Additionally, the General Assembly passed a bill stating that where a claimant receives permanent partial disability wage benefits pursuant to Virginia Code section 65.2-503 and is simultaneously paid temporary partial disability wage benefits under Virginia Code section 65.2-502, each combined payment

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101. *See id.* at 71, 474 S.E.2d at 164.

102. *See id.* at 69-70, 474 S.E.2d at 163-64.

103. *See id.* at 73, 474 S.E.2d at 165.

104. *See* VA. CODE ANN. §§ 65.2-400, -401 (Cum. Supp. 1997). Virginia Code section 65.2-401 was amended to clarify that in order to have a compensable ordinary disease of life, the elements of causation must be established by clear and convincing evidence, "not a mere probability." VA. CODE ANN. § 65.2-401 (Cum. Supp. 1997).

105. Stenrich Group v. Jemmott, 251 Va. 186, 199, 467 S.E.2d 795, 802 (1996).

counts as two weeks against the 500-week maximum entitlement to wage benefits.[106]

Further, new legislation mandates that total compensation cannot exceed 500 weeks, nor the results obtained by multiplying the average weekly wage of the Commonwealth for the applicable year of the accident by 500, except in cases of permanent and total disability pursuant to Virginia Code section 65.2-503(C), permanent disability under Virginia Code section 65.2-504(A)(4), and death from coal workers' pneumoconiosis under Code section 65.2-513.[107]

The notice provision of the Workers' Compensation Act was amended to reflect that a statutory employer who is not given notice of an accident within thirty days of the accident may still be held responsible for awards of compensation if: (1) the statutory employer has had sixty days' notice of the hearing to ascertain compensability of the accident; and (2) the statutory employer was not prejudiced by the lack of notice of the accident.[108]

The General Assembly amended the statute involving the issuance of written decisions by the Full Commission or Deputy Commissioners, as copies of an award or opinion following a hearing before a Deputy Commissioner or review must now be sent to the parties at issue by registered or certified mail.[109]

A new enactment provides that a determination of employee status made by the Commission or by a Virginia court shall estop either party from asserting otherwise in any subsequent action. This statute applies to final, unappealed awards or orders in cases involving the same parties and upon the same claims or causes of action.[110]

The statute concerning assessment of attorney's fees and costs against an employer and/or insurance carrier has been amended to further state that, where it is found by the Commission that an employer or insurance carrier filed an applica-

106. *See* VA. CODE ANN. § 65.2-503 (Cum. Supp. 1997).
107. *See id.* § 65.2-518 (Cum. Supp. 1997).
108. *See id.* § 65.2-600 (Cum. Supp. 1997).
109. *See id.* § 65.2-704 (Cum. Supp. 1997).
110. *See id.* § 65.2-706.1 (Cum. Supp. 1997).

tion for hearing in bad faith, there shall be an assessment against the employer or insurance carrier in an amount up to ten percent of the total amount of benefits accrued from the date that the Commission determines that the award should have been paid through the date of the award. This assessment will be in addition to any other costs, fees, or awards set forth in this code provision.[111]

The General Assembly also passed legislation requiring insurers, for a period of no more than four years, to provide premium discounts of up to five percent to each employer instituting a drug-free workplace program which satisfies the criteria established by the insurer.[112]

B. *Legislative Changes in 1996*

Virginia Code section 65.2-101 was amended to exclude from the definition of "employee" a person performing services as a sports official for an entity sponsoring an interscholastic or intercollegiate sporting event, or as a sports official for a public entity or a private, nonprofit organization which sponsors an amateur sporting event.[113] However, this exclusion does not apply to any person who performs services as a sports official as part of his or her regular employment.[114]

Virginia Code section 65.2-505 was amended to reflect that any employee who has a permanent disability, or who has sustained a permanent injury, and who receives a subsequent permanent injury by accident, as specified in Virginia Code section 65.2-503, with the same employer, is entitled to compensation only for the degree of incapacity that would have resulted from the subsequent accident if the previous injury or disability had not existed.[115] This code provision does not apply to an employee's vision or hearing loss that has not reached a compensable level.[116]

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111. *See id.* § 65.2-713 (Cum. Supp. 1997).
112. *See id.* § 65.2-813.2 (Cum. Supp. 1997).
113. *See id.* § 65.2-101 (Cum. Supp. 1997).
114. *See id.*
115. *See id.* § 65.2-505 (Cum. Supp. 1997).
116. *See id.*

The statute concerning a claimant's refusal of selective employment was also amended. Virginia Code section 65.2-510(C) now includes language that when an injured employee is precluded from accepting suitable light duty work due to pregnancy, the six-month period for curing a refusal of light duty employment may be tolled during such period as a physician certifies medical disability.[117]

Additionally, Virginia Code section 65.2-712 was amended to reflect that a statutory dependent pursuant to Virginia Code section 65.2-515 must immediately disclose to the employer, when self-insured, or to the insurance carrier in all other cases, any remarriage or change in status as a full-time student.[118] Failure to do so may entitle the employer or insurance carrier to a credit against future compensation payments due, or to pursue an action at law against the statutory dependent in order to recover the overpayment.[119]

117. *See id.* § 65.2-510(C) (Cum. Supp. 1997).
118. *See id.* § 65.2-712 (Cum. Supp. 1997).
119. *See id.*