

1998

Annual Survey of Virginia Law: Workers' Compensation

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Recommended Citation

Daniel E. Lynch, *Annual Survey of Virginia Law: Workers' Compensation*, 32 U. Rich. L. Rev. 1421 (1998).

Available at: <http://scholarship.richmond.edu/lawreview/vol32/iss4/15>

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WORKERS' COMPENSATION

*Daniel E. Lynch**

I. INTRODUCTION

This article addresses the most significant developments in the law of workers' compensation since September 1997. The areas discussed consist of the following: (1) injury by accident claims; (2) occupational disease claims; (3) benefits and coverage under the Workers' Compensation Act; (4) panels of physicians; and (5) 1998 legislative changes affecting workers' compensation. Emphasis has been placed on the most important developments in this area of law with respect to decisions of the Supreme Court of Virginia and the Virginia Court of Appeals, as well as new legislation.

II. INJURY BY ACCIDENT CLAIMS

A. *Exposure to Extreme Temperatures*

In *Southern Express v. Green*,¹ the claimant worked at a convenience store stacking beer and soft drinks in a refrigerated room during a period of up to four hours wearing only a short-sleeved shirt with no gloves.² The claimant was diagnosed with chilblains³ and superficial frostbite caused by long-term

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

1. 26 Va. App. 439, 495 S.E.2d 500 (Ct. App. 1998).

2. See *id.* at 440, 495 S.E.2d at 500-01.

3. Chilblains is a "condition brought on by exposure to cold, damp weather and expressed by painful redness of the skin and by itching." SCHMIDT'S ATTORNEY'S DICTIONARY OF MEDICINE 164 (1962); see also DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 331 (28th ed. 1994).

exposure to cold temperature.⁴ Citing *Byrd v. Stonega Coke & Coal Co.*,⁵ the full Workers' Compensation Commission ("Commission") determined that Green contracted this condition from exposure to cold at work and found that the "testimony and medical reports established an 'injury by accident' arising out of and in the course of [the claimant's] employment."⁶

Citing *Byrd*, the Virginia Court of Appeals affirmed the decision of the full Commission in *Green*, finding that "the [C]ommission did not err when it concluded that a condition resulting from exposure to extreme temperatures may still constitute an 'injury by accident.'"⁷ In *Green*, the facts established an extraordinary exposure to cold temperatures which subjected the claimant to an increased hazard in the refrigerated room.⁸ In finding this claim to be compensable, the court reasoned that the harmful exposure the claimant experienced was due to a particular and specific work event and that the chilblains and frostbite were the result of sudden mechanical or structural changes in the body which occurred when the claimant's body reached a critical point of chilling.⁹

B. *Failure to Comply with Medical Restrictions*

In *Carpet Palace, Inc. v. Salehi*,¹⁰ the Virginia Court of Appeals reversed the full Commission's finding that the claimant sustained a compensable injury by accident when he failed to comply with lifting restrictions.¹¹ In *Salehi*, the claimant, who was the owner and president of Carpet Palace, Inc. since 1976, initially suffered a compensable injury to his back on Novem-

4. See *Green*, 26 Va. App. at 441, 495 S.E.2d at 501.

5. 182 Va. 212, 215, 28 S.E.2d 725, 727 (1944) (holding that injuries caused by exposure to extreme temperatures may constitute an "injury by accident" under the Workers' Compensation Act).

6. *Green*, 26 Va. App. at 441, 495 S.E.2d at 501 (quoting *Byrd*, 182 Va. at 215, 28 S.E.2d at 727).

7. *Id.* at 444-45, 495 S.E.2d at 502-03 (holding further that *Byrd* had not been overturned by the Supreme Court of Virginia's decision in *Stenrich Group v. Jemmott*, 251 Va. 186, 467 S.E.2d 795 (1996), and its progeny).

8. See *id.* at 445, 495 S.E.2d at 503.

9. See *id.* at 445-46, 495 S.E.2d at 503.

10. 26 Va. App. 357, 494 S.E.2d 870 (Ct. App. 1998).

11. See *id.* at 362-63, 494 S.E.2d at 872-73.

ber 14, 1977, while lifting a heavy roll of carpeting.¹² The injury ultimately resulted in a settlement of his workers' compensation claim for \$20,000 and lifetime medical benefits.¹³ The claimant sought medical treatment on eight occasions for back pain following heavy lifting at work from 1977 through 1993. He was hospitalized at least four times for treatment of back pain, and he had at least two surgical procedures following his 1977 accident.¹⁴ The claimant's doctors imposed restrictions on repetitive bending and lifting over twenty-five pounds after his 1979 surgery.¹⁵

On October 3, 1994, upon moving a large box of carpet samples, the claimant immediately felt pain in his back and in his right leg.¹⁶ The claimant acknowledged having the lifting restriction and conceded that he violated the restriction.¹⁷ The Commission found the claim compensable.¹⁸

On appeal, the employer contended that the claimant did not sustain a compensable injury by accident because his injury resulted from his failure to comply with ongoing medical restrictions.¹⁹ The court of appeals agreed with the employer and reversed the decision of the Commission by finding that the claim was not compensable.²⁰ Citing the court of appeal's decision in *Dollar General Store v. Cridlin*,²¹ the court noted that an injury by accident must be "unexpected" in order to be compensable.²² The court indicated that "[t]he basic and indispensable ingredient of 'accident' is unexpectedness."²³ In reversing the Commission, the court reasoned that the claimant was aware of the lifting restrictions imposed by his doctor after the surgery in 1979, and he knew that the twenty-five pound lifting restriction was intended to prevent exactly the type of injury

12. *See id.* at 359, 494 S.E.2d at 871.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.* at 359-60, 494 S.E.2d at 871.

18. *See id.* at 361, 494 S.E.2d at 872.

19. *See id.*

20. *See id.* at 362-63, 494 S.E.2d at 872-73.

21. 22 Va. App. 171, 468 S.E.2d 152 (Ct. App. 1996).

22. *See Salehi*, 26 Va. App. at 361, 494 S.E.2d at 872.

23. *Id.* (quoting 2 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW, § 37.20 (1997) (internal quotation omitted)).

that occurred on October 3, 1994.²⁴ Nevertheless, the claimant lifted the heavy box, and the court noted that the resulting back injury "was a predictable consequence of claimant's voluntary defiance of his lifting restriction."²⁵ The court determined that the claimant's injury was the expected result of an activity that violated his physician's specific restrictions; therefore, the injury did not constitute an injury by accident.²⁶

III. OCCUPATIONAL DISEASE CLAIMS

A. *Line of Duty Presumption*

A decision of particular significance to municipalities in the Commonwealth of Virginia is the case of *Augusta County Sheriff's Department v. Overbey*.²⁷ *Overbey* involved Virginia Code section 65.2-402(B) "which creates a presumption that a deputy sheriff's heart disease was an occupational disease suffered in the line of duty 'unless such presumption is overcome by a preponderance of competent evidence to the contrary.'"²⁸ *Overbey* suffered a myocardial infarction, or heart attack, for which he filed a claim for workers' compensation benefits against his employer.²⁹ Augusta County Sheriff's Department denied this claim, "[a]sserting that the claimant's disability was not the result of an occupational disease suffered in the line of his duties as a deputy sheriff."³⁰ The full Commission, as affirmed by the Virginia Court of Appeals, found the claim compensable because the employer's evidence was not sufficient to overcome the line of duty presumption of Virginia Code sec-

24. *See id.* at 362, 494 S.E.2d at 872.

25. *Id.*

26. *See id.* at 362, 494 S.E.2d at 872-73.

27. 254 Va. 522, 492 S.E.2d 631 (1997).

28. *Id.* at 524, 492 S.E.2d at 632. Virginia Code section 65.2-402(B) provides:

Hypertension or heart disease causing the death of, or any health condition or impairment resulting in total or partial disability of . . . (iii) members of county, city or town police departments, (iv) sheriffs and deputy sheriffs . . . shall be presumed to be occupational diseases, suffered in the line of duty, that are covered by this title unless such presumption is overcome by a preponderance of competent evidence to the contrary.

VA. CODE ANN. § 65.2-402(B) (Cum. Supp. 1998).

29. *See Overbey*, 254 Va. at 524, 492 S.E.2d at 632.

30. *Id.*

tion 65.2-402(B).³¹ Finding that this case involved a matter of significant precedential value, the Supreme Court of Virginia awarded an appeal to the employer.³²

The supreme court reversed the decision of the court of appeals by finding that the employer's introduction of competent medical evidence of a non-work-related cause of the claimant's heart attack was sufficient to rebut the statutory line of duty presumption.³³ This evidence included the following risk elements considered by the claimant's treating physician as being causative factors: (i) a history of heavy smoking; (ii) elevated cholesterol; (iii) a family history of heart trouble; and (iv) non-insulin dependent diabetes mellitus, coupled with a strong family history of diabetes.³⁴ Additionally, the claimant had been experiencing personal difficulties, including his wife's suspension from her job, being charged with embezzlement and forgery a few days later, and his separation from his wife approximately a week before his heart attack.³⁵ The treating physician gave the opinion that the claimant's employment was not a risk factor or a cause of his heart disease, although it was possible that stress may have been a contributing factor.³⁶

In denying this claim, the Supreme Court of Virginia noted that the employer does not have the burden of excluding the possibility that job-related stress may have been a contributing factor to heart disease.³⁷ The employer had introduced sufficient evidence to rebut the statutory presumption; thus, the claimant "had the burden of 'establishing by clear and convincing evidence, to a reasonable medical certainty,' that his heart disease arose out of and in the course of his employment."³⁸ Because the claimant failed to do so, his application for benefits was dismissed.³⁹

31. *See id.* at 524, 492 S.E.2d at 632-33.

32. *See id.* at 524, 492 S.E.2d at 633.

33. *See id.* at 527, 492 S.E.2d at 634.

34. *See id.* at 525, 492 S.E.2d at 633.

35. *See id.*

36. *See id.*

37. *See id.* at 526-27, 492 S.E.2d at 634.

38. *Id.* at 527, 492 S.E.2d at 634 (citing VA. CODE ANN. § 65.2-401 (Cum. Supp. 1997)).

39. *See id.*

B. *Allergic Contact Dermatitis*

In *A New Leaf, Inc. v. Webb*,⁴⁰ the Virginia Court of Appeals affirmed the Commission's decision that the claimant's condition of allergic contact dermatitis was a compensable disease under the Workers' Compensation Act.⁴¹ In *Webb*, the claimant was employed by A New Leaf, Inc. as a floral designer.⁴² The claimant began working for this employer in October 1993, and her duties included designing and constructing floral arrangements and processing flowers for delivery to stores.⁴³ In March 1995, she noticed blisters and a "splotchy area" on her right index finger and palm. She subsequently was diagnosed with allergic contact dermatitis to the flowers with which she worked.⁴⁴ The claimant filed a claim for benefits stating that her allergic contact dermatitis was a compensable occupational disease.⁴⁵ The defendant contended that allergic contact dermatitis is not a compensable disease under the Workers' Compensation Act.⁴⁶ The Commission found the claim compensable and determined that the "evidence did not establish that cumulative traumatic insults resulting from repetitive motion caused the claimant's condition,"⁴⁷ thereby distinguishing this claim from *Stenrich Group v. Jemmott*.⁴⁸ The Commission also found that allergic contact dermatitis is caused by exposure over time to a particular causative agent that results in an adverse reaction.⁴⁹

Affirming the Commission and awarding benefits, a majority of the panel of the court of appeals reasoned that the record in

40. 26 Va. App. 460, 495 S.E.2d 510 (Ct. App. 1998).

41. See *id.* at 474, 495 S.E.2d at 517.

42. See *id.* at 462, 495 S.E.2d at 511.

43. See *id.* (explaining that "[p]rocessing flowers entails removing excess foliage from flowers, cutting their stems, and placing them in water").

44. See *id.* at 463, 495 S.E.2d at 511.

45. See *id.* at 464, 495 S.E.2d at 512.

46. See *id.*

47. *Id.* at 464, 495 S.E.2d at 512 (citing *Stenrich Group v. Jemmott*, 251 Va. 186, 467 S.E.2d 795 (1996) (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 provisions of the Act").

48. 251 Va. 186, 199, 467 S.E.2d 795, 802 (1996).

49. See *id.* at 468, 495 S.E.2d at 514.

the case established that the claimant's allergic contact dermatitis, which was incurred over time, was not a result of cumulative trauma caused by repetitive motion. Rather, the majority noted that allergic contact dermatitis is caused by the reaction of an individual's immune system with a substance to which the individual has developed a hypersensitivity.⁵⁰ Moreover, the court of appeals determined that the claimant's condition was a disease when evaluated based upon the policies underlying the supreme court's prior construction of the term "disease," the purpose of the Workers' Compensation Act, and the nature of the claimant's ailment.⁵¹ The court concluded that covering a florist's allergic contact dermatitis as a disease is consistent with the intent of the General Assembly and "does not threaten to erode the injury by accident/occupational-disease dichotomy or to create a loophole that enables compensation of gradually incurred traumatic injuries."⁵²

IV. BENEFITS AND COVERAGE UNDER THE WORKERS' COMPENSATION ACT

A. *Permanent and Total Disability*

Pursuant to Virginia Code section 65.2-503, compensation shall be awarded under Virginia Code section 65.2-500 for permanent and total incapacity when there is "[l]oss of both hands, both arms, both feet, both legs, both eyes, or any two thereof in the same accident."⁵³ The statute further provides that "[i]n construing this section, the permanent loss of the use of a member shall be equivalent to the loss of such member."⁵⁴

In the case of *Georgia-Pacific Corp. v. Dancy*,⁵⁵ the Supreme Court of Virginia faced the issue of whether a claimant qualified for permanent and total disability benefits where the evi-

50. See *id.* at 468-69, 495 S.E.2d at 514-15. Judge Fitzpatrick dissented, noting that the rule from *Jemmott*, 251 Va. at 199, 467 S.E.2d at 802, and its progeny mandates reversal of the award of the Commission. See *id.* at 476, 495 S.E.2d at 518 (Fitzpatrick, J., dissenting).

51. See *id.* at 471, 495 S.E.2d at 515.

52. *Id.* at 474, 495 S.E.2d at 517.

53. VA. CODE ANN. § 65.2-503(C)(1) (Cum. Supp. 1998).

54. *Id.* § 65.2-503(D) (Cum. Supp. 1998).

55. 255 Va. 248, 497 S.E.2d 133 (1998).

dence established that the claimant had a 100% disability to his left leg and a fifteen percent disability to his right leg as a result of his compensable industrial accident.⁵⁶ The full Commission below affirmed the Deputy Commissioner's award of permanent and total disability by finding that the combination of the claimant's two leg injuries rendered him unemployable.⁵⁷

The court of appeals affirmed the Commission's award of permanent and total disability benefits and stated that "the proper inquiry was whether the rated loss of use in Dancy's legs rendered both of Dancy's legs effectively unusable."⁵⁸ The court of appeals held that the Commission correctly based its ruling of permanent and total incapacity on the combined effect of the injuries to both of the claimant's legs.⁵⁹ Determining that the court of appeals' decision involved a matter of significant precedential value, the Supreme Court of Virginia awarded an appeal to the employer.⁶⁰

Affirming the decision of the court of appeals and awarding permanent and total disability wage benefits, the supreme court agreed with the Commission's decision that "the combination of the claimant's right and left leg disabilities, coupled with his inability to work, rendered him permanently and totally disabled."⁶¹ The court rejected the employer's contentions that the claimant had to establish either that each leg was unusable in employment or that it was error for the Commission to consider the combined effect of the disability ratings to both legs when determining the claimant's entitlement to benefits for total and permanent incapacity.⁶²

56. *See id.* at 249-50, 497 S.E.2d at 133-34.

57. *See id.*

58. *Id.* (quoting *Georgia Pacific Corp. v. Dancy*, 24 Va. App. 430, 437, 482 S.E.2d 867, 871 (Ct. App. 1997)).

59. *See id.*

60. *See id.* at 251, 497 S.E.2d at 134.

61. *Id.* at 253, 497 S.E.2d at 135.

62. *See id.*

B. *Penalty for Late Payment of Wage Benefits*

In *Cousar v. Peoples Drug Store*,⁶³ the Virginia Court of Appeals addressed the issue of whether wage benefit payments awarded by the court become due at the time of the entry of a final order of the court or upon the expiration of the time provided for on appeal to the supreme court.⁶⁴ Holding that the wage benefit payments become due at the time of the entry of a final order of the court, the court of appeals acknowledged that Virginia Code section 65.2-524 specifically suspends the penalty pending an appeal of right to the full Commission from a Deputy Commissioner's decision within twenty days or an appeal of right to the Virginia Court of Appeals within thirty days but goes no further.⁶⁵ The court noted that while Virginia Code section 65.2-524 specifically provides for the suspension of payment during the periods of application for a review of right to the full Commission and to the court of appeals, this code provision, as amended, specifically does not include relief from the statutory penalty during an appeal to the supreme court.⁶⁶ The court in *Cousar* reasoned that it could not add additional protection to a statute so limited in scope.⁶⁷

V. PANELS OF PHYSICIANS

The Virginia Court of Appeals held that a chiropractor is not a physician for purposes of designation to a panel of physicians pursuant to Virginia Code section 65.2-603(A)(1) in the case of *Gray v. Graves Mountain Lodge, Inc.*⁶⁸ In *Gray*, the claimant sustained compensable injuries to her neck, back, and hips, and the insurance carrier presented a new panel of physicians to

63. 26 Va. App. 740, 496 S.E.2d 670 (Ct. App. 1998).

64. *See id.* at 743, 496 S.E.2d at 671.

65. *See id.* at 744, 496 S.E.2d at 672.

66. *See id.* at 745, 496 S.E.2d at 673.

67. *See id.*

68. 26 Va. App. 350, 494 S.E.2d 866 (Ct. App. 1998); *see also* VA. CODE ANN. § 65.2-603(A)(1) (Cum. Supp. 1998) (stating "[a]s long as necessary after an accident, the employer shall furnish or cause to be furnished, free of charge to the injured employee, a physician chosen by the employee from a panel of at least three physicians selected by the employer and such other necessary medical attention").

the claimant pursuant to Virginia Code section 65.2-603 (A)(1).⁶⁹ The panel consisted of two orthopaedic surgeons and a chiropractor.⁷⁰ The claimant objected to the panel and asserted that a chiropractor is not a physician within the meaning of Virginia Code section 65.2-603(A).⁷¹

This issue was decided on the record without an evidentiary hearing.⁷² After both parties submitted written statements in support of their respective positions, the Deputy Commissioner ruled that chiropractors are appropriate health care providers for inclusion on a panel of physicians because of the long standing policy approving chiropractors as treating physicians.⁷³ The full Commission affirmed the Deputy Commissioner's opinion and stated, "the Commission has consistently held that a chiropractor is a proper attending physician when appropriately selected by the claimant. Additionally, the Commission has approved a chiropractor as the attending physician when selected from a panel provided by the employer."⁷⁴

The court of appeals reversed the decision of the full Commission and held that chiropractors are not physicians as contemplated by Virginia Code section 65.2-603(A).⁷⁵ According to the court, "if the legislature had intended the term 'physician' to include chiropractors, it could have specifically included language . . . to state that a chiropractor shall be deemed a 'physician' within the subsection. We cannot read such language into the statute when the legislature did not include it."⁷⁶ The court noted that "it is clear from the language of the statute that the legislature did not intend the term 'physician' as that term is used in Code § 65.2-603, to include chiropractors."⁷⁷

69. *See Gray*, 26 Va. App. at 351-52, 494 S.E.2d at 867.

70. *See id.*

71. *See id.* at 352, 494 S.E.2d at 867.

72. *See id.*

73. *See id.*

74. *Id.* at 352, 494 S.E.2d at 867-68.

75. *See id.* at 357, 494 S.E.2d at 870.

76. *Id.* at 355, 494 S.E.2d at 869.

77. *Id.* at 356, 494 S.E.2d at 869. In footnote number four, however, the court stated:

This holding does not change the Commission's long standing precedent that where an employer fails to provide a panel of physicians, the employee has the right to seek on his or her own medical attention, including chiropractic treatment Likewise, when a physician refers an

VI. 1998 LEGISLATIVE CHANGES AFFECTING WORKERS' COMPENSATION

Virginia Code section 65.2-525 was amended to increase from \$300 to \$10,000 the amount of compensation payments which may be made to the parent or guardian of a minor.⁷⁸ This code provision was further amended to increase from \$300 to \$10,000 the amount over which the payments shall be made to a guardian or conservator of a minor or an incapacitated adult.⁷⁹

The General Assembly amended Virginia Code section 65.2-705, which governs the deadline for requesting a review by the full Commission of a Deputy Commissioner's award.⁸⁰ Prior to this amendment, an application for full Commission review of a Deputy Commissioner's award had to be made within twenty days of the date of the award. With the 1998 modification, the twenty-day filing period is computed from the date the parties receive their notice of the award by registered or certified mail.⁸¹

Virginia Code section 65.2-604 has now been amended to permit the representative of (i) an injured employee, (ii) the employer, or (iii) the insurer to request and receive medical reports from any physician providing medical treatment to an injured employee.⁸²

Also, new legislation requires the Commission to provide copies of any written notice, opinion, order or award, to the employee, the employer, and the insurance carrier, and any counsel of record, if represented.⁸³

The burial expenses statute has been amended to increase from \$5,000 to \$10,000 the maximum burial expenses available

employee to a chiropractor for treatment, that service is clearly within the definition of "medical attention" as provided by Code § 65.2-603(A)(1).

Id. at 357, 494 S.E.2d at 870 n.4 (citation omitted).

78. *See* VA. CODE ANN. § 65.2-525 (Cum. Supp. 1998).

79. *See id.*

80. *See id.* § 65.2-705 (Cum. Supp. 1998).

81. *See id.*

82. *See id.* § 65.2-604 (Cum. Supp. 1998).

83. *See id.* § 65.2-715 (Cum. Supp. 1998).

for a deceased worker.⁸⁴ This new legislation further increases from \$500 to \$1,000 the amount of reasonable transportation expenses that an employer may be required to pay for the deceased worker.⁸⁵

Legislation was enacted to increase the maximum premium tax for the purpose of providing funds for compensation benefits awarded against any uninsured or self-insured employer from one-quarter of one percent to one-half of one percent.⁸⁶ This tax ceiling rate will revert to one-quarter of one percent on January 1, 2000.⁸⁷ This amendment also directs the Commission to conduct a study of the Uninsured Employer's Fund focused on (i) the fund's revenue needs, (ii) administration of claims, and (iii) oversight of self-insured employees.⁸⁸

The General Assembly amended Virginia Code section 65.2-603(A) to remove wheelchairs from this code section which limits the reimbursement for specified medical equipment and modifications to an aggregate cost of \$25,000.⁸⁹ Under this amended statute, wheelchairs, walkers, canes, or crutches would be furnished, fitted, and maintained by the employer as the nature of the injury may require without being subject to the \$25,000 lifetime cap.⁹⁰ This new legislation also requires that employers provide prosthetic or orthotic appliances, proper fitting and maintenance, and training in the use of the appliance whenever an accident results in the loss of use of an arm, hand, leg, or foot and not just when an accident results in amputation as previously mandated by this statute.⁹¹

The voluntary payment statute has been amended to allow employers, when making wage benefit payments, to deduct from the payments any voluntary payments which were not due and payable.⁹² This code provision previously allowed deducting the voluntary payments only by shortening the time period by

84. *See id.* § 65.2-512(B) (Cum. Supp. 1998).

85. *See id.*

86. *See id.* § 65.2-1201 (Cum. Supp. 1998).

87. *See id.*

88. *See id.*

89. *See id.* § 65.2-603(A) (Cum. Supp. 1998).

90. *See id.*

91. *See id.*

92. *See id.* § 65.2-520 (Cum. Supp. 1998).

which benefits were paid to the injured employee.⁹³ The new legislation allows the weekly benefits to be reduced by an amount not to exceed one-fourth of the amount of the compensation for as long as necessary in order for the employer to recover his voluntary payment.⁹⁴

93. *See id.*

94. *See id.*

