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Annual Survey of Virginia Law: Workers' Compensation

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WORKERS' COMPENSATION

Mary G. Commander*

I. INTRODUCTION

This article reintroduces workers' compensation as a topic given periodic treatment in the *Annual Survey of Virginia Law*. Prior to the creation of the Virginia Court of Appeals, effective January 1, 1985,¹ the law of workers' compensation had become static and predictable; accordingly, other areas were given priority in the *Survey*. This article covers selected significant developments in the law since 1985.

The past seven-and-one-half years have produced a number of changes in this area of the law, and succeeding years promise to offer even more. In the last session of the Virginia General Assembly, House Joint Resolution Number 172² proposed a full study of the Workers' Compensation Act (the Act)³ as a result of societal and legal changes of the past thirty years. Although the proposal failed,⁴ the Governor has created an Advisory Commission on Workers' Compensation to further examine and evaluate the Act and to make recommendations for legislation by December 15, 1992.⁵

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1. Act of Mar. 25, 1983, ch. 413, 1983 Va. Acts 519 (codified at VA. CODE ANN. §§ 17-116.01 to -116.014 (Repl. Vol. 1988 & Cum. Supp. 1992)).

2. H.J. Res. 172, Va. General Assembly, Reg. Sess. (1992).

3. VA. CODE ANN. §§ 65.2-100 to -131 (Repl. Vol. 1991 & Cum. Supp. 1992).

4. H.J. Res. 172 was passed by indefinitely on Feb. 7, 1992 by the House Committee on Rules.

5. Exec. Order No. 50(92) (June 11, 1992). The Advisory Commission is to examine:

the definition of injury; attorney's fees for injured employees, including those who refuse suitable employment; awards for a change in condition; refusal of employment; . . . the process for obtaining medical opinions [and] costs of health benefits to injured employees and ways to contain increases in such costs without decreasing the quality of health care . . .

Id. at 1-2.

II. THE VIRGINIA WORKERS' COMPENSATION ACT

The Act was recodified effective October 1, 1991, in title 65.2 of the Code of Virginia (the Code).⁶ Sections 65.1-1 through 65.1-163 of the former Act were repealed by the General Assembly. The recodification involved some substantive changes and further instituted a new section numbering system. One of the more obvious changes is that what had been the Industrial Commission now is named the Virginia Workers' Compensation Commission (the Commission). However, the bulk of the Act remains intact.⁷

III. INJURY BY ACCIDENT

A. Introduction

The standard workers' compensation case requires proof by the employee (claimant) of an "injury by accident" arising out of and in the course of his employment.⁸ Special provisions exist for occupational diseases and will be discussed separately.⁹

"Injury by accident" is not defined by statute; however, case law has established an accepted definition, i.e., an identifiable incident, occurring at a reasonably definite time, which results in an obvious sudden mechanical or structural change in the claimant's body.¹⁰

B. Pre-Existing Condition

As in traditional personal injury law, an employer takes an employee as he finds him.¹¹ Accordingly, "[w]hen an injury sustained in an industrial accident accelerates or aggravates a pre-existing

6. Act of Mar. 20, 1991, ch. 355, 1991 Va. Acts 509 (codified as amended at VA. CODE ANN. §§ 65.2-100 to -1310 (Repl. Vol. 1991)). The primary changes involved (i) revisions to the definition of "employee" and a consolidation of the sections which had been in § 65.1 concerning this issue; (ii) clarification of the status of statutory employees under Chapter 3; and (iii) revision of the "heart, lung and hypertension Act." *Id.*

7. For the work of the Code Commission in this regard, see REPORT OF THE VIRGINIA CODE COMMISSION OF THE RECODIFICATION OF TITLE 65.1 OF THE CODE OF VIRGINIA, H. Doc. No. 38 (1991) [hereinafter CODE COMMISSION REPORT].

8. VA. CODE ANN. § 65.2-101 (Repl. Vol. 1991) (definition of "injury").

9. See *infra* notes 60-69 and accompanying text.

10. See generally *Lane Co. v. Saunders*, 229 Va. 196, 326 S.E.2d 702 (1985); *Kraft Dairy Group, Inc. v. Bernardini*, 229 Va. 253, 329 S.E.2d 46 (1985).

11. *Pendleton v. Flippo Constr. Co.*, 1 Va. App. 381, 384, 339 S.E.2d 210, 212 (1986).

condition, . . . disability resulting therefrom is compensable under the Workers' Compensation Act."¹²

Despite this traditional rule, there are instances in which the existence of a pre-existing condition may constitute a defense to the payment of benefits. The first and most common situation is where a claimant misrepresents his physical or medical condition or previous injuries in an employment application.¹³ Additionally, where the employment merely aggravates or exacerbates an ordinary disease of life the injury is not compensable.¹⁴

C. Repetitive Trauma/Gradual Injury

One frequently encountered defense to a claim for compensation is that the injury is the result of repetitive trauma rather than an injury by accident. The frequency with which this defense is raised indicates the actual manner in which most injuries, especially those to the back, manifest themselves. The Virginia Court of Appeals tried — unsuccessfully — to address, clarify, and remedy this issue in a series of cases: *Bradley v. Philip Morris*,¹⁵ *Morris v. Morris*,¹⁶ *Door Systems v. Hood*,¹⁷ and *Pittsburgh Plate Glass v. Totten*.¹⁸

In *Bradley v. Philip Morris*, the claimant was required to move several heavy barrels of scrap metal while at work.¹⁹ During his lunch break later that day, the claimant felt a pain in his back. The deputy Commissioner awarded compensation benefits, the full

12. *Olsten of Richmond v. Leftwich*, 230 Va. 317, 319-20, 336 S.E.2d 893, 895 (1985) (citing *Ohio Valley Constr. Co. v. Jackson*, 230 Va. 56, 58, 334 S.E.2d 554, 555 (1985)). See also *Kemp v. Tidewater Kiewit*, 7 Va. App. 360, 363, 373 S.E.2d 725, 726 (1988).

13. See *McDaniel v. Colonial Mechanical Corp.*, 3 Va. App. 408, 411, 350 S.E.2d 225, 227 (1986). The employer, however, must show that the misrepresentation is related to the later injury. *Grimes v. Shenandoah Valley Press*, 12 Va. App. 665, 667, 406 S.E.2d 407, 409 (1991).

14. *Ashland Oil Co. v. Bean*, 225 Va. 1, 3, 300 S.E.2d 739, 740 (1983). This case still supports the statement in the text; however, it was decided prior to the enactment of § 65.1-46.1 (now § 65.2-401) dealing with ordinary diseases of life. See *Woody v. Mark Winkler Management*, 1 Va. App. 147, 149-50, 336 S.E.2d 518, 520 (1985).

15. 1 Va. App. 141, 336 S.E.2d 515 (1985).

16. 4 Va. App. 193, 355 S.E.2d 892 (1987), *rev'd*, 238 Va. 578, 385 S.E.2d 858 (1989).

17. No. 1175-87-4, (Va. Ct. App. Nov. 29, 1988), *rev'd sub nom.*, *Morris v. Morris*, 238 Va. 578, 385 S.E.2d 858 (1989).

18. No. 1587-87-4, (Va. Ct. App. Dec. 12, 1988), *rev'd sub nom.*, *Morris v. Morris*, 238 Va. 578, 385 S.E.2d 858 (1989).

19. *Bradley*, 1 Va. App. at 143, 336 S.E.2d at 516.

Commission reversed, and the court of appeals affirmed the denial of benefits.²⁰

Even though the denial of benefits was affirmed, the court of appeals stated that there was an identifiable incident. The court stated that it did "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 reasonably discrete time frame."²¹ In this case, the time frame was three hours.²² This case led to what was called "the three hour rule", *i.e.*, if the time elapsed was three hours or less, the injury was compensable.²³

In *Morris v. Morris*, the claimant worked for approximately forty-five minutes loading ninety-six cartons of fiberglass, each weighing fifty pounds, onto his truck.²⁴ A few minutes after completing this work, he experienced an acute myocardial infarction. The deputy Commissioner denied compensation benefits and the full Commission affirmed. The court of appeals, however, reversed the decision.²⁵ This case, in turn, led to the creation of the "forty-five minute" rule.²⁶

In *Door Systems v. Hood*, the claimant and a fellow employee unloaded seven steel garage doors during an hour-and-a-half period. Later in the day, the claimant experienced soreness in his back which he attributed to a "pulled muscle." The pain worsened, and physician determined that the claimant had sustained a ruptured disc. The deputy Commissioner awarded benefits. This was affirmed by the full Commission and the court of appeals.²⁷

In *Pittsburgh Plate Glass v. Totten*, the claimant worked on a scaffold securing 30-35 pound panels with a drill and screw gun from 6:30 to 9:30 a.m. The area where he worked was hot and had no ventilation. He began to experience pain which was diagnosed as a myocardial infarction. As a result of this injury, the deputy

20. *Id.* at 146, 336 S.E.2d at 518.

21. *Id.* at 145, 336 S.E.2d at 517.

22. *Id.*

23. See *Morris v. Morris*, 238 Va. 578, 582-83, 385 S.E.2d 858, 861 (1989) (citing Deputy Commissioner's application of *Bradley*). See also *Morris v. Morris*, 4 Va. App. 193, 199-200, 355 S.E.2d 892, 897 (1987).

24. *Morris*, 4 Va. App. at 195, 355 S.E.2d at 893.

25. *Id.* at 200, 353 S.E.2d at 897.

26. *Cf. id.* (forty-five minutes meets required temporal relationship).

27. *Id.*

Commissioner awarded compensation and this decision was affirmed by the full Commission and the court of appeals.²⁸

The Supreme Court of Virginia consolidated *Morris, Hood, and Totten* for review²⁹ and found, pursuant to section 17-116.07(B) of the Code,³⁰ that these cases involved "matters of significant precedential value."³¹ In reversing the court of appeals, the supreme court noted that:

Perhaps the most frequently recurring invitation to expand the coverage of the Act has been extended by those who wish to broaden the meaning of the statutory term 'injury by accident' to include injuries which, although work-related, are either gradually incurred or sustained at an unknown time.³²

The court emphasized that its prior decisions consistently rejected expanding the statutory terminology in this manner. The court ruled that the court of appeals' statement in *Bradley v. Philip Morris* implying that an "identifiable accident" meant a work activity taking place in a "reasonably discrete time frame" was dictum; even as dictum the court held it to be an incorrect statement of the law. In doing so, the court reiterated its position that any change in the law must come from the General Assembly, not from the courts.³³

Accordingly, the supreme court reversed the court of appeals and stated unequivocally that "injuries resulting from repetitive trauma, continuing mental or physical stress, or other cumulative events, as well as injuries sustained at an unknown time, are not 'injuries by accident'. . . ."³⁴

The court's strict interpretation nonetheless leaves room for compensable injuries that appear to fit into the category set forth by the court. Occupational diseases are the most obvious example. Additionally, the situation is different where the claimant can point to a specific incident, even if it is a part of a series of activities.

28. *Morris*, 238 Va. at 583-84, 385 S.E.2d at 861.

29. *Morris v. Morris*, 238 Va. 578, 385 S.E.2d 858.

30. VA. CODE ANN. § 17-116.07(B) (Repl. Vol. 1991).

31. *Morris*, 238 Va. at 580, 385 S.E.2d at 859.

32. *Id.* at 584-85, 385 S.E.2d at 862.

33. *Id.* at 588, 385 S.E.2d at 864.

34. *Id.* at 589, 385 S.E.2d at 865.

In *Jewell Ridge Coal Corp. v. McGlothlin*,³⁵ the claimant was a heavy equipment operator whose work required him to operate machinery in uneven terrain. In the course of his work, he sustained several "jerks" and "jolts," one of which hurt so badly that he "couldn't operate correctly after that."³⁶ Even so, he continued to work and the pain continued to increase. Afterwards it was determined that he had suffered a herniated disc and he was awarded compensation.³⁷

D. *Compensable Consequences*

The employer is also liable for the "compensable consequences" of the original work-related injury.³⁸ The classic case occurs when an employee falls while walking on crutches, the use of crutches being necessitated by the first injury.³⁹

In a recent case, *Bartholow Drywall v. Hill*,⁴⁰ the claimant sustained a compensable back injury in July, 1986. In January, 1989, as a result of her back injury, she fell at home and injured her wrist. The court of appeals found the doctrine of compensable consequences to apply to new injuries (the wrist), as well as to aggravation of earlier injuries and found also that the time limitation for the new injury was governed by section 65.1-87 (now 65.2-601) of the Code.⁴¹ When the compensable consequence causes a change in condition, however, section 65.1-99 (now 65.2-708) governs.⁴²

The compensable consequences doctrine usually comes into play as a basis for an application of benefits due to a change in condition. However, it can be a new injury if all of the requirements of the "injury by accident" test are met.⁴³

35. 2 Va. App. 294, 343 S.E.2d 94 (1986).

36. *Id.* at 296, 343 S.E.2d at 95.

37. *Id.* at 298, 343 S.E.2d at 97.

38. *Morris v. Badger Powhatan/Figgie Int'l, Inc.*, 3 Va. App. 276, 348 S.E.2d 876 (1986).

39. *See, e.g., Leonard v. Arnold*, 218 Va. 210, 237 S.E.2d 97 (1977).

40. 12 Va. App. 790, 407 S.E.2d 1 (1991).

41. *Id.* at 797, 407 S.E.2d at 5 (citing VA. CODE ANN. § 65.2-601 (Repl. Vol. 1991)).

42. *Id.* (citing VA. CODE ANN. § 65.2-708 (Repl. Vol. 1991)).

43. *First Fed. Sav. & Loan Ass'n v. Gryder*, 9 Va. App. 60, 383 S.E.2d 755 (1989).

IV. ARISING OUT OF EMPLOYMENT

The "arising out of the employment" prong deals with the activity being performed by the claimant and the conditions under which the activity is being performed.

In *County of Chesterfield v. Johnson*,⁴⁴ the claimant abruptly turned at the top of a flight of stairs in order to return to the basement and check a meter. His knee gave way as he turned, causing him to fall. Since there was nothing unusual about the steps and nothing to explain the reason for the knee giving way, the Virginia Supreme Court found that the claim was not compensable.⁴⁵

In *Richard E. Brown, Inc. v. Caporaletti*,⁴⁶ the court of appeals reaffirmed Virginia's position as an "actual risk" rather than "positional risk" state.⁴⁷ The court distinguished this case from *Johnson* and awarded benefits because the activity involved required "unusual exertion."⁴⁸

In order to satisfy the "arising out of" test in a third party assault or action, there must be proof that the assault or action was directed at the claimant because of her capacity or status as an employee.⁴⁹ In addition, if an employer conducts a social event which is deemed to be incidental to the business, an employee who is injured at the function may have a valid claim for compensation.⁵⁰ This type of situation requires a very fact-specific inquiry.⁵¹

44. 237 Va. 180, 376 S.E.2d 73 (1989).

45. *Id.* at 186, 376 S.E.2d at 76.

46. 12 Va. App. 242, 402 S.E.2d 709 (1991).

47. *See id.* at 243-44, 402 S.E.2d at 710. *See also* Mullins v. Westmoreland Coal Co., 10 Va. App. 304, 306, 391 S.E.2d 609, 611 (1990) (distinguishing "positional risk" and "actual risk" jurisdictions).

48. *Caporaletti*, 12 Va. App. at 245, 402 S.E.2d at 711. In *Caporaletti*, the claimant was injured while gradually lowering a 100 pound furnace on its side and while bending over the furnace for four to five minutes performing work activities. *Id.* at 244, 402 S.E.2d at 710. This case also distinguished *Plumb Rite Plumbing Service v. Barbour*, 8 Va. App. 482, 382 S.E.2d 305 (1989).

49. *See Hill City Trucking, Inc. v. Christian*, 238 Va. 735, 385 S.E.2d 377 (1989) (denying compensation to a truck driver robbed and shot after cashing a check at a truck stop).

50. *See generally* Kim v. Sportswear, 10 Va. App. 460, 393 S.E.2d 418 (1990) (injury sustained at New Year's Eve party sponsored by employer and utilized to obtain good will of employees deemed compensable); Mullins v. Westmoreland Coal Co., 10 Va. App. 304, 391 S.E.2d 609 (1990) (injury during basketball game prior to work shift did not arise out of employment).

51. *See Kim*, 10 Va. App. at 465-68, 393 S.E.2d at 422-23.

V. IN THE COURSE OF EMPLOYMENT

The "in the course of employment" prong relates to the time and place of the injury and to the activity being performed.

In *Briley v. Farm Fresh*,⁵² the plaintiff, an employee of Farm Fresh, was shopping at the store after going off duty. She slipped and fell while shopping and consequently filed a civil negligence action against Farm Fresh. Because of the workers' compensation bar, the trial court dismissed the case.⁵³

On appeal, the supreme court upheld the dismissal because

the plaintiff would not likely have been at the supermarket at 2:00 a.m. but for her employment there. Moreover, the risks that led to her injury were all part of the work environment. In sum, the plaintiff was injured at a place where she was reasonably expected to be while engaged in an activity reasonably incidental to her employment by the defendant.⁵⁴

In *Sentara Leigh Hospital v. Nichols*,⁵⁵ the claimant was injured in an automobile accident while travelling from her home to a patient's home. As a home health nurse, she had no office and performed her duties in the homes of her patients. She was not paid for mileage or for travel time.⁵⁶

The court of appeals held that the claim was barred by the "going and coming rule," which denies compensation for accidents going to or coming from work unless one of three exceptions is met.⁵⁷

The three exceptions are as follows:

(1) where the means of transportation to or from work is provided by the employer or the employee's travel time is paid for or included in wages;

(2) where the way used is the sole means of ingress and egress or is constructed by the employer; and

52. 240 Va. 194, 396 S.E.2d 835 (1990).

53. *Id.* at 196-97, 396 S.E.2d at 836.

54. *Id.* at 198, 396 S.E.2d at 837. *See also* Thore v. Chesterfield County Bd. of Supervisors, 10 Va. App. 327, 391 S.E.2d 882 (1990).

55. 12 Va. App. 841, 407 S.E.2d 334 (1991), *aff'd on reh'g*, 13 Va. App. 630, 414 S.E.2d 426 (1992) (en banc).

56. *Sentara*, 12 Va. App. at 845, 407 S.E.2d at 336.

57. *Id.* at 845, 407 S.E.2d at 337.

(3) where the employee is charged with some duty or task connected with his employment while on his way to or from work.⁵⁸ In this case, the court found that none of the three exceptions was met.⁵⁹

VI. OCCUPATIONAL DISEASE

Occupational disease claims⁶⁰ are governed by sections 65.2-400 ("occupational disease" defined)⁶¹ and -401 ("ordinary disease of life" coverage).⁶² Section 65.2-401 was enacted in 1986 to provide coverage for ordinary diseases of life which had been previously excluded from coverage in the occupational disease statute.⁶³

The burden of proof is different for each claim. Section 65.2-400 requires proof by a preponderance of the evidence to establish a claim for occupational disease,⁶⁴ while section 65.2-401 requires proof of ordinary disease of life "by clear and convincing evidence, to a reasonable medical certainty."⁶⁵

The occupational disease statutes are an entity unto themselves. They operate concurrently with, but separately from, the injury by accident provisions.⁶⁶ For example, a claimant may file a claim alleging alternatively an occupational disease and an injury by accident. Accordingly, a claimant can initially pursue a claim for benefits under an accidental injury theory and thereafter, if the claim is unsuccessful, file another claim for occupational disease.⁶⁷ This practice is not barred by *res judicata* because each claim represents a different cause of action.⁶⁸ Further, as the Virginia Court of Appeals has noted, "[u]nlike claims based on injury by accident, claims arising from an occupational disease may be pursued more

58. *Id.* at 843, 407 S.E.2d at 335.

59. *Id.* at 845, 407 S.E.2d at 337.

60. For a discussion of occupational disease claims in Virginia through 1985, see Elizabeth V. Scott, *Workers' Compensation for Disease in Virginia: The Exception Swallows the Rule*, 20 U. RICH. L. REV. 161 (1985).

61. VA. CODE ANN. § 65.2-400 (Repl. Vol. 1991).

62. *Id.* § 65.2-401.

63. Act of Apr. 2, 1986, ch. 378, 1986 Va. Acts 623 (codified at VA. CODE ANN. § 65.2-401 (Repl. Vol. 1991)).

64. *Virginia Dep't of State Police v. Talbert*, 1 Va. App. 250, 337 S.E.2d 307 (1985).

65. VA. CODE ANN. § 65.2-401 (Repl. Vol. 1991).

66. See *supra* notes 9-43 and accompanying text.

67. *Wood v. Allison Apparel Mktg., Inc.*, 11 Va. App. 352, 398 S.E.2d 110 (1990).

68. *Id.*

than once when based on different medical evidence establishing the disease."⁶⁹

VII. ORDINARY DISEASE OF LIFE

Ordinary disease claims are decided "on a case by case basis, adhering to the strict proof that is required in the statute."⁷⁰

Probably the most prevalent type of workers' compensation claim is one involving an injury to the back. In *Holly Farms/Federal Co. v. Yancey*,⁷¹ the Industrial Commission found that a lumbar strain constituted an ordinary disease of life and awarded compensation benefits. The Supreme Court of Virginia reversed and held that a back injury which developed over a period of time must be considered an injury and cannot qualify as an occupational disease.⁷²

An increased awareness of the physical and mental strain imposed by various aspects of employment has increased both the number of people seeking treatment and the number of claimants pursuing compensation.⁷³ Emotional stress has been found by the Commission to be an ordinary disease of life.⁷⁴ Accordingly, a claimant must meet the more stringent "clear and convincing" proof requirements of section 65.2-401 when her claim involves emotional stress.⁷⁵

An area which has received attention by the courts recently is post-traumatic stress syndrome (PTSD). In *Hercules, Inc. v. Gunther*,⁷⁶ the claimant was delivering rocket propellant when it exploded. The force lifted him off the ground and caused the death

69. *AMP, Inc. v. Ruebush*, 10 Va. App. 270, 274, 391 S.E.2d 879, 881 (1990).

70. *Ingersoll-Rand Co. v. Musick*, 7 Va. App. 684, 687, 376 S.E.2d 814, 816 (1989) (hearing loss).

71. 228 Va. 337, 321 S.E.2d 298 (1984).

72. *Id.* at 341, 321 S.E.2d at 300.

73. VIRGINIA LAW FOUNDATION, WORKERS' COMPENSATION FOR THE EMPLOYER'S ATTORNEY AND CLAIMANT'S ATTORNEY 13 (4th ed. 1992). In 1989, there were 56,922 lost time claims and 156,914 minor medical claims filed for a total of 213,836. In 1990, the lost time claims totalled 61,849 with 155,607 minor medical claims. In 1991, there were 59,943 lost time claims and 123,603 minor medical claims. As of September 1, 1992, there have been 35,931 lost time claims and 90,409 minor medical claims for a total of 126,340. Telephone interview with Jim Sutton, Virginia Workers' Compensation Commission (Sept. 1, 1992). See also Exec. Order No. 50(92), *supra* note 5, at 1.

74. *Mitchell v. City of Newport News*, 65 O.I.C. 126 (1986).

75. See *supra* notes 64-65 and accompanying text.

76. 13 Va. App. 357, 412 S.E.2d 185 (1991).

of two of his coworkers. He was able to return to work the next day but continued to suffer from anxiety-related symptoms. Ultimately, he was diagnosed as suffering from PTSD.⁷⁷

The employer's defense rested on *Chesterfield County Fire Department v. Dunn*,⁷⁸ where the court of appeals held that PTSD does not constitute an injury by accident.

The court of appeals distinguished *Dunn* and held that in this case PTSD was an injury by accident as it related to the "obvious sudden shock or fright which [the claimant] sustained in the course of his employment."⁷⁹

The Virginia Court of Appeals has also held that "[e]motional harm following physical injury is compensable, even when the physical injury does not directly cause the emotional consequence."⁸⁰ Applying this rule, the court awarded compensation to an employee who developed headaches and panic attacks after being sprayed in the face with aerosol insecticide.⁸¹ In contrast, the court of appeals in *Dunn* refused to award benefits to an emergency medical technician (EMT) who developed post-traumatic stress syndrome after treating a severely injured man who later died.⁸² The court found that the EMT failed to prove an injury by accident.⁸³ This case, decided in 1990, concerned a 1985 "injury" and a diagnosis in June, 1986.⁸⁴ It should be noted that the injury in *Dunn* preceded the enactment of section 65.1-46.1 (now 65.2-401), which allows recovery for ordinary diseases of life as an occupational disease.⁸⁵

VIII. STATUTORY EMPLOYERS

The concept of statutory employer has great significance in the areas of workers' compensation and personal injury law by providing a source of insurance coverage when the immediate employer lacks coverage. In a personal injury context, it can provide a de-

77. *Id.* at 359, 412 S.E.2d at 186.

78. 9 Va. App. 475, 389 S.E.2d 180 (1990).

79. *Gunther*, 13 Va. App. at 363, 412 S.E.2d at 188.

80. *Seneca Falls Greenhouse & Nursery v. Layton*, 9 Va. App. 482, 486, 389 S.E.2d 184, 187 (1990).

81. *Id.* at 485, 389 S.E.2d at 186.

82. *Dunn*, 9 Va. App. at 476, 389 S.E.2d at 181.

83. *Id.* at 477, 389 S.E.2d at 181.

84. *Id.* at 476, 389 S.E.2d at 181.

85. VA. CODE ANN. § 65.2-401 (Repl. Vol. 1991).

fense pursuant to the exclusivity provisions of the Act. Statutory employers are covered by section 65.2-302 of the Code.⁸⁶

The purpose of this statute and its predecessors is to extend the coverage of the Act to

all persons engaged in work that is part of the trade, business, or occupation of the party who undertakes as owner or who contracts as contractor to perform the work, and to make liable to every employee engaged in the work every such owner, contractor or subcontractor above such employee.⁸⁷

Only "other parties" or "strangers to the employment" are subject to liability in a civil action. "Fellow employees" and employers are protected by the Act. The 1991 amendment to the statute was designed to clarify these relationships.⁸⁸

The cases in which an employee is seeking compensation from an employer or owner are referred to as "right side up" cases. Cases in which the employee seeks civil damages instead of compensation from the owner are referred to as "upside down" cases. Regardless of the posture of the case, courts must liberally construe the Act in favor of providing workers' compensation coverage.⁸⁹

In *Nichols v. VVKR, Inc.*,⁹⁰ the Virginia Supreme Court went through the analysis required in evaluating the use of an earlier version of section 65.1-29 as a bar to civil liability. The first question is whether the "nature" of the owner makes it a private or public enterprise.⁹¹ This issue is significant because it determines the standard to be applied. If the owner is a private entity, a court will determine whether the activity is one normally carried out by employees rather than independent contractors. If the owner is a

86. VA. CODE ANN. § 65.2-302 (Repl. Vol. 1991).

87. *Smith v. Horn*, 232 Va. 302, 305, 351 S.E.2d 14, 16 (1986) (suit by an employee of one independent contractor barred against an employee of another independent contractor hired by the same owner).

88. See CODE COMMISSION REPORT, *supra* note 7, at introduction.

89. See generally *Henderson v. Central Telephone Co.*, 233 Va. 377, 355 S.E.2d 596 (1987).

90. 241 Va. 516, 403 S.E.2d 698 (1991). See also *Ford v. City of Richmond*, 239 Va. 664, 391 S.E.2d 270 (1990) (municipality was statutory employer of contractor's employee).

91. *Nichols*, 241 Va. at 520, 403 S.E.2d at 701.

public or governmental entity, its business will be deemed to include everything that the entity is authorized to do.⁹²

In *Nichols*, the supreme court found that an employee of a subcontractor could sue an allegedly negligent architectural and engineering firm which contracted with an independent public agency. The firm could not make use of the rule applicable to governmental owners.⁹³

In *Evans v. Hook*,⁹⁴ the court reached a different conclusion. *Evans* involved an injured construction company employee who filed suit against the masonry contractor and the architect involved in the project. This case differed from *Nichols* in that there the court found that the construction and rehabilitation of the facility was not a part of the trade, business, or occupation of the transit company.⁹⁵

The statutory employer question arises most often in construction cases;⁹⁶ however, it can be seen in many other business situations. In *Carmody v. F.W. Woolworth Co.*,⁹⁷ an employee of Photo Corporation of America (PCA) was injured while working in a Woolco Department Store. After receiving workers' compensation from PCA, he filed suit against F.W. Woolworth. PCA had a license from Woolworth to operate a portrait photography department in its store in exchange for 10% of the sales made. Woolworth did all of the advertising in its own name, and the PCA name was not used. PCA employees wore Woolworth uniforms and were required to follow the Woolworth employee rules and regulations.⁹⁸ The supreme court affirmed the trial court's finding that the plaintiff was a statutory employee of Woolworth, stating that PCA "was in the business of retail sales and its business represented merely an extension of the owner's retail sales business to include an additional type of goods."⁹⁹

92. *Id.*

93. *Id.* at 522, 403 S.E.2d at 702.

94. 239 Va. 127, 387 S.E.2d 777 (1990).

95. See *supra* notes 90-93 and accompanying text.

96. See *Cinnamon v. IBM*, 238 Va. 471, 384 S.E.2d 618 (1989) (manufacturer who hired a general contractor who subcontracted work to the plaintiff's direct employer is not the statutory employer of the plaintiff); *Henderson v. Central Telephone Co.*, 233 Va. 377, 355 S.E.2d 596 (1987); *Whalen v. Dean Steel Erection Co.*, 229 Va. 164, 327 S.E.2d 102 (1985); *A.G. Van Metre, Jr., Inc. v. Gandy*, 7 Va. App. 207, 372 S.E.2d 198 (1988).

97. 234 Va. 198, 361 S.E.2d 128 (1987).

98. *Id.* at 202, 361 S.E.2d at 130.

99. *Id.* at 206, 361 S.E.2d at 132.

It must be noted that for the statutory employer issue to arise, the injured party must be an "employee" as defined by the Act. For example, a self-employed truck driver who owns his own equipment and is injured while moving trailers for a flat rate per trailer is an independent contractor and not an employee.¹⁰⁰ The Supreme Court of Virginia has consistently declined to extend coverage of the Act "by judicial fiat" leaving any such extension to the province of the General Assembly.¹⁰¹

IX. EXCLUSIVITY

In *Haddon v. Metropolitan Life Insurance Company*,¹⁰² the plaintiff filed a civil action against her employer and a supervisor, alleging that she had been subjected to harassment and sex discrimination. The defendants demurred on the ground that the action was barred by the exclusivity provisions of the Workers' Compensation Act. The trial court sustained the demurrers, and the plaintiff appealed.¹⁰³

On appeal, the plaintiff argued that (1) this was not an injury "by accident"¹⁰⁴ and (2) there should be an exception to the exclusivity provision in cases of intentional torts.¹⁰⁵ The court rejected both arguments and found that the actions complained of fell within the ambit of the Act.¹⁰⁶ Soon thereafter, in *Kelly v. First Virginia Bank*,¹⁰⁷ the supreme court found that the Act barred a bank employee's sexual harassment civil suit against her supervisor.¹⁰⁸ In response to these cases, the General Assembly amended section 65.2-301 to remove sexual harassment claims from coverage under the Act.¹⁰⁹

100. *Intermodel Servs., Inc. v. Smith*, 234 Va. 596, 607, 364 S.E.2d 221, 228 (1988).

101. *Id.* at 603. A contractor cannot avoid the coverage of the Act by performing all of his work through subcontractors and having no employees of his own. The employees of all of the subcontractors can be added together in order to meet the "three or more employee" requirement. *Smith v. Weber*, 3 Va. App. 379, 350 S.E.2d 213 (1986).

102. 239 Va. 397, 389 S.E.2d 712 (1990).

103. *Id.* at 398, 389 S.E.2d at 713.

104. *Id.*

105. *Id.* at 399, 389 S.E.2d at 713.

106. *Id.* at 400, 389 S.E.2d at 714.

107. 404 S.E.2d 723 (1991). Strong dissents were filed by Justice Hassell and by Justice Lacy, with whom Justice Whiting joined.

108. *Id.*

109. Act of Mar. 26, 1992, ch. 469, 1992 Va. Acts 603 (codified at VA. CODE ANN. § 65.2-301 (Cum. Supp. 1992)).

In another decision, the Act was held not to bar similar actions. In *Snead v. Harbaugh*,¹¹⁰ the supreme court held that a defamation action was not barred by the Act. The court noted that the plaintiff claimed only general damages and not personal injury. It specifically noted that the issue of whether defamation had caused physical injury or emotional distress was not before the court, implying that the result might be different in such cases.¹¹¹

In addition, an employee can recover pursuant to the employer's self-insured uninsured motorist plan if the accident involves a third party, rather than a fellow employee. The "exclusivity provision" does not serve as a bar.¹¹²

X. SETTLEMENT OF THIRD PARTY CLAIMS

Often a workers' compensation claim will also give rise to a personal injury claim against a third party. The employer/insurer has a lien against any recovery for medical and compensation benefits which have been paid. Those who fail to consult with the carrier prior to settling the third party case do so at their peril.

In *Ball v. C.D.W. Enterprises, Inc.*,¹¹³ the claimant was injured when the crane he was operating came into contact with an electrical wire. The claimant filed a five million dollar lawsuit that ultimately was settled for five thousand dollars without the knowledge or consent of the employer/insurer. By that time, the compensation lien was three hundred thousand dollars. Because of the settlement, the claimant's right to any further compensation and medical benefits terminated.¹¹⁴

The claimant argued that his rights to compensation should not have been terminated because he received none of the proceeds from the settlement. The court disagreed, stating that "[t]he termination of the appellant's right to further compensation derives not from what he may have received, but rather from his extinguishment of the subrogation rights of the employer and insurer."¹¹⁵

110. 241 Va. 524, 404 S.E.2d 53 (1991). *Snead* involved a defamation claim brought by a tenured faculty member against the dean and faculty of the University of Richmond's T.C. Williams School of Law. *Id.* at 525, 404 S.E.2d at 54.

111. *Id.* at 527, 404 S.E.2d at 55.

112. *William v. City of Newport News*, 240 Va. 425, 434, 397 S.E.2d 813, 818 (1990).

113. 13 Va. App. 470, 413 S.E.2d 66 (1992).

114. *Id.* at 471, 413 S.E.2d at 67.

115. *Id.* at 474, 413 S.E.2d at 69.

*Green v. Warwick Plumbing & Heating Corp.*¹¹⁶ concerned the related and often encountered situation in which a claimant's compensable injury is exacerbated by a subsequent non-work injury. In *Green*, the claimant was injured in May, 1983 and received benefits until they were terminated by the Commission. In March, 1984, he was involved in an automobile accident which exacerbated his 1983 injury. The resulting accident case was settled without the consent of the carrier. The court of appeals found that the right to compensation was extinguished even though the employer failed to pay any of the medical expenses related to the accident and had failed to intervene as a third party in the case.¹¹⁷

In *City of Newport News v. Blankenship*,¹¹⁸ however, the settlement of a third party claim without the consent of the employer did not terminate the party's right to future payments because the exacerbation of the work-related injury was merely temporary (eleven days of disability) and the claimant returned to his pre-second injury condition.¹¹⁹

XI. ESTOPPEL AND THE STATUTE OF LIMITATIONS

If a claim for benefits is not "filed" within two years of the date of the injury, the claim is forever barred.¹²⁰ Since most cases are not contested and are handled directly between employees and insurance carriers or servicing agencies, there is a great opportunity for informality or inattention which may lead to a claim not being filed within the statutory period.

Voluntary payment of compensation or medical benefits, without more, does not estop the employer from asserting the statute of limitations.¹²¹ However, when such payments are accompanied by representations of continued payments and the claimant is induced to not file a claim, the statute of limitations cannot be used as a defense.¹²² In such instances, when there is an "imposition on the

116. 5 Va. App. 409, 364 S.E.2d 4 (1988).

117. *Id.* at 412, 364 S.E.2d at 6.

118. 10 Va. App. 704, 396 S.E.2d 145 (1990).

119. *Id.*

120. VA. CODE ANN. §§ 65.2-406, -601 (Repl. Vol. 1991). However, certain occupational diseases are addressed by a three-year statute of limitations and the cause of action may accrue upon discovery. *Id.* § 65.2-406.

121. *Rose v. Red's Hitch & Trailer Serv.*, 11 Va. App. 55, 396 S.E.2d 392 (1990).

122. *Nabisco Brands, Inc. v. Jones*, 12 Va. App. 1028, 1032-33, 407 S.E.2d 919, 921 (1991).

Commission and the claimant," the employer is estopped from relying on the statute of limitations.¹²³

In addition, under the new section 65.2-602, if (i) the employer has notice of an accident and pays compensation or wages during the period of disability and (ii) fails to file an employer's first report of accident and (iii) this has prejudiced the employee's rights with respect to filing a claim within the limitation period, the period is tolled for the length of time that payments are made or until the first report is filed.¹²⁴

Mutual mistake that an open award is in place does not estop an employer from asserting affirmative defenses to the claim.¹²⁵ Nor does failure of the employer to file an accident report.¹²⁶

Finally, payment of compensation under the Longshore and Harbor Workers' Compensation Act,¹²⁷ with no filings under the state Act, does not toll the limitation period.¹²⁸

XII. CONCLUSION

As in most areas of the law, Virginia courts continue to decline the opportunity to expand the scope of the Workers' Compensation Act to reflect advances in medical diagnosis and changes in society at large. That task has been left to the General Assembly, and with the Governor's Advisory Commission set to make its recommendations in December, the door is open for more change in the near future.

123. *Avon Products, Inc. v. Ross*, 14 Va. App. 1, 8, 415 S.E.2d 225, 229, (1992).

124. VA. CODE ANN. § 65.2-602 (Repl. Vol. 1991).

125. *Niblett v. Piedmont Aviation, Inc.*, 12 Va. App. 652, 655, 405 S.E.2d 635, 637 (1991).

126. *Hervey v. Newport News Shipbuilding & Dry Dock Co.*, 12 Va. App. 88, 92, 402 S.E.2d 688, 690 (1991).

127. 33 U.S.C. §§ 901-950 (1988).

128. *Bowden v. Newport News Shipbuilding & Dry Dock Co.*, 11 Va. App. 683, 686-88, 401 S.E.2d 884, 886 (1991).

