

1999

## Annual Survey of Virginia Law: Workers' Compensation

Daniel E. Lynch

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Workers' Compensation Law Commons](#)

---

### Recommended Citation

Daniel E. Lynch, *Annual Survey of Virginia Law: Workers' Compensation*, 33 U. Rich. L. Rev. 1101 (1999).

Available at: <http://scholarship.richmond.edu/lawreview/vol33/iss3/15>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# WORKERS' COMPENSATION

*Daniel E. Lynch\**

## I. INTRODUCTION

This article addresses recent developments in the law of workers' compensation, as reflected in decisions of the Supreme Court of Virginia and the Virginia Court of Appeals, and through new legislation. Areas discussed include (1) injury by accident claims; (2) occupational disease claims; (3) benefits and coverage under the Workers' Compensation Act; and (4) 1999 legislative changes affecting workers' compensation.

## II. INJURY BY ACCIDENT CLAIMS

### A. *Arising Out of Employment*

In *Smithfield Packing Co. v. Carlton*,<sup>1</sup> the claimant was awarded benefits by the Workers' Compensation Commission (the "Commission") for an injury to his foot.<sup>2</sup> While operating a tractor trailer for his employer, the claimant made a wide right turn.<sup>3</sup> As he was doing so, a motorcycle approached him from behind and to his right.<sup>4</sup> The claimant stopped the tractor trailer to allow the motorcycle to pass.<sup>5</sup> Once he was past the tractor trailer, the operator of the motorcycle stopped in front of the truck, got off his motorcycle, and approached the claimant.<sup>6</sup> He reached in, grabbed the claimant's arm, and pulled him.<sup>7</sup> The claimant "fell out of the truck on to the ground."<sup>8</sup> The driver of the motorcycle was trying to kick him and

---

\* Principal, Williams, Lynch & Whitt, P.C., Richmond, Virginia. B.B.A., 1984, James Madison University; J.D., 1987, University of Richmond School of Law.

The author acknowledges the assistance of John T. Cornett, Jr., Associate, Williams, Lynch & Whitt, P.C., with the preparation of this article.

1. 29 Va. App. 176, 510 S.E.2d 740 (Ct. App. 1999).

2. *See id.* at 179, 510 S.E.2d at 741.

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.* at 179, 510 S.E.2d at 741-42.

8. *Id.*

they “started tussling.”<sup>9</sup> As the claimant tried to get up, the truck rolled over his foot, and the injury to his foot resulted.<sup>10</sup>

Awarding benefits to the claimant, the Commission determined that:

[T]he need to occupy part of two lanes to negotiate a turn in a tractor trailer and the difficulty in seeing a small object such as a motorcycle on the right side are all risks peculiar to the claimant’s employment as a truck driver.

We also agree that the altercation was business related. It is clear [the motorcycle driver] was angry because he was almost run over by a truck of which the claimant was the driver. There is no evidence that [the motorcycle driver] and the claimant knew each other or that the incident arose from anything other than a potential collision between a motorcycle and the tractor trailer that the claimant was driving for his employer.<sup>11</sup>

On appeal to the Virginia Court of Appeals, the employer asserted that the claimant failed to prove that his injury “arose out of” his employment.<sup>12</sup> Affirming the Commission’s award of benefits to the claimant, the court of appeals reasoned that the motorcycle operator’s

furious attack on [the] claimant was triggered by [the] claimant’s “need to occupy part of two lanes to negotiate a turn in a tractor trailer and the difficulty in seeing a small object such as a motorcycle on the right side,” impersonal circumstances directly attributable to the duties of his employment and clearly satisfying the “arising out of” prong of compensability.<sup>13</sup>

The court noted that Virginia applies the “actual risk” test, which “requires that the employment subject the employee to the particular danger that brought about his or her injury.”<sup>14</sup> The court further stated that in order for a claimant to be awarded benefits as a result of an assault, the claimant must establish “that the assault was directed against him as an employee, or because of his employment.”<sup>15</sup>

9. *Id.* at 180, 510 S.E.2d at 742.

10. *See id.* at 179-80, 510 S.E.2d at 741-42.

11. *Id.* at 180, 510 S.E.2d at 742.

12. *See id.*

13. *Id.* at 181-82, 510 S.E.2d at 742-43.

14. *Id.* at 181, 510 S.E.2d at 742 (quoting *Lipsey v. Case*, 248 Va. 59, 61, 445 S.E.2d 105, 106 (1994)).

15. *Id.* at 181, 510 S.E.2d at 742 (quoting *Continental Life Ins. Co. v. Gough*, 161 Va. 755, 760, 172 S.E. 264, 266 (1934)). The employer also contended that the claimant should have been barred from recovery because his seatbelt was unfastened at the time of the injury in violation of the employer’s safety rules. *See id.* at 182, 510 S.E.2d at 743. The court of appeals agreed with the Commission’s determination that even though the claimant willfully violated

### B. *Exposure to Extreme Temperatures*

In *Southern Express v. Green*,<sup>16</sup> the claimant worked at a convenience store, stacking beer and soft drinks in a refrigerated room for a period of up to four hours, wearing only a short-sleeved shirt with no gloves.<sup>17</sup> The claimant was subsequently diagnosed with chilblains<sup>18</sup> and superficial frostbite caused by long-term exposure to cold temperature.<sup>19</sup> A Deputy Commissioner of the Commission denied this claim, finding that the claimant's injury resulted from "continuous exposure over a period of time."<sup>20</sup> The full Commission reversed the Deputy Commissioner's decision and awarded benefits to the claimant.<sup>21</sup> On appeal, a panel of the court of appeals affirmed the award of benefits on the basis that "a condition resulting from exposure to extreme temperatures may still constitute an 'injury by accident.'"<sup>22</sup> The Supreme Court of Virginia awarded an appeal to the employer.<sup>23</sup>

Affirming the opinion of the court of appeals, the supreme court agreed that the claimant proved an injury by accident.<sup>24</sup> The supreme court noted that the claimant's "chilblains first appeared during the time that she spent in the cooler, thus at a particular time and place and upon a particular occasion, and resulted in a structural change in her body."<sup>25</sup> The court further stated that the claimant's chilblains resulted from a single exposure to cold temperature on a definite occasion during the performance of a specific piece of work.<sup>26</sup> In conclusion, the court held that the

---

the employer's safety rule, the claimant was allowed to recover workers' compensation benefits because the employer failed to prove that the violation caused the claimant's injury. *See id.* at 182-83, 510 S.E.2d at 743.

16. 257 Va. 181, 509 S.E.2d 836 (1999).

17. *See id.* at 183-84, 509 S.E.2d at 837.

18. *See id.* at 185 n.3, 509 S.E.2d at 838 n.3 (Chilblains is described as "[a] form of cold injury characterized by localized erythema and sometimes blistering. The affected area itches, may be painful, and may progress to crusted ulcerations . . ." (citing TOBER'S CYCLOPEDIA MEDICAL DICTIONARY 367 (17th ed. 1993))).

19. *See Green*, 257 Va. at 184-85, 509 S.E.2d at 838.

20. *Id.* at 185, 509 S.E.2d at 838.

21. *See id.*

22. *Id.* (quoting *Southern Express v. Green*, 26 Va. App. 439, 445, 495 S.E.2d 500, 503 (Ct. App. 1998)).

23. *See id.* at 183, 509 S.E.2d at 837.

24. *See id.* at 188-89, 509 S.E.2d at 840-41 (citing *Byrd v. Stonega Coke & Coal Co.*, 182 Va. 212, 28 S.E.2d 725 (1943) (holding that injuries caused by exposure to extreme temperatures may constitute an "injury by accident" under the Workers' Compensation Act)).

25. *Green*, 257 Va. at 188-89, 509 S.E.2d at 840.

26. *See id.* at 189, 509 S.E.2d at 841.

claimant established an identifiable incident, noting that the claimant's medical condition "was not caused by repeated exposures over a period of months or years."<sup>27</sup> The supreme court disagreed with the employer's assertion that the claimant's injury "resulted from repetitive trauma, continuing physical stress, or a cumulative event."<sup>28</sup>

### C. *Compensable Consequence*

The Virginia Court of Appeals addressed a matter of first impression involving compensable consequences in the case of *Allen & Rocks, Inc. v. Briggs*.<sup>29</sup> In *Briggs*, the claimant sustained a compensable injury to his lower back when he slipped on stairs in the course of his employment.<sup>30</sup> Over a year later, the claimant developed severe pain in his lower leg.<sup>31</sup> Dr. Murray Joiner, the claimant's treating physiatrist, expressed the opinion that the claimant's left knee pain was secondary to chronic gait deviations caused by the claimant's failed back syndrome, which was compensable.<sup>32</sup> At the employer's request, the claimant underwent an independent medical evaluation.<sup>33</sup> Dr. Daniel L. Hodges concluded that the claimant suffered from failed back syndrome with secondary mechanical pain in the right knee due to the claimant's "antalgic gait from his low back."<sup>34</sup> The employer and insurance carrier denied the claim for benefits relative to the claimant's left knee.<sup>35</sup> Following a hearing on the record, the Commission found the claimant's left knee injury "was a compensable consequence of his work-related back injury."<sup>36</sup>

On appeal to the Virginia Court of Appeals, the employer argued that the Commission erred in awarding benefits to the claimant for his knee condition.<sup>37</sup> The employer reasoned that the knee pain was the result of cumulative trauma, which is not compensable under the Workers' Compensation Act.<sup>38</sup> Relying on the decision by the

27. *Id.*

28. *Id.*

29. 28 Va. App. 662, 508 S.E.2d 335 (Ct. App. 1998).

30. *See id.* at 665, 508 S.E.2d at 336.

31. *See id.*

32. *See id.* at 666, 508 S.E.2d at 336-37.

33. *See id.*

34. *Id.* at 667, 508 S.E.2d at 337.

35. *See id.*

36. *Id.*

37. *See id.*

38. *See id.*

Supreme Court of Virginia in *Stenrich Group v. Jemmott*,<sup>39</sup> the employer contended that the doctrine of compensable consequences does not apply when there is a gradually incurred injury.<sup>40</sup> The employer argued that an employee may not recover for cumulative trauma injuries "however labeled or however defined."<sup>41</sup>

The court of appeals disagreed with the employer, however, and affirmed the award of benefits by the Commission.<sup>42</sup> The court held that any subsequent injury to the claimant's knee that was a direct and natural result of the primary back injury was also compensable under the chain of causation rule.<sup>43</sup> Further, the court noted that the medical evidence established that the claimant's knee condition was "secondary to and as a consequence of" his primary back injury.<sup>44</sup> The general rule in Virginia is that "[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 intervening cause attributable to claimant's own intentional conduct."<sup>45</sup>

#### D. *Consequence of a Compensable Consequence*

In *Amoco Foam Products Co. v. Johnson*,<sup>46</sup> the issue before the Supreme Court of Virginia was whether a claimant may be awarded benefits for an injury caused by a compensable consequence, or a "consequence of a compensable consequence."<sup>47</sup> In July 1992, the claimant sustained a compensable left ankle injury arising out of her employment.<sup>48</sup> Following medical treatment and surgery on the ankle, the claimant fell at home in August 1994; her ankle gave way, causing injury to her right knee.<sup>49</sup> The August 1994 right knee injury was found to be a compensable consequence of the July 1992 industrial accident.<sup>50</sup> The claimant subsequently sustained a further

---

39. 251 Va. 186, 467 S.E.2d 795 (1996).

40. See *Briggs*, 28 Va. App. at 670, 508 S.E.2d at 338.

41. *Id.* (quoting *Jemmott*, 251 Va. at 199, 467 S.E.2d at 802).

42. See *id.* at 672, 508 S.E.2d at 339.

43. See *id.*

44. *Id.*

45. *Id.* (citing *Food Distribs. v. Estate of Ball*, 24 Va. App. 692, 697, 485 S.E.2d 155, 158 (Ct. App. 1997); *Leadbetter v. Penkalski*, 21 Va. App. 427, 432, 464 S.E.2d 554, 556-57 (Ct. App. 1995); *Imperial Trash Serv. v. Dotson*, 18 Va. App. 600, 606-07, 445 S.E.2d 716, 720 (Ct. App. 1994)).

46. 257 Va. 29, 510 S.E.2d 443 (1999).

47. *Id.* at 32, 510 S.E.2d at 444.

48. See *id.* at 30-31, 510 S.E.2d at 443.

49. See *id.* at 31, 510 S.E.2d at 443.

50. See *id.*

right knee injury in November 1995 when her right knee "gave out" at home, causing her to fall.<sup>51</sup> Affirming the decision of the Commission, the Virginia Court of Appeals held that the claimant's November 1995 knee injury was compensable as a consequence of her 1994 knee injury, which was a compensable consequence of her 1992 ankle injury.<sup>52</sup>

On appeal, the Supreme Court of Virginia reversed the court of appeals and denied the claim for benefits attributable to the November 1995 right knee injury.<sup>53</sup> The supreme court noted that there was no causal connection between the incidents of employment giving rise to the 1992 ankle injury and the knee injury in November 1995.<sup>54</sup> The court stated that the "link of causation must directly connect the original accidental injury with the additional injury for which compensation is sought."<sup>55</sup> Accordingly, the supreme court held that the court of appeals erred in holding that the claimant's 1995 knee injury was a compensable consequence of her 1992 ankle injury, as the 1995 injury did not arise out of the claimant's employment.<sup>56</sup>

### III. OCCUPATIONAL DISEASE CLAIMS

#### A. *Allergic Contact Dermatitis*

In *A New Leaf, Inc. v. Webb*,<sup>57</sup> the Supreme Court of Virginia, affirming the opinion of the Virginia Court of Appeals, held that the claimant's allergic contact dermatitis was compensable as an occupational disease under the Workers' Compensation Act.<sup>58</sup> In *Webb*, the claimant was employed as a florist where "[h]er responsibilities included daily handling, cutting and arranging of flowers."<sup>59</sup> In March 1995, she noticed "blistered, splotchy areas on her right index finger [and palm] . . . similar in appearance to a poison ivy rash."<sup>60</sup> She was diagnosed with allergic contact dermatitis attribut-

---

51. *See id.*

52. *See id.* at 31, 510 S.E.2d at 443-44.

53. *See id.* at 31, 510 S.E.2d at 444.

54. *See id.* at 32-33, 510 S.E.2d at 444-45.

55. *Id.* at 33, 510 S.E.2d at 445.

56. *See id.*

57. 257 Va. 190, 511 S.E.2d 102 (1999).

58. *See id.* at 192, 511 S.E.2d at 102.

59. *Id.*

60. *Id.*

able to her contact with two of the flowers with which she worked.<sup>61</sup> The claimant filed a claim for benefits, alleging that her allergic contact dermatitis was a compensable occupational disease.<sup>62</sup> The full Commission affirmed the decision of the Deputy Commissioner, finding the claim compensable.<sup>63</sup> A panel of the Virginia Court of Appeals affirmed the opinion of the Commission, finding that “[c]redible evidence supports the commission’s factual finding that claimant’s allergic contact dermatitis was not caused by “cumulative traumatic insults resulting from repetitive motion.” The record indicates that claimant’s allergic contact dermatitis was not causally linked to any repetitive motion that she performed at work.”<sup>64</sup> The court of appeals noted that “[a]llergic contact dermatitis is caused by the reaction of an individual’s immune system with a substance . . . to which that individual has developed a hypersensitivity.”<sup>65</sup>

On appeal to the Supreme Court of Virginia, the employer relied primarily on the supreme court’s decisions in *Stenrich Group v. Jemmott*<sup>66</sup> and *Merillat Industries, Inc. v. Parks*<sup>67</sup> to contend that the claimant’s contact dermatitis was not compensable.<sup>68</sup> The employer argued that it was caused by repeated exposure to flowers and was the result of cumulative trauma, which is not compensable.<sup>69</sup> The court, however, distinguished *Jemmott* and *Merillat* by reasoning that the medical evidence established that the claimant was allergic to some of the flowers that she handled at work and that the contact dermatitis was caused by her physical contact with the chemicals contained in those flowers.<sup>70</sup> The court stated that contact dermatitis was a “reaction of the body’s immune system to the substance to which the person is sensitive.”<sup>71</sup> While “the sores and blisters appeared on [the claimant’s] hands after frequent handling of the flowers . . . there [was] no evidence . . . that her allergic contact dermatitis resulted from cumulative trauma arising from repetitive

---

61. See *id.* at 193, 511 S.E.2d at 102-03.

62. See *id.*

63. See *id.* at 194, 511 S.E.2d at 103.

64. *Id.* (quoting *A New Leaf, Inc. v. Webb*, 26 Va. App. 460, 468, 495 S.E.2d 510, 514 (Ct. App. 1998).

65. *Id.* (quoting *Webb*, 26 Va. App. at 468, 495 S.E.2d at 514).

66. 251 Va. 186, 467 S.E.2d 795 (1996).

67. 246 Va. 429, 436 S.E.2d 600 (1993).

68. See *Webb*, 257 Va. at 195-97, 511 S.E.2d at 104-05.

69. See *Webb*, 257 Va. at 195-96, 511 S.E.2d at 104.

70. See *id.* at 197, 511 S.E.2d at 105.

71. *Id.* (quoting Cindy Hoogasian, *Dermatitis Concerns Continue*, *FLORIST*, March 1990, at 77).

motion.<sup>72</sup> Therefore, this case was distinguished from *Jemmott*, where the court held 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 . . . Act.”<sup>73</sup> In *Webb*, the court also concluded that the claimant’s allergic contact dermatitis qualified as a disease.<sup>74</sup> Accordingly, the supreme court affirmed the court of appeals decision awarding benefits to the claimant.<sup>75</sup>

#### IV. BENEFITS AND COVERAGE UNDER THE WORKERS’ COMPENSATION ACT

##### A. *Claimant’s False Statement as to Felony Convictions in an Employment Application*

In *Prince William County Service Authority v. Harper*,<sup>76</sup> the claimant concealed felony convictions when she completed an application for employment.<sup>77</sup> The employment application contained the following question: “Have you ever been convicted of a law violation . . . ?”<sup>78</sup> The claimant answered “no” to this question, although she had pled guilty to the felonies of insurance fraud and criminal conspiracy in the Commonwealth of Pennsylvania just one year earlier.<sup>79</sup> To ensure the accuracy of the information in the employment application, it also contained the following certification: “I hereby certify that this application is a complete record and that all entries given are true and accurate to the best of my knowledge.”<sup>80</sup>

The claimant sustained injuries to her left wrist and coccyx while performing job related duties in June 1994.<sup>81</sup> The parties executed agreements providing for the payment of disability benefits for time

72. *Id.*

73. *Jemmott*, 251 Va. at 199, 467 S.E.2d at 802.

74. *See Webb*, 257 Va. at 197-98, 511 S.E.2d at 105. Finding that the claimant’s contact dermatitis was a disease rather than an injury, the court noted that the claimant’s condition was the result of a dermatological reaction with the chemicals in the flowers “which is distinct from the wear and tear resulting from a repetitive motion.” *Id.* at 198, 511 S.E.2d at 105.

75. *See id.*

76. 256 Va. 277, 504 S.E.2d 616 (1998).

77. *See id.*

78. *Id.* at 278, 504 S.E.2d at 616.

79. *See id.*

80. *Id.*

81. *See id.* at 278-79, 504 S.E.2d at 616.

that the claimant missed from work.<sup>82</sup> In February 1995, the claimant filed an application seeking additional disability wage benefits because of a change in her condition.<sup>83</sup> During the course of that proceeding, the employer learned of the claimant's undisclosed felony convictions.<sup>84</sup>

At a hearing before a Deputy Commissioner, the employer's personnel director testified that the claimant would not have been hired had she disclosed her felony convictions because of the nature of the convictions and their proximity to her date of hire.<sup>85</sup> While the claimant resigned from her employment before the employer became aware of her felony convictions, the personnel director further testified that had the claimant been employed at the time that the employer learned of her misrepresentations, her employment would have been terminated.<sup>86</sup> The employer asserted at the hearing that the claimant's false representations precluded the claimant from receiving workers' compensation benefits.<sup>87</sup> The Deputy Commissioner rejected the employer's assertion and awarded benefits.<sup>88</sup> This decision was affirmed by the full Commission.<sup>89</sup> The employer appealed the Commission's award of benefits to the Virginia Court of Appeals, which affirmed the Commission's decision, finding that the evidence failed to demonstrate that "the misrepresentation, that Harper had not committed a crime, was causally related to Harper's injury."<sup>90</sup>

On appeal to the Supreme Court of Virginia, the employer asserted that since the claimant obtained her employment through fraud or material misrepresentation, she should be barred from receiving workers' compensation benefits.<sup>91</sup> The employer argued that there was no valid contract of hire and that she may not benefit from her fraudulent conduct.<sup>92</sup> The employer further asserted that a causal relationship existed between the claimant's failure to disclose her felony convictions and her injury because if she had

---

82. *See id.* at 279, 504 S.E.2d at 616.

83. *See id.*

84. *See id.*

85. *See id.* at 279, 504 S.E.2d at 617.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *Id.* (quoting *Prince William County Serv. Auth. v. Harper*, 25 Va. App. 166, 170, 487 S.E.2d 246, 248 (Ct. App. 1997)).

91. *See id.* at 280, 504 S.E.2d at 617.

92. *See id.*

revealed her convictions in her job application, she would not have been hired, and the employer/employee relationship would not have existed.<sup>93</sup> Applying the principles set forth in *Falls Church Construction Co. v. Laidler*,<sup>94</sup> the supreme court affirmed the decision of the court of appeals and held that the claimant was not barred from receiving workers' compensation benefits.<sup>95</sup> The court held that the employer "failed to adduce evidence which established a causal relationship between her work-related injury and her misrepresentation of her criminal record."<sup>96</sup> According to the court, the personnel director's testimony that the employer would not have hired the claimant had it been aware of her felony convictions was insufficient to establish a causal relationship between the claimant's misrepresentation of her felony convictions and her work-related injury.<sup>97</sup>

### B. *Claimant's Misrepresentation of Immigration Status and Eligibility for Employment in the United States During the Hiring Process*

The issue in *Granados v. Windson Development Corp.*<sup>98</sup> was whether the Virginia Court of Appeals erred in denying workers' compensation benefits to an illegal alien "because he misrepresented his immigration status and eligibility for employment in the United States."<sup>99</sup> At the time Granados was hired, he was asked to provide his Social Security card and one other form of identification, in accordance with the requirements of the United States Department of Justice, Immigration and Naturalization Service.<sup>100</sup> Granados presented a Social Security card bearing his name and a card purportedly issued by the Immigration and Naturalization Service that contained his photograph and identified him as a resident alien.<sup>101</sup> Granados also signed the required employment eligibility

93. *See id.*

94. 254 Va. 474, 493 S.E.2d 521 (1997). In *Laidler*, the supreme court held that where an employee falsely represents information in an employment application, a later claim for worker's compensation benefits is barred "if the employer proves that 1) the employee intentionally made a material false representation; 2) the employer relied on that representation; 3) the employer's reliance resulted in the consequent injury; and 4) there is a causal relationship between the injury in question and the misrepresentation." *Id.* at 477-78, 493 S.E.2d at 523.

95. *See Harper*, 256 Va. at 280, 504 S.E.2d at 617.

96. *Id.*

97. *See id.*

98. 257 Va. 103, 509 S.E.2d 290 (1999).

99. *Id.* at 105, 509 S.E.2d at 290.

100. *See id.* at 105, 509 S.E.2d at 290-91.

101. *See id.* at 105, 509 S.E.2d at 291.

and verification form, attesting that he was a permanent resident alien.<sup>102</sup>

The evidence established that Granados was ineligible for lawful employment in the United States on the date that he was hired and on the date that he sustained his work-related injury.<sup>103</sup> At a hearing before a Deputy Commissioner and in discovery, "Granados admitted that he had never applied for a Social Security card or any other kind of work permit, that he was not a permanent resident alien, and that he was ineligible for employment in the United States."<sup>104</sup> He did not dispute that the documents that he provided to the employer were forged.<sup>105</sup> A representative of Windson Development Corporation ("Windson") testified that Windson did not hire applicants who lacked proper documentation of their immigration status, and that Granados would not have been hired if he had failed to produce documents indicating his eligibility for employment.<sup>106</sup> The Deputy Commissioner denied the claim for benefits because the claimant materially misrepresented his employment eligibility by providing the false documentation and by signing the employment eligibility verification form.<sup>107</sup> The full Commission affirmed the opinion of the Deputy Commissioner, which was subsequently affirmed by the Virginia Court of Appeals.<sup>108</sup>

On appeal the supreme court determined that the Commission, as affirmed by the court of appeals, erred in ruling that Granados's false representations barred his recovery of workers' compensation benefits.<sup>109</sup> The court stated that the employer "failed to demonstrate the required causal relationship between Granados[s] false representation and his resulting injury."<sup>110</sup> The court also noted that Granados's injury was "unrelated to the substance of his false representations concerning his immigration status and [his] eligibility for employment."<sup>111</sup> The supreme court further determined, however, that Granados was not "in the service of Windson under any contract of hire because, under the Immigration Reform

---

102. *See id.*

103. *See id.*

104. *Id.*

105. *See id.*

106. *See id.* at 105-06, 509 S.E.2d at 291.

107. *See id.* at 106, 509 S.E.2d at 291.

108. *See id.* (citing *Granados v. Windson Dev. Corp.*, 26 Va. App. 251, 494 S.E.2d 162 (Ct. App. 1997)).

109. *See id.* at 108, 508 S.E.2d at 292.

110. *Id.* at 108, 509 S.E.2d at 292.

111. *Id.*

and Control Act of 1986, an illegal alien cannot be employed lawfully in the United States.<sup>112</sup> The supreme court affirmed the opinion of the court of appeals and denied benefits to Granados on the grounds that Granados was ineligible to receive workers' compensation benefits as an "employee" under the Immigration Reform and Control Act of 1986 because his purported contract of hire was void and unenforceable.<sup>113</sup>

### C. Average Weekly Wage Calculations and the "Substantially Similar" Doctrine

In *Mercy Tidewater Ambulance Service v. Carpenter*,<sup>114</sup> the claimant suffered a compensable injury to his back while working as a paramedic, or emergency medical technician ("EMT") for Mercy Tidewater.<sup>115</sup> The parties executed a Memorandum of Agreement that awarded the claimant wage benefits based upon his earnings as an EMT for the employer.<sup>116</sup> At the time of his industrial accident, however, the claimant was also employed as an unlicensed clinician at Children's Hospital of the King's Daughters ("Children's Hospital").<sup>117</sup> At the time the claimant executed the Memorandum of Agreement, he was not aware that his job at Children's Hospital could be considered as similar employment in computing his average weekly wage.<sup>118</sup> Therefore, the claimant filed an application requesting that the Commission retroactively modify his average weekly wage to include his wages from Children's Hospital.<sup>119</sup>

As an EMT for Mercy Tidewater, the claimant "provided advanced and basic life support care to patients being transported in an ambulance."<sup>120</sup> The claimant described his job duties at the hearing in this manner: "We worked accidents, heart attacks, strokes . . . . We would start IV's, start oxygen therapy, [provide] patient assessments. We would give medications . . . . We would draw blood, we analyze like blood sugars, bandage wounds, gunshots . . . ." <sup>121</sup> According to the claimant, his duties as an unlicensed

112. *Id.* at 108, 509 S.E.2d at 293 (citing 8 U.S.C. § 1324a (1994)).

113. *See id.* at 108-09, 509 S.E.2d at 293.

114. 29 Va. App. 218, 511 S.E.2d 418 (Ct. App. 1999).

115. *See id.* at 221, 511 S.E.2d at 419.

116. *See id.*

117. *See id.* at 222, 511 S.E.2d at 419-20.

118. *See id.* at 222, 511 S.E.2d at 420.

119. *See id.* at 222-23, 511 S.E.2d at 420.

120. *Id.* at 221, 511 S.E.2d at 419.

121. *Id.* at 222, 511 S.E.2d at 419.

clinician at Children's Hospital included the following: "weighing patients; taking vital signs, including pulse, respiration and blood pressure; drawing blood samples; starting IVs; administering respiratory treatments; assisting with heart monitors; and performing nasal washings and urine catheterizations."<sup>122</sup>

Agreeing with the claimant and amending his average weekly wage, the Commission found "substantial overlap in the specific duties and skills required of both jobs. The claimant's primary mission for both employers was emergency medical services."<sup>123</sup> The Commission further noted that the "claimant provided a valid explanation for his delay in seeking a modification of the award and [the] employer failed to show any prejudice."<sup>124</sup> Mercy Tidewater appealed the Commission's decision amending the claimant's average weekly wage to the Virginia Court of Appeals.

On appeal, the court of appeals affirmed the decision of the Commission, noting that "Virginia follows the majority rule that when an employee is injured on one job while in concurrent employment, the average weekly wage compensated is based on the combined earnings of both jobs if, but only if, the employments are related or similar."<sup>125</sup> The court pointed out that the term "similar" in this respect may relate to the similarity of "(1) the work, (2) the industry in which the work is performed, or (3) the degree of hazard to which the employee is exposed."<sup>126</sup> The court held that "credible evidence supports the commission's finding that [the] claimant's employment at Children's Hospital was substantially similar to his employment at Mercy Tidewater."<sup>127</sup> The court's decision reiterated the Commission's findings that the claimant's jobs with both employers substantially overlapped in the specific duties and skills, and that the claimant's primary mission for both employers was emergency care services.<sup>128</sup>

---

122. *Id.* at 222, 511 S.E.2d at 420.

123. *Id.* at 223, 511 S.E.2d at 420.

124. *Id.*

125. *Id.* at 224, 511 S.E.2d at 421 (quoting *First Virginia Banks, Inc. v. McNeil*, 8 Va. App. 342, 343, 381 S.E.2d 357, 358 (Ct. App. 1989)).

126. *Id.* at 224, 511 S.E.2d at 421 (citing 5 ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 60.31 (1997)).

127. *Id.*

128. *See id.* at 225, 511 S.E.2d at 421. The court of appeals also held that from a procedural standpoint, the Commission correctly modified the claimant's average weekly wage, as there was a mutual mistake of fact as to the claimant's average weekly wage. *See id.* at 226-27, 511 S.E.2d at 422. The Commission held that the claimant sufficiently explained his delay in requesting a modification, as the claimant testified that at the time he executed the Memorandum of Agreement, he was not aware that his job at Children's Hospital could be

*D. Average Weekly Wage Calculations Where Employee's Two Different Jobs are Performed for the Same Employer*

An interesting twist to the "substantially similar" doctrine was presented in *Dinwiddie County School Board v. Cole*.<sup>129</sup> In that case, Cole held two jobs with the Dinwiddie County School Board (the "School Board"): one job as a bus driver and a second job as a teacher's aide.<sup>130</sup> She had separate contracts for each job, and she was paid from separate budgets in different departments.<sup>131</sup> Cole sustained a compensable injury to her shoulder while working as a teacher's aide.<sup>132</sup> Although the injury prevented her from driving her school bus, a Deputy Commissioner found that Cole's two positions were dissimilar; therefore, the wages from the two jobs were not to be combined in calculating the claimant's average weekly wage.<sup>133</sup> The Commission "agreed that the jobs were dissimilar but calculated Cole's average weekly wage by combining income from both positions."<sup>134</sup> In addition, she was awarded temporary partial disability wage benefits for lost earnings.<sup>135</sup> The School Board appealed this opinion.<sup>136</sup>

The Virginia Court of Appeals affirmed the decision of the Commission, holding that Cole's earnings from both jobs were to be combined in determining the average weekly wage.<sup>137</sup> The court reasoned that the "substantially similar" doctrine, which prevents combining salaries from two separate jobs if the jobs are dissimilar, "is not present when the two jobs are performed for the same employer."<sup>138</sup> Citing to the Commission's decision with approval, the court of appeals said the following:

---

considered as similar employment for the purposes of calculating his average weekly wage. *See id.* Also, the employer was unaware of the claimant's job with Children's Hospital. *See id.* The court of appeals also vacated the Commission's award of permanent partial disability benefits, holding that the claimant failed to prove he had reached maximum medical improvement. *See id.* at 227-28, 511 S.E.2d at 422-23.

129. 28 Va. App. 462, 506 S.E.2d 36 (Ct. App. 1998).

130. *See id.* at 463, 506 S.E.2d at 36.

131. *See id.*

132. *See id.*

133. *See id.*

134. *Id.* at 463-64, 506 S.E.2d at 36-37.

135. *See id.*

136. *See id.* at 464, 506 S.E.2d at 37.

137. *See id.*

138. *Id.* at 465, 506 S.E.2d at 37.

The rationale for the approach [combining wages under the "substantially similar" doctrine] is to prevent the costs of injury being out of proportion to the industry's payroll or risks. If an employee works for only one employer, the burden is not out of proportion to the employer's payroll or the industry's risks. The single employer is not being forced to assume responsibility for the wages paid by some other employer or the risks of some other industry. Combining a claimant's wages paid by a single employer for two jobs performed is fair to the single employer because that employer had already assumed the liability risk.<sup>139</sup>

Accordingly, the court in *Cole* affirmed the decision of the Commission, finding no reason to disturb the Commission's award.<sup>140</sup>

#### E. *Claimant's Cure of an Unjustified Refusal of Medical Care*

*Fairfax County School Board v. Rose*<sup>141</sup> concerned the effectiveness of a "verbal cure" in the context of an unjustified refusal of medical treatment," which was a matter of first impression in Virginia.<sup>142</sup> In *Rose*, the claimant sustained a compensable injury through an accident to her back in March 1991.<sup>143</sup> Dr. James W. Preuss, the claimant's treating physician, and several other physicians recommended that the claimant undergo back surgery to repair two herniated lumbar discs.<sup>144</sup> The claimant refused to have the recommended surgery.<sup>145</sup> The claimant's disability wage benefits were suspended by the Commission as of November 7, 1993, on the grounds that the claimant unjustifiably refused the recommended back surgery.<sup>146</sup>

In July 1994, the claimant attempted suicide and was hospitalized and treated for depression.<sup>147</sup> She also suffered from agoraphobia, which restricted her ability to go out in public.<sup>148</sup> The claimant received treatment for these conditions between 1994 and 1996.<sup>149</sup>

In November 1995, the claimant filed an application for a hearing, seeking the reinstatement of wage benefits commencing November 6, 1995, on the basis that she was willing to submit to the surgery by

---

139. *Id.* at 464, 506 S.E.2d at 37.

140. *See id.* at 465, 506 S.E.2d at 37.

141. 29 Va. App. 32, 509 S.E.2d 525 (Ct. App. 1999).

142. *Id.* at 37, 509 S.E.2d at 527.

143. *See id.* at 34, 509 S.E.2d at 526.

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.* at 35, 509 S.E.2d at 526.

148. *See id.*

149. *See id.*

Dr. Preuss.<sup>150</sup> Claimant's counsel notified the employer's counsel by a letter that stated "Ms. Rose is now willing to undergo the lumbar surgery proposed by Dr. Preuss. Please contact me regarding the scheduling of an appointment with Dr. Preuss."<sup>151</sup> The claimant met with Dr. Preuss in February 1996 and stated her willingness to have the surgery.<sup>152</sup> Dr. Preuss subsequently noted that he discussed surgery with the claimant in February 1996, "but that he did not recommend [the] surgery at that time because of her stable condition."<sup>153</sup> Dr. Preuss testified in a deposition that "in any case where the patient's neurological examination is stable and the patient is willing to tolerate the level of pain and incapacity, he would not recommend surgery and he would regard it as an elective procedure."<sup>154</sup> Dr. Preuss acknowledged "that if she was willing to undergo [the] surgery, her symptoms would improve."<sup>155</sup> Following a hearing, a Deputy Commissioner determined that the claimant's refusal of *medical treatment was effectively cured as of November 6, 1995.*<sup>156</sup> The full Commission affirmed the decision of the Deputy Commissioner.<sup>157</sup>

Following a decision by a divided panel of the court of appeals, the Virginia Court of Appeals addressed in a rehearing en banc whether the claimant's November 6, 1995 letter informing the employer of her willingness to undergo the previously refused surgery effectively cured her prior unjustified refusal of medical treatment.<sup>158</sup> The court held that in order for a verbal cure of an unjustified refusal of medical treatment to be effective, it must be made in good faith, which must be demonstrated through "an affirmative action or a showing of circumstances mitigating the failure to act."<sup>159</sup> The court held that the claimant's letter, combined with the mitigating factors of the claimant's mental conditions of depression and agoraphobia (which explained any delay in contacting Dr. Preuss), cured her unjustified refusal of medical treatment.<sup>160</sup> The court noted that the "[c]laimant's psychological condition and her statements to her

---

150. *See id.*

151. *Id.*

152. *See id.*

153. *Id.* at 35, 509 S.E.2d at 526-27.

154. *Id.* at 35, 509 S.E.2d at 527.

155. *Id.* at 35-36, 509 S.E.2d at 527.

156. *See id.* at 36, 509 S.E.2d at 527.

157. *See id.*

158. *See id.*

159. *Id.* at 38, 509 S.E.2d at 528.

160. *See id.* at 38-39, 509 S.E.2d at 528.

treating physician, that she was willing to submit to surgery if it was still recommended, were affirmative actions which reinforced that her November 6, 1995 statement was made in good faith.<sup>161</sup> Accordingly, the court of appeals affirmed the decision of the Commission and held that the claimant timely and effectively cured her prior refusal of medical treatment.<sup>162</sup>

#### V. 1999 LEGISLATIVE CHANGES AFFECTING WORKERS' COMPENSATION

Virginia Code section 65.2-402 was amended by several bills that were passed by the General Assembly in its 1999 Session. The presumption as to death or disability from hypertension or heart disease was extended for work-related death or disability to include Virginia Marine Patrol officers.<sup>163</sup> This statute was further amended to add game wardens who are "full-time sworn members of the enforcement division of the Department of Game and Inland Fisheries" and Capitol Police Officers to the category of employees entitled to the presumptions of Virginia Code section 65.2-402.<sup>164</sup> Additionally, Virginia Code section 65.2-402 was amended to provide that leukemia and various other cancers, which are "caused by a documented contact with a toxic substance" and which cause death or total or partial disability of a volunteer or salaried firefighter or hazardous materials officer, with twelve years of continuous service and while in the line of duty, are "presumed to be an occupational disease."<sup>165</sup>

The General Assembly amended Virginia Code section 65.2-604 to require that all health care providers attending an injured employee furnish, upon request, a copy of any medical report to the injured employee, the employer, or the insurer, or any of their

---

161. *Id.* at 39, 509 S.E.2d at 528.

162. *See id.* Judge Coleman, joined by Judges Bray and Lemons, dissented, stating: the record is clear, in my opinion, that in order to cure her unjustified refusal of medical treatment she must be willing to have disc surgery, and Rose did not and does not intend to have the surgery. . . . I would reverse the commission's finding and hold that no credible evidence proves that Rose's "verbal cure" was in good faith; to the contrary, the evidence proves that she had no intention to accept the medical treatment.

*Id.* at 42-43, 509 S.E.2d at 530 (Coleman, J., dissenting).

163. *See* VA. CODE ANN. § 65.2-402(B) (Cum. Supp. 1999).

164. *Id.*

165. *Id.* § 65.2-402(C) (Cum. Supp. 1999).

representatives.<sup>166</sup> Prior to this amendment, this requirement was imposed only on physicians.<sup>167</sup>

Virginia Code section 65.2-524 now allows the Commission to waive the penalty imposed when benefits are not paid within two weeks after they become due, if:

[T]he Commission finds that any required payment has been made as promptly as practicable and (i) there is good cause outside the control of the employer for the delay or (ii) in the case of a self-insured employer, the employer has issued the required payment to the employee as part of the next regular payroll after the payment becomes due.<sup>168</sup>

New legislation permits employers or insurance carriers to include chiropractors on the panel of physicians furnished to injured employees.<sup>169</sup> This amendment further provides, however, that a chiropractor is to be included only if the employees' injuries can be treated within the chiropractor's scope of practice.<sup>170</sup>

Virginia Code section 65.2-706(C) was amended to reflect that an appeal from a decision of the Virginia Court of Appeals to the Supreme Court of Virginia concerning a workers' compensation award effectively suspends the award, and any payment thereon, until the court determines the outcome of the appeal.<sup>171</sup>

Additionally, new legislation authorizes employers subject to the Virginia Workers' Compensation Act to voluntarily pay an employee workers' compensation benefits "above and beyond those benefits provided under the Act."<sup>172</sup> This amendment stipulates that such payments are not to be treated as affecting or altering an existing right or remedy of an employer or employee under the Virginia Workers' Compensation Act.<sup>173</sup>

Virginia Code section 65.2-302 was amended to exempt from statutory employer liability:

any person who, at the time of an injury sustained by a worker engaged in the maintenance or repair of real property managed by such person, and for which injury compensation is sought:

166. *See id.* § 65.2-604(A) (Cum. Supp. 1999).

167. *See id.* (Repl. Vol. 1995).

168. *Id.* § 65.2-524 (Cum. Supp. 1999).

169. *See id.* § 65.2-603(F) (Cum. Supp. 1999).

170. *See id.*

171. *See id.* § 65.2-706(C) (Cum. Supp. 1999).

172. *Id.* § 65.2-307(B) (Cum. Supp. 1999).

173. *See id.*

- a. Was engaged in the business of property management on behalf of the owner's of such property and was acting merely as an agent of the owner; and
- b. Did not engage in and had no employees engaged in the same trade, business or occupation as the worker seeking compensation; and
- c. Did not seek or obtain . . . profit from the services performed by individuals engaged in the same trade, business or occupation as the worker seeking compensation.<sup>174</sup>

---

174. *Id.* § 65.2-302(D) (Cum. Supp. 1999).

