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WORKERS' COMPENSATION LAW

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8-1 IN GENERAL

8-1.01 Introduction to the Virginia Workers' Compensation Act

The Virginia Workers' Compensation Act ("the Act"), Title 65.2 of the Code of Virginia, is set forth in Va. Code §§ 65.2-100 through 65.2-1206. In addition, the Virginia Workers' Compensation Commission has promulgated thirteen Rules relating to procedural matters and setting forth tables. Administration of the Act is overseen by three Commissioners ("the full Commission") elected by majority vote of each house of the General Assembly for six-year terms. Hearing officers are called Deputy Commissioners.² Hearings take place in or contiguous to the city or county where the injury occurred. Va. Code § 65.2-702(B). The Commission has a main office at 333 East Franklin Street, Richmond, Virginia 23219; telephone (877) 664-2566; fax (804) 823-6957. The Commission also maintains a [website](#). General information, [opinions](#),³ statutes, [Rules of the Commission](#)⁴, forms, and information regarding mediation services and foreign language interpretation may be obtained at this website.

In addition to addressing the Act's general applicability to local governments, this Chapter examines in detail the occupational diseases presumption provisions of the Act. Those provisions are applicable to only certain local government employees.

¹ The authors thank former co-author Ralph L. Whitt, Jr. for his past contributions to this chapter.

² In response to the decision in *Layne v. Crist Electrical Contractor, Inc.*, 62 Va. App. 632, 751 S.E.2d 679 (2013), the General Assembly amended Va. Code § 65.2-705(D) to allow a retired Commissioner to sit by designation if there is a vacancy or absence on the full Commission.

³ All references to opinions published by the Industrial Commission shall be "O.I.C." if rendered before October 1, 1991, and all references to decisions published by the Workers' Compensation Commission shall be "O.W.C." if rendered on or after October 1, 1991. The Commission file number (VWC) is also given for ease in database research. For instance, using [CaseFinder](#), *Weaver v. Fairfax County Police Department*, VWC 175-50-13 (May 31, 2000), may be located by citing 00 WC UNP 1755013. Cases cited by only their VWC file number have not been published as of this writing.

In workers' compensation cases, reference is frequently made to unpublished decisions. This chapter relies on some such cases. While an unpublished opinion of a court has no precedential value, a court or the Commission does not err by considering the rationale and adopting it to the extent it is persuasive. *Fairfax Cnty. Sch. Bd. v. Rose*, 29 Va. App. 32, 509 S.E.2d 525 (1999) (en banc). The Commission itself makes no distinction between published and unpublished decisions with respect to the effect a prior Commission opinion may have on a pending dispute.

⁴ Note that the Rules were amended effective January 4, 2024.

8-1.02 The Act Is the Employee's Exclusive Remedy for Occupational Injury

Virginia Code § 65.2-307 provides that when an employee sustains an injury, the Act is the sole and exclusive remedy available against the employer. The Virginia Supreme Court described the purpose and intent of the Act in an early case as follows:

The Workmen's Compensation Law . . . is as essential to industry as it is to labor. It comprises one of the most important branches of law. Upon its effectiveness depends the potential welfare of a large number of employees and their families. It places upon industry as an expense of the business the pecuniary loss, measured by the compensation provided in the statute, attendant upon all accidents to employees within the hazards of the industry. It extends the employer's liability to all accidental personal injuries "arising out of and in the course of the employment," the expense of which is added to the cost of production. The employer surrenders his right of defense on the ground of contributory negligence and the common-law doctrines of the assumption of risk and fellow servants. The rules of evidence are relaxed. The employee surrenders his right to a trial by jury and agrees to accept an arbitrary amount fixed by statute in lieu of full compensation for the injuries sustained. He gains a wider security. The issue of negligence or non-negligence of the employer and the fellow servants is eliminated. Long, costly and delayed litigation is avoided. A smaller but speedier recovery is guaranteed.

Feitig v. Chalkley, 185 Va. 96, 38 S.E.2d 73 (1946).

The Act is a "carefully balanced societal exchange between the interests of employers, employees, insurers, and the public." *Morris v. Morris*, 238 Va. 578, 385 S.E.2d 858 (1989). Prior to the Act, an employee had to sue to recover for a work-related injury and overcome such defenses as contributory negligence, assumption of risk, and the fellow-servant rule, which negates liability for injuries resulting from the negligence of a fellow worker. Recovery could be slow or inadequate. *Feitig v. Chalkley*, 185 Va. 96, 38 S.E.2d 73 (1946); *Humphries v. Boxley Bros. Co.*, 146 Va. 91, 135 S.E. 890 (1926).

When an injury falls within the purview of Va. Code § 65.2-300, the exclusivity provision applies. The applicability of the Act does not turn on the compensability of the claim; rather, the compensability of the claim turns on the Act's applicability. *Giordano v. McBar Indus.*, 284 Va. 259, 729 S.E.2d 130 (2012) (although separated wife did not want to be a dependent who could be compensated under the Act, she was nonetheless barred from suing in tort). If the injury falls outside the coverage of the Act (e.g., if the injury did not arise out of and occur in the course of the worker's employment), the exclusivity provision will not be triggered. *Amisi v. Riverside Reg'l Jail Auth.*, 469 F. Supp. 3d 545 (E.D. Va. 2020) (citing *Snead v. Harbaugh*, 241 Va. 524, 404 S.E.2d 53 (1991)). Coverage under the Act constitutes an out-of-state resident's only remedy for injuries that occur in Virginia and that are caused by a statutory employer. *Demetres v. East West Constr. Inc.*, 776 F.3d 271 (4th Cir. 2015); *Garcia v. Pittsylvania Cnty. Serv. Auth.*, 845 F.2d 465 (4th Cir. 1988); see also *Eckstein v. Sonoco Prods. Co.*, No. 7:20CV435 (W.D. Va. Dec. 7, 2020) (claims governed by VWCA even though incident occurred in North Carolina because employment contract was made in Virginia, employer's place of business was in Virginia, and contract was not for services rendered exclusively outside Virginia).

Since adoption of the Act, an employee cannot sue the employer in tort for most injuries but is entitled to medical treatment supplied by medical providers of the employer's choice and a sum fixed by statute for lost wages and permanent impairment. In turn, the employer is required to pay for such benefits but is immune from tort liability for most occupational disabilities, as the Act provides the exclusive remedy for industrial accidents. *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942); see

Hartman v. Retailers & Mfrs. Distrib. Marking Serv. Inc., 929 F. Supp. 2d 581 (W.D. Va. 2013) (sexual assault by co-worker did not arise out of employment because attack was personal in nature and thus tort claims could proceed; however, negligence claims regarding the alleged dangerousness of the dimly lit parking lot were subject to the Act's exclusive remedy provision); *Lopez v. Intercept Youth Servs., Inc.*, 300 Va. 190, 861 S.E.2d 392 (2021) (estate of counselor for at-risk youth, who was murdered by resident of the facility, cannot bring negligence action against employer because murder arose out of conditions of employment). The exclusivity provision also bars tort and similar claims against the injured employee's co-workers. *Amisi v. Riverside Reg'l Jail Auth.*, 469 F. Supp. 3d 545 (E.D. Va. 2020) (citing *David White Crane Serv. v. Howell*, 282 Va. 323, 714 S.E.2d 572 (2011)). Notably, the exclusivity provision does not bar claims for violations of civil rights under 42 U.S.C. § 1983. *Id.*

An employee's negligence does not bar compensation under the Act so long as the employee is working at a place where his duties reasonably require him to be, and the injury does not result from willful negligence or misconduct. *Fauver v. Bell*, 192 Va. 518, 65 S.E.2d 575 (1951). Common-law remedies remain in some situations; for example, where an employer commits an intentional tort with the intent to injure an employee, an action by that employee is not barred by the Act. *McGreevy v. Racal-Dana Instruments, Inc.*, 690 F. Supp. 468 (E.D. Va. 1988). The exclusivity of the Act applies even if the employer is uninsured for workers' compensation liability as required by the Act. *David White Crane Serv. v. Howell*, 282 Va. 323, 714 S.E.2d 572 (2011). An employee of an uninsured employer may pursue alternative relief simultaneously, and if the employee fails to collect under the remedy initially pursued, the employee may pursue the alternative remedy. However, the employee is entitled to only one recovery. *Redifer v. Chester*, 283 Va. 121, 720 S.E.2d 66 (2012).

An employer takes an employee as he is found, with all the employee's pre-existing disabilities. Predisposition to injury or disease is not a defense to a workers' compensation claim. However, the employee must prove either that his injury arose out of and in the course of his employment or that the employment aggravated or accelerated a pre-existing condition. Difficult issues of causation may be presented that frequently are resolved by presentation of medical evidence. *Olsten of Richmond v. Leftwich*, 230 Va. 317, 336 S.E.2d 893 (1985). Ordinary diseases of life that are aggravated by but not caused by the employment are not covered under the Act. *Ashland Oil Co. v. Bean*, 225 Va. 1, 300 S.E.2d 739 (1983). However, the aggravation of a pre-existing condition caused by exertion from employment is compensable, provided such exertion results in a sudden and obvious injury, which requires proof of a mechanical or structural change in the body part allegedly injured. *Jewell Ridge Coal Corp. v. McGlothlin*, 2 Va. App. 294, 343 S.E.2d 94 (1986); *Alexandria City Pub. Schs. v. Handel*, 299 Va. 191, 848 S.E.2d 816 (2020).

The Act is liberally construed in favor of the employee, *Ellis v. Commonwealth Department of Highways*, 182 Va. 293, 28 S.E.2d 730 (1944) ("the purpose of the . . . Act is to protect the employee"), and makes injuries a cost of doing business. *Fauver v. Bell*, 192 Va. 518, 65 S.E.2d 575 (1951). The employee generally has the burden of proving his claim by a preponderance of the evidence.⁵ *Bergmann v. L & W Drywall*, 222 Va. 30, 278 S.E.2d 801 (1981). The claimant has the burden to relate an accidental injury to the employment and to show that incapacity is the result. A medical opinion that a work-related incident "probably" is the cause of an injury is sufficient to prove causation. *Smith v. Fieldcrest Mills, Inc.*, 224 Va. 24, 294 S.E.2d 805 (1982). A "possibility" is insufficient to prove causation. *Rust Eng'g Co. v. Ramsey*, 194 Va. 975, 76 S.E.2d 195 (1953). If the injury could have resulted from both work- and non-work-related causes, the injury is not compensable. *Crisp v. Brown's Tysons Corner Dodge, Inc.*, 1 Va. App. 503, 339 S.E.2d

⁵ With some claims, such as those under Va. Code § 65.2-401, the claimant must prove his claim by clear and convincing evidence.

916 (1986). The Commission can infer a cause of an accident, even if the cause was not alleged by the claimant. *U.S. Auto. Mfg. v. Gordon*, No. 0633-97-4 (Va. Ct. App. Aug. 26, 1997) (unpubl.) (“[N]othing in the Workers’ Compensation Act or the case law prohibits the commission from awarding compensation based upon a theory of recovery which is supported by the evidence but not raised by the claimant.”).

8-1.02(a) Alien Workers

Negating the Virginia Supreme Court’s decision in *Granados v. Windson Development Corp.*, 257 Va. 103, 509 S.E.2d 290 (1999), in which an illegal alien was denied benefits, the Act was amended in 2000 to include aliens “whether lawfully or unlawfully employed.” Va. Code § 65.2-101 (defining “employee”). *But see* Va. Code §§ 65.2-502 and 65.2-603(A)(3) (must be eligible for legal employment to receive partial or temporary benefits or vocational rehabilitation services). The Court of Appeals has held that the amendment does not apply retrospectively. *Mendoza-Garcia v. Cho Yeon Hwi*, No. 1257-00-4 (Va. Ct. App. Mar. 27, 2001) (unpubl.); *see also Rios v. Ryan Inc. Cent.*, 35 Va. App. 40, 542 S.E.2d 790 (2001) (illegal alien failed to prove employment contract became retroactively valid and enforceable because of change in status).

8-2 EMPLOYER-EMPLOYEE RELATIONSHIP

8-2.01 Employer and Employee Defined

In Virginia, any employer with three or more regular⁶ (including part-time) employees in the same business is required to furnish workers’ compensation coverage at no cost to its employees. “Employer” includes political subdivisions. Va. Code § 65.2-101. It also includes any volunteer fire company or emergency medical services agency electing to be included in the Act and maintaining insurance coverage as an employer, for which entity the average weekly wage is deemed to be the statutory minimum. Va. Code § 65.2-101(3). Public safety volunteers, however, are deemed employees of their political subdivision or state institution only if the governing body has adopted a resolution acknowledging such persons as employees for purposes of the Act. Va. Code § 65.2-101(1)(k).

Within the meaning of the Act, an employee is a person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is not in the usual course of the trade, business, occupation, or profession of the employer. Va. Code § 65.2-101 (defining “employee”). A contract of hire is an agreement for an employee to provide labor or personal services to an employer for wages or other things of value supplied by the employer. *Charlottesville Music Ctr. v. McCray*, 215 Va. 31, 205 S.E.2d 674 (1974). The power to control the method and manner of how the work is to be performed is a significant factor in determining whether an employer-employee relationship exists. *See Figman v. Cnty. of Culpeper*, VWC 228-07-00 (Jan. 25, 2008) (participant in federal- and state-funded job training program administered by the county was an employee of the legal aid society that exercised the greater degree of control); *Glean v. Fairfax County Government*, 20 VWC 146-39-10 (2020) (claimant was not under “special employment” of the Virginia Department of Emergency Management and thereby entitled to the hypertension presumption; VDEM did not “control[] the means and methods by which he performed the work”).

⁶ The mere employment of three workers is not enough. In determining if the employment is “regular,” the courts should determine if there are regularly-recurring periods of employing the requisite number of persons over some reasonable period of time. *Mirarchi v. Whistle Stop Hobbies*, No. 1742-12-4 (Va. Ct. App. Apr. 23, 2013) (unpubl.) (three employees not regular when, although multiple part-time employees hired, only one at a time worked at the store when owner was absent); *Ragland v. Muguruza*, 59 Va. App. 250, 717 S.E.2d 842 (2011) (three employees not regular when only helped two days). If the employer has fewer than three regular workers, those workers are not “employees” covered by the Act. Va. Code § 65.2-101(2)(h).

Police officers, firefighters, sheriffs and their deputies, town sergeants and their deputies, county and city commissioners of the revenue and treasurers, Commonwealth's attorneys, clerks of circuit courts and their deputies, officers, and employees, and electoral board members are deemed employees of the respective cities, counties, and towns in which their services are employed and by whom their salaries are paid or earned. Va. Code § 65.2-101(1)(i) (defining "employee").⁷ Members of the governing body of a county, city, or town are employees whenever coverage under the Act is extended to such members by resolution or ordinance. Va. Code § 65.2-101(1)(j). However, officers and employees of municipal corporations and political subdivisions who are elected by the people or by the governing body and who act in purely administrative capacities and are to serve for a definite term of office are not employees. Va. Code § 65.2-101(2)(b). "Casual" employees, domestic servants, and farm laborers are not employees within the meaning of the Act. Va. Code § 65.2-101(2)(e), (f), and (g).

Who constitutes an employee under the Act is a question of law. *Creative Designs Tattooing Assocs. v. Estate of Parrish*, 56 Va. App. 299, 693 S.E.2d 303 (2010). However, whether the facts bring a person within the definition of an employee is a question of fact. *Dillon Constr. & Accident Fund Ins. Co. v. Carter*, 55 Va. App. 426, 686 S.E.2d 542 (2009).

8-2.01(a) Independent Contractors

There is no coverage under the Act for an independent contractor. Common-law principles apply in establishing whether an employee-employer relationship exists, as opposed to an independent contractor relationship. The essential elements to be considered are: (1) the right to hire, (2) the power to dismiss, (3) the obligation to pay wages, and (4) the power to control and direct, which is the most important element. *Phillips v. Brinkley*, 194 Va. 62, 72 S.E.2d 339 (1952); *Coker v. Gunter*, 191 Va. 747, 63 S.E.2d 15 (1951); see *Metro Mach. Corp. v. Mizenko*, 244 Va. 78, 419 S.E.2d 632 (1992) (the "control" factor is important in determining whether an employee "loaned" to another employer becomes the servant of the other for purposes of the Act); see also *Creative Designs Tattooing v. Estate of Parrish*, 56 Va. App. 299, 693 S.E.2d 303 (2010).

8-2.01(b) Statutory Employees

A local government,⁸ business owner, or general contractor can be held to be a statutory employer of a contractor's employee and thereby become liable for workers' compensation benefits if the contractor's employee is injured. This can also limit the employee's ability to sue civilly. *McGowan v. ABM Janitorial Servs.*, No. 2:10cv388 (E.D. Va. June 29, 2011), *aff'd sub nom McGowan v. Baskett*, No. 11-1840 (4th Cir. Feb. 6, 2012). As to private businesses, the Court applies the "normal work test" to determine whether the injured party was engaged in the trade, business, or occupation of the owner at the time of injury. If so, the owner is the statutory employer and can be liable for workers' compensation benefits, and those benefits are the employee's exclusive remedy against both the owner and contractor. *Rodriguez v. Leesburg Bus. Park*, 287 Va. 187, 754 S.E.2d 275 (2014); *Jones v. Commonwealth*, 267 Va. 218, 591 S.E.2d 72 (2004); *Nichols v. VVKR, Inc.*, 241 Va. 516, 403 S.E.2d 698 (1991); *Alexander v. ST Tissue, LLC*, 94 Va. Cir. 426 (City of Richmond 2016).

As to contractors, subcontractors, and the like, the Court may also apply what is called the "subcontracted fraction test." This test applies when an owner hires a contractor

⁷ Such employees are deemed to be employees of the Commonwealth while rendering aid outside of the Commonwealth pursuant to a request, approved by the Commonwealth, under the Emergency Management Assistance Compact enacted pursuant to Va. Code § 44-146.28:1.

⁸ The federal government cannot be a statutory employer, as under the Supremacy Clause, it cannot be subject to the Workers' Compensation Act. *Gibbs v. Newport News Shipbuilding & Drydock Co.*, 284 Va. 677, 733 S.E.2d 648 (2012).

to perform work outside the scope of the owner's trade, business, or occupation, and the contractor then hires a subcontractor to do some or all of that work. The contractor, who was hired by the owner and is obligated by the agreement with the owner to complete the whole project and who engaged the subcontractor to perform a fraction of the project, is the statutory employer of the subcontractor. *Jeffreys v. Uninsured Employer's Fund*, 297 Va. 82, 823 S.E.2d 476 (2019); *Cinnamon v. Int'l Business Machines Corp.*, 238 Va. 471, 384 S.E.2d 618 (1989); Va. Code § 65.2-302(B).

As applied to governmental entities, however, the test differs. The trade, business, or occupation of a governmental entity is determined by the law creating the entity and establishing its functions. Any task that a government entity is legally authorized or required to do is considered its trade, business, or occupation, regardless of how often that task is performed or the number of employees directly employed to do that task. *Jones v. Commonwealth*, 267 Va. 218, 591 S.E.2d 72 (2004); *Roberts v. City of Alexandria*, 246 Va. 17, 431 S.E.2d 275 (1993) (City of Alexandria was the statutory employer of a healthcare provider's employee contracted to provide medical services at the city jail); *Ford v. City of Richmond*, 239 Va. 664, 391 S.E.2d 270 (1990) (City of Richmond was the statutory employer of a contractor's employee hired to repair a water reservoir roof); *Williams v. E.T. Gresham Co.*, 201 Va. 457, 111 S.E.2d 498 (1959) (Chesapeake Bay Ferry District was the statutory employer of a pile driver contractor's employee even though District employees had never driven piles on their own). The application of the governmental entity test presumes, however, that the owner/contractor has in fact contracted with another to have work performed. *Moore v. Va. Int'l Terminals, Inc.*, 283 Va. 232, 720 S.E.2d 117 (2012). In other words, for a statutory employer/employee relationship to exist, the work must be part of the governmental entity's trade, business, or occupation, and the governmental entity must have contracted with another to have the work performed. To lessen the risk of workers' compensation liability to statutory employees, local government employers should require contractors to indemnify them and provide proof of workers' compensation insurance. See section [8-10.04](#).

8-2.02 Employee's Right to Compensation

An employee is covered under the Act if he sustains an "injury by accident arising out of and in the course of the employment." Va. Code § 65.2-101. The expressions "arising out of" and "in the course of" are used conjunctively and are not synonymous. Both conditions must be satisfied before compensation can be awarded. *Graybeal v. Bd. of Sup'rs of Montgomery Cnty.*, 216 Va. 77, 216 S.E.2d 52 (1975).

An employee is also covered if he suffers from an "occupational disease" as defined in Va. Code § 65.2-400 et seq. The definition of "injury" encompasses both "injury by accident" and "occupational disease." Disease is not considered an injury unless it "results naturally and unavoidably" from injury by accident or occupational disease. Va. Code § 65.2-101. Occupational disease and the presumptions applicable thereto are covered elsewhere in this Chapter.

8-2.03 Notice of Accident or Diagnosis

Immediately after the occurrence of an accident, or as soon thereafter as practicable, an injured employee must give written notice of the accident to the employer. The notice must state the name and address of the employee, the time and place of the accident, and the nature and cause of the accident and injury. The employee is not entitled to have medical expenses or workers' compensation paid by the employer before giving such notice, unless the employer had knowledge of the accident or the employee was prevented by incapacity, fraud, or deceit from giving notice. Va. Code § 65.2-600.

No compensation or medical benefits shall be payable unless written notice of the injury by accident is given within thirty days after the occurrence or the accident or death,

unless reasonable excuse is made to the satisfaction of the Commission, and the Commission is satisfied that the employer has not been prejudiced by such lack of notice. Va. Code § 65.2-600(D).

The employee has a duty to give the employer written notice within sixty days of a diagnosis of occupational disease. No defect or inaccuracy in the notice bars compensation, however, unless the employer can show that it suffered "clear prejudice." Va. Code § 65.2-405.

When an employee makes a claim pursuant to the Act, the Commission must order the employer to advise the employee, within thirty days of the date of the order, about the employer's intent. The notice must state whether the employer intends to accept or deny the claim or is unable to determine whether it intends to accept or deny the claim because it lacks sufficient information from the employee or a third party. Va. Code § 65.2-601.2(A). If the employer responds that it intends to deny the claim, the notice must provide reasons for the intended denial. *Id.* If the employer states it has insufficient information to decide whether to accept or deny the claim, the notice must identify the additional information the employer needs to make the determination. *Id.* The employer's response is a "required report" for purposes of Va. Code § 65.2-902 (providing for civil penalties for failure to make required reports). Va. Code § 65.2-601.2(B). However, the employer's response does not become part of the hearing record. Va. Code § 65.2-601.2(C).

8-2.04 Injury by Accident

To suffer an "injury by accident," the employee must have experienced (1) an identifiable incident; (2) that occurred at some reasonably definite time; (3) an obvious sudden mechanical or structural change in the body; and (4) a causal connection between the incident and the bodily change. *Kohn v. Marquis*, 288 Va. 142, 762 S.E.2d 755 (2014) (possible previous head trauma does not negate determination that blows to head on a certain day were proximate cause of injury and constituted an "accident" when the final blow led to the claimant's death); *Teasley v. Montgomery Ward & Co.*, 14 Va. App. 45, 415 S.E.2d 596 (1992) (quoting *Chesterfield Cnty. v. Dunn*, 9 Va. App. 475, 389 S.E.2d 180 (1990)); *Alexandria City Pub. Sch. v. Handel*, 299 Va. 191, 848 S.E.2d 816 (2020) (there is no compensable injury without a sudden obvious mechanical or structural change to each body part allegedly injured); *Eckstein v. Sonoco Prods. Co.*, No. 7:20CV435 (W.D. Va. Dec. 7, 2020) (slap by supervisor constituted "injury by accident" for purposes of VWCA); *Pro-Football, Inc. v. Uhlenhake*, 37 Va. App. 407, 558 S.E.2d 571 (2002) (professional football players are covered by the Act because their employment regularly subjects them to the particular danger; high probability of injury and assumption of the risk are not defenses to workers' compensation claim), *aff'd*, 265 Va. 1, 574 S.E.2d 288 (2003); *Snead v. Harbaugh*, 241 Va. 524, 404 S.E.2d 53 (1991) (defamation of character does not result in injury within the meaning of the Act; therefore, the exclusivity provision of the Act does not apply, and suit can be had at common law); *Alexandria City Pub. Schs. v. Handel*, 299 Va. 191, 848 S.E.2d 816 (2020) (holding that "without such a change in a body part, there is no injury to it").

8-2.05 Arising out of the Employment

Only an injury "arising out of" and "in the course of" employment is compensable under the Act. Virginia employs the "actual risk test" to determine whether an injury arises out of the employment. An injury "arises out of" the employment when there is a causal connection between the employee's injury and the conditions under which the employer requires the work to be done. *Hilton v. Martin*, 275 Va. 176, 654 S.E.2d 572 (2008) (holding that a co-worker's assault was personal to the employee and therefore not covered); *accord Hartman v. Retailers & Mfrs. Distrib. Marking Serv. Inc.*, 929 F. Supp. 2d 581 (W.D. Va. 2013) (extensive discussion of Virginia law on whether co-worker assault arises out of employment); *Amisi v. Riverside Reg'l Jail Auth.*, 469 F. Supp. 3d 545 (E.D. Va. 2020) (for

purposes of overcoming motion to dismiss, plaintiff demonstrated injury that did not “arise out of” employment when she was subjected to strip search intake procedure intended only for inmates). Unlike assault cases, however, an innocent victim of workplace horseplay is covered by the Act because horseplay is considered a natural incidence of employment. *Simms v. Ruby Tuesday, Inc.*, 281 Va. 114, 704 S.E.2d 359 (2011).

An injury that cannot fairly be traced to the employment as a contributing proximate cause and that comes from a hazard to which the workmen would have been equally exposed apart from the employment is not compensable. *Conner v. Bragg*, 203 Va. 204, 123 S.E.2d 393 (1962); *Green Hand Nursery, Inc. v. Loveless*, 55 Va. App. 134, 684 S.E.2d 818 (2009) (random motor vehicle leaving roadway and striking employee was not a risk of employment but wet tarp and obstacles that impeded escape from danger were); see also *Wythe Cnty. Cmty. Hosp. v. Turpin*, No. 0208-11-3 (Va. Ct. App. Oct. 4, 2011) (unpubl.) (on-call nurse driving for work-related reasons entitled to compensation for accident caused when she was distracted by her cell phone light). The employee must show that the work environment contributed to the injury. *United Parcel Serv. v. Fetterman*, 230 Va. 257, 336 S.E.2d 892 (1985) (where a driver bending to tie his shoe on the back of his UPS truck experienced back pain, he failed to show a causal connection between his act of bending and his injury). However, the claimant need not present “acute, forensic detail” explaining how the accident happened if it was “patently” employment related. *Powers v. Moss Home Improvement*, VWC 138-44-59 (June 22, 2020) (reversing Deputy Commissioner’s finding that fall from ladder was not compensable because claimant could not explain exactly why he fell and because his testimony established that his activity was manifestly awkward and presented an inherent risk of falling).

When a dead tree fell on a tractor being operated by an employee traveling on a public road from one location to another, the accident arose out of his employment. *Davis v. City of Martinsville*, VWC 138-44-59 (Aug. 19, 2020). Pursuant to the “street-risk doctrine,” the claimant demonstrated that his duties required his presence upon the public streets, and that his injury arose from an actual risk of that presence upon the streets. *Id.* Even if rare, a falling tree growing at the edge of a public street is a risk of travel on the street and not an act of God. *Id.* But see *O’Donoghue v. United Cont’l Holdings, Inc.*, 70 Va. App. 95, 824 S.E. 2d 519 (2019) (injury not compensable when airplane serviceman working on airport ramp outside in a rainstorm suffered electrocution caused by lightning strike or static electricity discharged from airplane or malfunction of electrical equipment; because one of the possible causes—lightning strike—was non-compensable under these circumstances, claimant did not prove his injury arose out of his employment).

A court should defer to the Commission’s factual determination that an obstacle was a workplace hazard if it is supported by credible evidence. *Dollar Tree Stores, Inc. v. Wilson*, 64 Va. App. 103, 765 S.E.2d 151 (2014). For an extensive discussion of the case law addressing this issue, see *Liberty Mut. Ins. Corp. v. Herndon*, 59 Va. App. 544, 721 S.E.2d 32 (2012).

8-2.05(a) Common Risk/Risk to Which the General Public Is Exposed

Injury resulting from a risk common to the general public is not compensable. In *Central State Hospital v. Wiggers*, 230 Va. 157, 335 S.E.2d 257 (1985), a clerk arose from her desk and walked ten steps to answer the phone. Just as she reached for the phone, her right ankle twisted. The claimant did not contend that she slipped, tripped, stumbled, or fell but only that she twisted her ankle while walking normally. There was no evidence of any substance on the floor. The Court found that the claimant failed to establish a causal connection between her work environment and her injury. In *Richmond Memorial Hospital v. Crane*, 222 Va. 283, 278 S.E.2d 877 (1981), a nurse stood up from a chair and began to walk straight ahead. When she stepped, she felt something snap in her leg. The claimant neither slipped, tripped, stumbled, nor fell. Her injury occurred while she was walking along

a level, clean, unobstructed, well-lit corridor. The Court concluded that nothing in her work environment contributed to her injury.

In *Farnia v. Prime Receivables, LLC*, No. 0956-00-4 (Va. Ct. App. Nov. 7, 2000) (unpubl.), an employee injured her wrist when answering the telephone. The court held that the simple act of picking up a receiver did not involve any significant exertion or awkward position, and no condition or hazard peculiar to the workplace caused the injury. The injury was not compensable as it did not result from an actual risk of the employment. However, compare *Farnia* with *First Federal Savings & Loan Ass'n v. Gryder*, 9 Va. App. 60, 383 S.E.2d 755 (1989), where a bank clerk seated on a teller's stool caught the heel of her shoe on the rim of her stool when she twisted to answer the phone and felt back pain. The court held her injury was compensable as it resulted from an actual risk occasioned by a work environment to which others are not similarly exposed. See also *Green Hand Nursery, Inc. v. Loveless*, 55 Va. App. 134, 684 S.E.2d 818 (2009) (that the general public may be exposed to the same risk is not dispositive if there is a causal relationship between the injury and claimant's work responsibilities). In *Kerr v. Magic City Ford Lincoln Isuzu Trucks*, VWC 152-78-39 (Aug. 24, 2020), the Commission reversed a Deputy Commissioner's finding that the claimant's accident did not arise out of a risk of his employment when he quickly stepped back into a garage to turn off a light as the garage door descended. The claimant was not engaged in an ordinary movement as he fell; he was "stepping sideways across an elevation leading into the garage." *Id.* The sideways motion combined with the sloping surface were dispositive to demonstrate that the conditions of the workplace caused the injury. *Id.*

If weather poses a particular risk to a public safety officer's employment, any injury found to be arising out of and in the course of his employment is compensable unless the willful misconduct defense under Va. Code § 65.2-306 applies. Va. Code § 65.2-301.1. But see *Conner v. City of Danville*, 70 Va. App. 192, 826 S.E. 2d 337 (2019) (injury not compensable when police officer, while on duty and interviewing crime suspect, slipped and fell on wet grass when running for cover from storm).

8-2.05(b) Criminal Activity

In *Graybeal v. Board of Supervisors of Montgomery County*, 216 Va. 77, 216 S.E.2d 52 (1975), a criminal defendant planted a bomb on the family car of the Commonwealth's Attorney who prosecuted him. The Commission found that the Commonwealth's Attorney's injuries arose out of his employment. The Court affirmed and held: "In the realities of the present case, the course from prosecution to desire-for-revenge to injury was unbroken, constituting a single work-connected incident." Compare *Graybeal* with *Hill City Trucking, Inc. v. Christian*, 238 Va. 735, 385 S.E.2d 377 (1989) (injury to a long-distance trucker resulting from robbery after a truck stop found not compensable where robbers took the employee's wallet but did not disturb the truck or its contents; Court found nothing about the employment itself heightened the risk of assault or robbery), and *Grand Union Co. v. Bynum*, 226 Va. 140, 307 S.E.2d 456 (1983) (denial of death claim of supermarket general manager killed after leaving work and going to a friend's house by individuals who admitted they targeted manager to get his keys and break into supermarket; Court found there was no evidence manager was in the course of his employment because he was not fulfilling duties of employment, no showing he was at a place where an employee reasonably expected to be, and no unbroken course of events beginning with work and ending with the death in order to create a single work-related incident).

Virginia Code § 65.2-301 provides that when an employee is sexually assaulted in the course of employment and promptly reports the assault to the appropriate law-enforcement authority, where the nature of the employment substantially increases the risk, the injury shall be deemed to have arisen out of the employment and shall be a valid workers' compensation claim, and the claimant may elect to sue the attacker at law as well. However, if the sexual assault was personal in nature, it did not "arise out of the

employment" and therefore would fall outside the Act. *Butler v. Southern States Cooperative, Inc.*, 270 Va. 459, 620 S.E.2d 768 (2005); *Hartman v. Retailers & Mfrs. Distrib. Marking Serv. Inc.*, 929 F. Supp. 2d 581 (W.D. Va. 2013) (extensive discussion of Virginia law on whether co-worker assault arises out of employment). This code section, as well as the Workers' Compensation Act at large, do not apply to cases of sexual harassment. Va. Code § 65.2-301(C).

8-2.05(c) Steps

Typically, "an injury sustained as a result of a fall on stairs, for example, 'does not arise out of the employment without evidence [that] a defect in the stairs or . . . a condition of the employment caused the fall.'" *Nurses 4 You, Inc. v. Ferris*, 49 Va. App. 332, 641 S.E.2d 129 (2007) (quoting *Grayson Sch. Bd. v. Cornett*, 39 Va. App. 279, 572 S.E.2d 505 (2002)). For example, an employee who descended, then turned around on a set of steps while checking a meter, failed to show the work environment contributed to his injury. *Cnty. of Chesterfield v. Johnson*, 237 Va. 180, 376 S.E.2d 73 (1989). Similarly, the injury of an experienced fireman who slipped climbing onto the first step of a fire truck did not arise out of his employment. *Smith v. Rockingham Cnty.*, No. 0991-10-4 (Va. Ct. App. Feb. 22, 2011) (unpubl.). On the other hand, where an employee was required to ascend steps that were slightly higher than normal, the unusual nature of the steps was a sufficient causative factor to find the resulting injury compensable. *Reserve Life Ins. Co. v. Hosey*, 208 Va. 568, 159 S.E.2d 633 (1968); see also *Echevarria v. City of Chesapeake*, No. 0105-16-1 (Va. Ct. App. Oct. 18, 2016) (unpubl.) (police officer slipping on stairs).

8-2.05(d) Unusual or Awkward Position

Everyday movements, such as "walking, bending, or turning without any other contributing environmental factors, are not risks of employment." *Southside Va. Training Ctr. v. Ellis*, 33 Va. App. 824, 537 S.E.2d 35 (2000). "In contrast, complex or awkward motions, or those which combine multiple simple movements, may be compensable." *Haden v. The Landmark Group, LLC*, VWC 166-21-51 (Apr. 21, 2020). A furnace worker who stooped in an awkward position for four to five minutes and was then unable to stand suffered compensable injury. *Richard E. Brown, Inc. v. Caporaletti*, 12 Va. App. 242, 402 S.E.2d 709 (1991). But see *Plumb Rite Plumbing Serv. v. Barbour*, 8 Va. App. 482, 382 S.E.2d 305 (1989) (plumber injured his back while bending but before picking up pipe; court held injury was not compensable because simple act of bending, without more, was unrelated to any workplace risk).

8-2.05(e) Recreation and Exercise

An injury which is sustained as a result of recreational activity "arises out of employment" only when the activity is an "accepted and normal" activity within the employment. *Mullins v. Westmoreland Coal Co.*, 10 Va. App. 304, 391 S.E.2d 609 (1990). In addition, an employer can enlarge the course of employment by extending the scope of employment to embrace recreational and social events. *Kum Ja Kim v. Sportswear*, 10 Va. App. 460, 393 S.E.2d 418 (1990). The dispositive question is whether the social or recreational function is so closely associated with the employment to be considered an incident of it. *Id.* Injury sustained while participating in employer-sponsored off-duty recreational activities that are not a part of the employee's duties is not compensable. Va. Code § 65.2-101(1) (definition of injury). But see *Perkins v. Cnty. of Henrico*, VWC VA00000847178 (July 24, 2014) (counselor at juvenile detention center sustained compensable injury when voluntarily participating in off-premises softball game during a paid staff training session, where employer encouraged participation and benefitted from it). However, if an employee is required to attend and business is discussed, the injury may have arisen out of the employment. *Bosman v. United States*, No. 2:12cv140 (E.D. Va. Nov. 27, 2012) (golf outing).

8-2.06 Occurring in the Course of Employment

An injured employee must prove the injury occurred "in the course of" the employment. In *Conner v. Bragg*, 203 Va. 204, 123 S.E.2d 393 (1962), the Court stated:

the words 'in the course of' refer to the time, place and circumstances under which the accident occurred . . . [A]n accident occurs in the 'course of employment' when it takes place within the period of employment, at a place where the employee may be reasonably expected to be, and while he is reasonably fulfilling the duties of his employment or is doing something which is reasonably incidental thereto.

Id.; *Graybeal v. Bd. of Sup'vrs of Montgomery Cnty.*, 216 Va. 77, 216 S.E.2d 52 (1975) (assaulted Commonwealth's Attorney was injured in the course of the employment because "the course from prosecution to desire-for-revenge to injury was unbroken"); *Heritage Hall v. Crabtree*, 46 Va. App. 750, 621 S.E.2d 694 (2005) (injury occurred within the course of employment where employee, trying to prevent a nursing home resident from leaving, took actions reasonably incident to her duties; such actions benefited the employer and were consistent with employer's expectations).

By statute, claims of firefighters, law enforcement officers, or medical services personnel are deemed in the course of employment if they arose from the undertaking of a law-enforcement or rescue activity even while off-duty or outside an assigned shift or work location. Va. Code § 65.2-102.

8-2.06(a) Employer's Expectations

Cyclist injured while engaged in bicycle travel from campsite to conference site was not reasonably fulfilling the duties of or performing functions reasonably incidental to her employment, in part because the claimant's non-work-related travel to the campsite was not incidental to her attendance at the conference. *Va. Polytechnic Inst. & State Univ. v. Wood*, 5 Va. App. 72, 360 S.E.2d 376 (1987). Lifeguard's drowning death during normal work hours ruled compensable where supervisor was aware of swimming activities and did not express disapproval and swimming skill was integral to his employment duties. *Boys & Girls Club of Va. v. Marshall*, 37 Va. App. 83, 554 S.E.2d 104 (2001).

8-2.06(b) Period of Work, Gratuitous Labor

Injury occurring after hours while waiting for a ride from a co-worker was not compensable even though the employee assisted the co-worker with tasks to hasten their departure time; employee was acting as a volunteer. *Jackson v. Ratcliff Concrete Co.*, 8 Va. App. 592, 382 S.E.2d 494 (1989). A grocery store employee's injury that occurred when she slipped and fell after her shift had ended and after she had stayed in the store to shop for 15 minutes was compensable. *Briley v. Farm Fresh, Inc.*, 240 Va. 194, 396 S.E.2d 835 (1990).

8-2.07 Idiopathic and Unexplained Injuries

The distinction between idiopathic and unexplained injuries was addressed in *PYA/Monarch & Reliance Ins. Co. v. Harris*, 22 Va. App. 215, 468 S.E.2d 688 (1996) (man fell while getting out of a truck, with no memory of what happened). An "idiopathic" injury is one caused by a preexisting personal disease of the employee, whereas an "unexplained" injury is one in which there is no credible evidence to explain what happened. *Id.*

8-2.07(a) Idiopathic Injury

Injuries resulting from pre-existing diseases or conditions of the employee (i.e., idiopathic injuries) are not compensable unless the employment is shown to have been in the causal chain or made the injury more severe than it would have been otherwise. *PYA/Monarch & Reliance Ins. Co. v. Harris*, 22 Va. App. 215, 468 S.E.2d 688 (1996); *Cruz v. Sampling Assoc. Int'l, LLC*, VWC 221-16-41 (Aug. 30, 2005) (lack of railings at top of step increased risk of employment); cf. *Williams v. C. F. Sauer Co.*, VWC 218-41-17 (Aug. 9, 2005)

(testimony that a handrail might have helped break a fall did not establish that lack of handrail caused a fall). For example, when an employee fainted and fell backwards while standing on a milk crate (about eighteen inches high) while holding three half-gallon cartons of milk, her injuries were held to be compensable because the elevated height constituted an added risk of the employment which made her injuries more severe. *Southland Corp. v. Parson*, 1 Va. App. 281, 338 S.E.2d 162 (1985). Conversely, when an employee's aneurysm ruptured while he was driving a truck for his employer, which then caused him to crash into a tree, his injuries from the collision were held to not be compensable because there was no credible evidence that the operation of the truck increased the severity of the aneurysm. *Virginia DOT v. Mosebrook*, 13 Va. App. 536, 413 S.E.2d 350 (1992).

8-2.07(b) Unexplained Accident or Injury

If the cause of the accident is unknown, whether it arose out of the course of employment can be inferred from circumstantial evidence. *Va. Tree Harvesters, Inc. v. Shelton*, 62 Va. App. 524, 749 S.E.2d 556 (2013). In *Shelton*, the injured employee had no recollection of the accident and there were no eyewitnesses, but the court allowed compensation because circumstantial evidence regarding the dangerousness of the work and the disrepair of the equipment sufficiently supported a conclusion that the injury arose out of employment. In *Estate of Arroyo v. Ramirez*, No. 1282-14-1 (Va. Ct. App. Feb. 3, 2015) (unpubl.), however, the Court of Appeals stated that it would only be conjecture or speculation to assume that an improperly guarded elevator shaft caused a claimant's fall. See also *Lazarte v. Century Contracting Corp.*, VWC 214-42-81 (Mar. 22, 2004) (fall from scaffold for which there was no causal explanation not compensable); cf. *Univ. of Va. v. Harrison*, No. 0566-13-2 (Va. Ct. App. Nov. 19, 2013) (unpubl.) (no critical link between unexplained fall from ladder and conditions of the workplace) and *Basement Waterproofing & Drainage v. Beland*, 43 Va. App. 352, 597 S.E.2d 286 (2004) (unexplained fall from ladder was compensable where claimant was using both hands for work and could not hold on for support; risk or hazard unique to the employment supplied critical link). There is a statutory presumption that the injury arose out of and was in the course of employment where the employee is

1. physically or mentally unable to testify as confirmed by competent medical evidence, or
2. dies without regaining consciousness, or
3. dies at or near the accident location, or
4. is found dead at a site of employment, and
5. where the factual circumstances are of sufficient strength from which the only rational inference to be drawn is that the accident arose out of and in the course of employment, unless such presumption is overcome by a preponderance of competent evidence to the contrary.

Va. Code § 65.2-105. The statutory presumption does not apply when the claimant is able to testify at the hearing, even if he is unable to testify about the injury because of amnesia. *Rush v. Univ. of Va. Health Sys.*, 64 Va. App. 550, 769 S.E.2d 717 (2015).

8-2.08 Purely Psychological Injuries

A claimant may recover workers' compensation benefits for a purely psychological injury, provided the injury is causally related to a sudden shock or fright arising out of the course of the claimant's employment. *UPS v. Prince*, 63 Va. App. 702, 762 S.E.2d 800 (2014). The shock or fright must result from a traumatic, catastrophic, unexpected event, not merely upsetting events that are within the range of employment experiences. *Id.* The sudden shock or fright need not be caused by circumstances placing the claimant at risk of harm. *Jackson v. Ceres Marine Terminals, Inc.*, 64 Va. App. 459, 769 S.E.2d 276

(2015); see also *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 13 S.E.2d 291 (1941); *Chesterfield Cnty. v. Dunn*, 9 Va. App. 475, 389 S.E.2d 180 (1990).

A post-traumatic stress disorder (PTSD), anxiety disorder, or depressive disorder incurred by a law enforcement officer or firefighter may be compensable under certain circumstances. The disorder may be compensable if it was caused by a "qualifying event," defined as an incident or exposure occurring in the line of duty that (1) resulted in serious injury or death to any person, or (2) involved the injury, abuse, exploitation, or death of a child, or (3) an immediate threat to the life of the claimant or another individual, or (4) mass casualties. Va. Code § 65.2-107(A).

For PTSD, the "qualifying event" means such an incident or exposure occurring on or after July 1, 2020, and also includes responding to crime scenes for investigation. For anxiety disorder or depressive disorder, the "qualifying event" means such an incident or exposure occurring on or after July 1, 2023. *Id.* The disorder must be diagnosed by a board-certified psychiatrist or a licensed psychologist who has experience diagnosing and treating PTSD, and the disorder must meet the diagnostic criteria of the most recent Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. The disorder must have been caused primarily by the qualifying event and not some other event or source of stress. Va. Code § 65.2-107(B).

The disorder is not compensable if it was caused primarily by a disciplinary action, transfer, demotion, promotion, termination, or similar action of the officer or firefighter. *Id.* A firefighter seeking compensation must have complied with relevant occupational safety standards. *Id.* The statute defines "firefighter" and "law enforcement officer" broadly to include, among others, emergency medical services personnel, volunteer firefighters, forest wardens, special agents of the Alcoholic Beverage Control Authority, and certain campus police officers. Va. Code § 65.2-107(A).

Benefits awarded under Va. Code § 65.2-107 are limited. Indemnity and medical benefits are limited to a maximum of fifty-two weeks from the date of diagnosis. Va. Code § 65.2-107(C). No medical benefits or wage loss benefits are awardable after four years from the date of the qualifying event. *Id.* Additionally, the weekly wage loss benefits, when combined with "other benefits," including SSDI, retirement benefits, and long-term and short-term disability, cannot exceed the claimant's pre-injury average weekly wage. *Id.*

Litigation interpreting Va. Code § 65.2-107 is limited, but holds that the limited benefits set forth in the Code section are the exclusive remedy for PTSD incurred by a covered employee as a result of a "qualifying event" whether it resulted from a single event or multiple traumatic events. *Bean v. City of Chesapeake*, 22 WC UNP VA00001886662 (June 10, 2022), *Millner v. City of Lynchburg*, 23 WC UNP VA00001903365 (July 10, 2023). Notwithstanding those definitive holdings, in *Lett v. City of Newport News*, 23 WC UNP VA00001975063 (Sept. 11, 2023), Commissioner Newman asserted in dicta that a law enforcement officer could receive benefits for PTSD under Va. Code § 65.2-107 and the occupational disease and ordinary disease of life statutes set forth in Va. Code §§ 65.2-400 and 65.2-401.

Coverage does not apply if the PTSD pre-existed the incident(s) on which the claim is based or the claimant does not fall within the covered class of employees. *Dawson v. Pittsylvania Cnty.*, 22 WC UNP VA00001839618 (Nov. 1, 2022); *Hall v. VADOC – Red Onion State Prison*, 21 WC UNP VA02000034827 (May 10, 2021).

8-3 DEFENSES TO INJURY BY ACCIDENT

8-3.01 Injuries Caused by Repetitive or Cumulative Trauma, Continuing Physical Stress, or Other Cumulative Events

A gradual onset of pain does not give rise to a compensable injury. *Va. Elec. & Power Co. v. Cogbill*, 223 Va. 354, 288 S.E.2d 485 (1982) (clerk who suffered back sprain after prolonged sitting and bending forward in hard chair on truck bed did not suffer a sudden or obvious structural change in the body); *Badische Corp. v. Starks*, 221 Va. 910, 275 S.E.2d 605 (1981) (employee failed to identify a specific incident occurring at some reasonably definite time where she suffered gradually incurred pain after lifting weights and pulling cans over period of time).

In *Morris v. Morris*, 238 Va. 578, 385 S.E.2d 858 (1989), the Virginia Supreme Court summarized its prior decisions and reasserted that an employee must prove his injury was caused by a work-related identifiable incident sustained at a reasonably definite time, and injury 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.'"

The Supreme Court clarified that job-related impairments resulting from cumulative trauma caused by repetitive motion are not compensable. *Stenrich Group v. Jemmott*, 251 Va. 186, 467 S.E.2d 795 (1996) (carpal tunnel syndrome and trigger thumb syndrome resulting from cumulative trauma are not compensable diseases). Following *Jemmott*, the General Assembly amended Va. Code § 65.2-400(C) to statutorily define hearing loss and carpal tunnel syndrome not as occupational diseases but ordinary diseases of life as defined in Va. Code § 65.2-401; as such, they may be compensable if sufficient proof is made of occupational origin. See, e.g., *Doig v. Cargill Meat Solutions Corp.*, VWC 20-32-735 (May 12, 2020) (claimant did not establish carpal tunnel arose out of and in the course of his employment where doctors opined it was not caused by work); *King v. General Electric*, VWC 15-12-002 (Apr. 23, 2020) (awarding medical benefits when claimant established his noisy work environment was primary source of hearing loss and tinnitus; he did not have to prove there were "no possible outside causes of his disease"), *aff'd*, *Gen. Elec. & Elec. Ins. Co. v. King*, No. 0683-20-4 (Va. Ct. App. Oct. 27, 2020) (unpubl.).

In *Kohn v. Marquis*, 288 Va. 142, 762 S.E.2d 755 (2014), a police recruit suffered repeated blows to the head during training exercises over several months but died after blows to the head on a particular day. Without mentioning *Morris* specifically, the Court stated that these circumstances differed from "gradually incurred injury and repetitive trauma cases" because "an obvious mechanical or structural change" occurred while the employee was engaged in work activity. Since *Kohn*, the courts have engaged in factual distinctions in determining if an injury resulted from cumulative or repetitive trauma versus a mechanical or structural bodily change that occurred during an identifiable incident. In *Van Buren v. Augusta County*, 66 Va. App. 441, 787 S.E.2d 532 (2016), the Court of Appeals distinguished *Morris*, where a ruptured disk resulted from unloading and installing steel doors for one and a half hours, with the physical actions taken by a firefighter in *Van Buren* who attributed his back injury to moving an obese patient over the course of forty minutes. The court stated the firefighter's back injury resulted from a variety of physical actions, such as lifting, holding, twisting, and bending, which were not repetitive. However, the "variety of movements" factor does not appear in any Virginia Supreme Court case law.

In *Riverside Regional Jail Authority v. Dugger*, 68 Va. App. 32, 802 S.E.2d 184 (2017), the Court of Appeals, construing *Morris* and *Kohn*, held that a torn meniscus that occurred sometime during a four-hour defensive training exercise was the result of an identifiable accident occurring at a definite time and was not the result of repetitive movements. In *Kim v. Roto Rooter Services Co.*, No. 1053-16-4 (Va. Ct. App. Mar. 7,

2017) (unpubl.), however, the Court of Appeals in denying the claim held that although the claimant performed a variety of physical actions, he was repetitively kneeling for several hours. Kim had begun experiencing knee pain during his first work shift, but it worsened during the next work shift, which required him to kneel down for a "long, long time."

The Court of Appeals found repetitive movement still an "injury by accident" when it affirmed an award where the claimant injured his back cranking a handle on a truck's "landing gear" for ten to thirty minutes. The Court of Appeals noted that this was "not an activity that was normal, repetitive work required of his position" and that the injury was the result of a "single event" of cranking on a definite occasion during the performance of the specific piece of work such that it was an identifiable incident. The causative event occurred within the course of ten to thirty minutes, a reasonably definite time period. *Family Dollar Stores, Inc. v. Presgraves*, No. 0814-10-4 (Va. Ct. App. Dec. 21, 2010) (unpubl.).

The Virginia Supreme Court has awarded compensation for injuries that developed over the course of several hours due to passive exposure to certain conditions and considered the exposure as one identifiable incident. In *Southern Express v. Green*, 257 Va. 181, 509 S.E.2d 836 (1999), the Court awarded compensation for an injury by accident claim for chilblains that developed over the course of four hours while the employee worked in a freezer. The Court of Appeals seems thus far unwilling to award benefits for a causative event occurring over the course of an eight-hour period. See, e.g., *Dep't of Motor Vehicles v. Bandy*, No. 1878-18-2 (Va. Ct. App. Apr. 30, 2019) (unpubl.); see also *City of Charlottesville v. Sclafani*, 300 Va. 212, 862 S.E.2d 101 (2021) (rejecting bright-line rule that injury occurring within three- or four-hour period of work has sufficient temporal precision to constitute "identifiable incident," but finding evidence sufficient to conclude injury occurred during specific training incident).

8-3.02 Willful Misconduct, Violation of Safety Rules and Intoxication

Virginia Code § 65.2-306 prohibits compensation for injury or death caused by the employee's willful misconduct or intentional self-inflicted injury, attempt to injure another, intoxication, willful failure or refusal to use a safety appliance or perform a statutory duty, willful breach of a reasonable employer's rule known by the employee and for the employee's benefit, or use of a nonprescription controlled substance. The burden of proof rests upon the party asserting the defense.

When defending a claim on the ground that an employee violated a safety rule, the employer must show the rule was enforced and the employee knew or should have known of the rule. Verbal directives can constitute a safety rule. *Layne v. Crist Elec. Contractor, Inc.*, 64 Va. App. 342, 768 S.E.2d 261 (2015). An employer need not have punished or threatened termination of an employee for prior violations of a safety rule in order to demonstrate bona fide enforcement of the rule. *Mouhssine v. Crystal City Laundry*, 62 Va. App. 65, 741 S.E.2d 804 (2013) (repetition of rule in meetings and verbal correction demonstrated enforcement) (citing *Peanut City Iron & Metal Co. v. Jenkins*, 207 Va. 399, 150 S.E.2d 120 (1966)). The employer must demonstrate the breach of the safety rule was the proximate cause of the injury. *Jones v. Crothall Laundry*, 69 Va. App. 767, 823 S.E. 2d 37 (2019).

A willful breach of a safety rule occurs when an employee with knowledge of the rule intentionally performs the forbidden act. *Layne v. Crist Elec. Contractor, Inc.*, 64 Va. App. 342, 768 S.E.2d 261 (2015). A conflict of law appears to exist in Virginia over whether an employer bears the burden of proving enforcement as part of a willful violation of a safety rule defense, or whether, once an employer establishes the willful violation of a safety rule, the burden shifts to the claimant to rebut that defense by proving employer's lack of enforcement. *Pitt v. Shackelford's Restaurant*, No. 1956-11-2 (Va. Ct.

App. Mar. 27, 2012) (unpubl.). This issue remains unresolved as the Virginia Supreme Court has not yet been required to reach the issue in a decision.

When asserting a defense under this code section, the employer must provide the employee with specific notice in writing that the defense will be asserted as well as notice of the particular forbidden act relied upon, at least fifteen days in advance of the hearing. Notice must also be filed with the Commission. [Commission Rule 1.10](#).

In *Patterson v. Valley Proteins, Inc.*, No. 1707-05-3 (Va. Ct. App. Feb. 21, 2006) (unpubl.), a truck driver made a prohibited stop on an interstate highway and then pulled back onto the road, causing an accident and injury. The court denied compensation because of the employee's willful misconduct. Compare *Buzzo v. Woolridge Trucking*, 17 Va. App. 327, 437 S.E.2d 205 (1993) (truck driver's speeding did not rise to level of willful misconduct under Va. Code § 65.2-306(A) where speedometer was broken); *Finney v. Mason*, VWC 210-04-75 (Dec. 19, 2005) (trucker's failure to stop at a stop sign was as likely to be negligence as intent to "run" the sign; employer failed to carry its burden to prove willful misconduct), *aff'd*, No. 0156-06-1 (Va. Ct. App. May, 30 2006).

Proper administration of and reliance on a positive certified blood alcohol or drug test at the time of injury creates a rebuttable presumption as to injury, but not death, that the employee was under the influence at the time of injury, which may be overcome by clear and convincing evidence to the contrary. Va. Code § 65.2-306(B); see *Am. Safety Razor Co. v. Hunter*, 2 Va. App. 258, 343 S.E.2d 461 (1986) (severe intoxication may remove employee from employment; however, here, employee continued to work without coworkers' noticing signs of intoxication; employer failed to carry affirmative burden of proving that intoxication was a cause of injury where employee fell from forklift that lurched suddenly).

8-3.03 Fraud and Misrepresentation

When relying upon a fraud or misrepresentation defense, the employer has the burden to prove (1) the employee intentionally made a material misrepresentation, knowing the representation to be false; (2) the employer relied upon the false representation to its detriment; and (3) the misrepresentation and reliance resulted in consequent injury to the employee such that there was a causal relationship between the misrepresentation and the injury. *McDaniel v. Colonial Mech. Corp.*, 3 Va. App. 408, 350 S.E.2d 225 (1986) (claimant forfeited rights to workers' compensation benefits when he falsified his employment application as to an injury in previous employment).

8-3.04 Going and Coming Rule

Accidents sustained while an employee is going to or coming from work generally are not compensable. There are several exceptions to this rule. See generally *Kendrick v. Nationwide Homes, Inc.*, 4 Va. App. 189, 355 S.E.2d 347 (1987).

The Commission analyzed the "going and coming" and "extended premises" rules in *United Cont'l Holdings, Inc. v. Sullivan*, 79 Va. App. 540, 896 S.E.2d 426 (2024), explaining the "application of either the 'going and coming' rule or the extended premises doctrine relies wholly upon the factual circumstances of the case," and "the distance between the injury and the premises is not dispositive." If the injury occurs in a parking lot that is neither owned nor controlled by the employer, the compensability test "rests on a combination of criteria, including but not limited to proximity, authority, and responsibility for maintenance." *Id.*, quoting *Cleveland v. Food Lion, LLC* No. 0578, 43 Va. App. 514, 600 S.E.2d 138 (2004). However, if the injury occurs on a passage or walkway where the employee's passage is "required and expected by virtue of her employment," the employer has impliedly consented to the employee's use of the walkway to access the workplace, and the injury arises in the course of her employment. *Id.*, quoting *Prince v. Pan Am. World Airways*, 6 Va. App. 268, 368 S.E.2d 96 (1988).

8-3.04(a) Exceptions:**8-3.04(a)(1) When the means of transportation is provided by the employer or the time consumed is paid for or included in the wages**

See *Marshall v. Craft Forklift, Inc.*, 41 Va. App. 777, 589 S.E.2d 456 (2003) (injury sustained in accident while commuting to work in employer's loaned van was not compensable where loan of van was gratuitous, not customary to business, and of no benefit to employer); *Blaustein v. Mitre Corp.*, 36 Va. App. 344, 550 S.E.2d 336 (2001) (employer's reimbursement of subway fare or parking fees did not fall within "transportation" exception for employee injured on the way to work); *Estate of Ho v. Info. Tech. Solutions*, VWC 214-14-35 (Jan. 26, 2005) (an agreement to provide transportation to and from work became an implicit prerequisite to employment and brought claim within "transportation" exception), *aff'd*, No. 2742-05-4 (Va. Ct. App. Oct. 17, 2006).

8-3.04(a)(2) Where the way used is the sole and exclusive way of ingress and egress or is constructed by the employer

See *Barnes v. Stokes*, 233 Va. 249, 355 S.E.2d 330 (1987) (sole remedy for injury caused by co-worker in company parking lot while leaving work was workers' compensation); *Brown v. Reed*, 209 Va. 562, 165 S.E.2d 394 (1969) (same); *Capital Area Pediatrics, Inc. v. Eken*, No. 1557-12-4 (Va. Ct. App. May 7, 2013) (unpubl.) (injuries from fall compensable because sidewalk was part of extended premises of place of employment); *Abraham v. CBOCS Inc.*, No. 3:11cv182 (E.D. Va. Oct. 27, 2011) (Workers' Compensation Act bar applied to injury sustained in employer-owned parking lot that provided employee parking even though employee parked in customer parking area); *cf. Washington v. Honeywell Int'l, Inc.*, No. 0467-17-2 (Va. Ct. App. Oct. 24, 2017) (unpubl.) (denying claim for injury sustained on public road while claimant walking from employer parking lot to employer building because public street was not extension of premises and route was not sole and exclusive way of ingress and egress); *Lane v. Emergency Veterinary Clinic*, No. 2073-12-4 (Va. Ct. App. Apr. 23, 2013) (unpubl.) (parking lot fall not compensable); *Hunton & Williams v. Gilmer*, 20 Va. App. 603, 460 S.E.2d 235 (1995) (injury sustained in parking garage not compensable where employer neither owned nor controlled garage and no evidence showed an area set aside for employees); *Bogart v. Randstad Staffing*, VWC 199-84-09 (Jan. 6, 2004) (claimant's fall on ice in public parking lot while going to employer's office to pick up paycheck was not compensable).

8-3.04(a)(3) Where the employee is charged with some duty or task in connection with his employer

This is the "special errand" rule. See *Harbin v. Jamestown Vill. Joint Venture*, 16 Va. App. 190, 428 S.E.2d 754 (1993) (widow of deceased employee entitled to benefits where employee struck by car while traveling to off-premises special assignment that benefited employer; employee's negligence immaterial). In *Slemmons v. Prince William County Police Department*, No. 2548-00-4 (Va. Ct. App. May 8, 2001) (unpubl.), a police officer suffered injury in an auto accident on the way to pick up arrest warrants prior to reporting to work. The Court found the injury not compensable as the employee was commuting to work, and was not on a special errand, as there was no requirement that he obtain the warrants before reporting for his usual shift.

8-3.04(a)(4) Where the employee is satisfying normal personal necessities

This is the "personal comfort" exception. *Kraf Constr. Servs. Inc. v. Ingram*, 17 Va. App. 295, 437 S.E.2d 424 (1993) (employee's injury compensable when struck by car while crossing highway to get drink where employer did not provide place to satisfy personal comfort and employer was providing transportation); *Newman Knight Frank v. Estate of Williams*, No. 0600-20-2 (Va. Ct. App. Nov. 4, 2020) (personal comfort exception applied when decedent died while resting for two hours between work shifts).

8-4 PRESUMPTION PROVISIONS

8-4.01 Occupational Diseases in General

In general, a disease is an occupational disease only if it arises out of and in the course of employment and is not an ordinary disease of life to which the general public is exposed outside of the employment. Va. Code § 65.2-400(A). A disease arises out of the employment only if it is apparent to the rational mind upon consideration of all the circumstances that:

1. there is a direct causal connection between the conditions under which work is performed and the occupational disease;
2. it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
3. it can be fairly traced to the employment as the proximate cause;
4. it is neither a disease to which an employee may have had substantial exposure outside of the employment, nor any condition of the neck, back, or spinal column;
5. it is incidental to the character of the business and not independent of the relation of employer and employee; and
6. it had its origin in a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.

Va. Code § 65.2-400(B).

The above notwithstanding, an ordinary disease of life to which the general public is exposed outside of employment may be compensable as an occupational disease. To prevail, the claimant must prove by clear and convincing evidence, to a reasonable medical certainty, that the disease arose out of and in the course of employment, did not result from causes outside the employment, and either the disease follows as an incident of an occupational disease, or the disease is characteristic of and caused by conditions peculiar to that employment. Va. Code § 65.2-401.

8-4.02 Presumption Statutes

The Heart and Lung Act (Presumption Act), Va. Code § 65.2-402, provides that respiratory diseases, hypertension, heart disease, and certain cancers that cause the death, or any health condition or impairment resulting in total or partial disability, of firefighters shall be presumed to be occupational diseases. That same code section provides that hypertension or heart disease that causes the death, or any health condition or impairment resulting in total or partial disability, of police officers, sheriffs, deputy sheriffs, and other specified public safety officers shall also be presumed to be occupational diseases. The Presumption Act also covers Department of Emergency Management hazardous materials officers and paid and volunteer firefighters. *Id.*; see also Va. Code § 65.2-101(1)(l) (including in the definition of "employee" volunteer public safety officers if the local governing body adopts a resolution acknowledging them as employees for purposes of eligibility for workers' compensation). In addition to the Presumption Act, Va. Code § 65.2-402.1 establishes a presumption that specified public safety employees with hepatitis, meningococcal meningitis, tuberculosis, or HIV resulting in total or partial disability, who can document occupational exposure to blood or body fluids, have an occupational disease. All presumptions may be rebutted by a preponderance of competent evidence to the contrary. The heart disease, hypertension, and cancer presumptions apply to firefighters and law enforcement officers who have served at least five years in their position. Va. Code § 65.2-402(B).

8-5 APPLICATION OF PRESUMPTION STATUTES

8-5.01 Effect of Statutes

The effect of the presumption statutes is to eliminate the necessity for proof by the claimant of a causal connection between the condition complained of and the employment and to shift the burden of going forward with evidence from the claimant to the employer. *Page v. City of Richmond*, 218 Va. 844, 241 S.E.2d 775 (1978). To receive the benefit of the presumption (claimants alleging heart disease or hypertension must "have completed five years of service in their position"), a claimant need prove only that he suffers from a condition named in the statute, that he is or was employed in a capacity covered by the presumption, and that he is disabled or impaired by the condition. Va. Code §§ 65.2-402, 65.2-402.1. In addition, the employee must prove that either he was not requested by the employer to undergo a pre-employment physical or that he underwent such a pre-employment physical and the condition for which benefits are being sought was not detected. Va. Code §§ 65.2-402(D), 65.2-402.1(E). For infectious diseases only, the presumption is not effective until six months after the physical examination unless the claimant can demonstrate a documented exposure during the six-month period. Va. Code § 65.2-402.1(F)(1).

8-5.02 Conditions Covered

The Presumption Act grants the benefit of the rebuttable presumption for five conditions: (1) respiratory diseases, (2) hypertension, (3) heart disease, (4) certain cancers, and (5) certain infectious diseases. Va. Code §§ 65.2-402(A), (B), (C), 65.2-402.1(A). In 2021, COVID-19 was added to the list of covered infectious diseases.⁹ Va. Code § 65.2-402.1(B).

8-5.02(a) Respiratory Conditions

Pulmonary sarcoidosis, a disease of unknown etiology, has been held to be a respiratory condition covered by the presumption. *Fairfax Cnty. Fire & Rescue Servs. v. Newman*, 222 Va. 535, 281 S.E.2d 897 (1981). Similarly, carcinoma of the lung has been held to be a compensable respiratory disease, *Woody v. Henrico Cnty. Fire Dep't*, VWC 168-81-70 (June 22, 2001), *rev'd on other grounds*, 39 Va. App. 322, 572 S.E.2d 526 (2002); *Smith v. City of Richmond*, 58 O.I.C. 333, VWC 569-128 (1978), as has emphysema, *Page v. City of Richmond*, 218 Va. 844, 241 S.E.2d 775 (1975), and restrictive lung disease, *Burch v. City of Richmond*, 61 O.I.C. 84, VWC 100-52-36 (1982).

8-5.02(b) Hypertension

In at least two cases, the Commission was asked to determine whether the condition complained of by the employee constituted hypertension under the Presumption Act. In *Marshall v. Commonwealth*, the Deputy Commissioner defined hypertension as "a persistently high pressure of the blood against the arterial walls, the diagnosis of which is based on at least three consecutive daily or weekly blood pressure readings." 61 O.I.C. 288, VWC 105-12-95 (1982). The Deputy Commissioner ruled that a single reading of elevated blood pressure, followed by normal blood pressure readings, is insufficient to invoke the presumption. *Id.* Consistent with that definition, the full Commission ruled that a single reading of an elevated blood pressure level obtained at a pre-employment physical examination was not enough for the employer to establish a preexisting condition of hypertension. *Harris v. Arlington Cnty.*, 63 O.I.C. 165, VWC 107-34-99 (1984); *Glean v. Fairfax County Government*, 20 VWC 146-39-10 (2020) ("An elevated blood pressure reading in and of itself does not establish the claimant suffered from hypertension or heart disease.")

⁹ Prior to the legislative change, the Attorney General opined that COVID-19 would qualify as a respiratory condition under the statute. 2020 Op. Va. Att'y Gen. 22.

8-5.02(c) Heart Disease

In *Virginia Department of State Police v. Haga*, 18 Va. App. 162, 442 S.E.2d 424 (1994), the Court of Appeals considered the meaning of the word "disease" in Va. Code § 65.2-402 in determining whether a coronary artery spasm was a heart disease. Noting that the Virginia Supreme Court had stated in *Merillat Industries v. Parks*, 246 Va. 429, 436 S.E.2d 600 (1993), that the definition of either "injury" or "disease" is so broad as to encompass any bodily ailment of whatever origin, the *Haga* court proceeded to "employ well established standards of statutory construction." In so doing, the court found that the word "disease" had a "well established meaning" in Webster's Ninth New Collegiate Dictionary (1986 Ed.) (a "condition that impairs the performance of a vital function," such as a sickness or a malady), Black's Law Dictionary ("a deviation from the healthy or normal condition of any of the functions or tissues" of the body, or "an alteration in the state of the body or of some of its organs, interrupting or disturbing the performance of the vital functions, and causing or threatening pain and weakness"), and Dorland's Illustrated Medical Dictionary (26th ed. 1985). The Court of Appeals ruled that the definition of disease employed by the Commission in *Haga* was consistent with the definition in the foregoing sources, and affirmed the award of benefits to the employee. See section 8-3.01; see also *A New Leaf, Inc. v. Webb*, 257 Va. 190, 511 S.E.2d 102 (1999) (because allergic reaction was not caused by cumulative "trauma," contact dermatitis acquired over time is compensable as a disease); *Stenrich Grp. v. Jemmott*, 251 Va. 186, 467 S.E.2d 795 (1996) (condition resulting from "cumulative trauma" is an injury, not a disease).

The courts and the Commission have considered conditions in other cases to determine whether the condition is covered by the Presumption Act. While cardiac spasm, or coronary artery spasm, is a compensable heart disease, see *Haga, supra*, esophageal spasm is not, *Arnold v. City of Richmond*, 60 O.I.C. 24, 26, VWC 100-02-94 (1981). Similarly, a diagnosis of atrial fibrillation, a separate heart condition frequently associated with hypertension, does not trigger the protections of the statute for hypertension, but is considered a form of heart disease and is covered by the heart disease presumption. Compare *Delaney v. City of Fairfax Fire & Rescue*, No. 1588-93-4 (Va. Ct. App. May 31, 1994) (unpubl.) (one brief incident of arrhythmia not heart disease); *Link v. Commonwealth*, 71 O.W.C. 143, 145, VWC 155-19-20 (1992) with *Henrico Cnty. Sheriff's Office v. McQuay*, No. 2241-98-2 (Va. Ct. App. Aug. 17, 1999) (unpubl.) (repeated incidents of cardiac arrhythmia establish a disease); *Estate of Jonathan Beasley v. City of Chesapeake*, VWC VA00000889787 (Nov. 12, 2015) (acute myocardial infarction constitutes heart disease in the absence of underlying coronary artery disease); *Davis v. Albemarle (Cnty. of) Fire Dep't*, VWC 216-78-89 (Apr. 5, 2006) (irregular heart rhythms constitute heart disease), *summarily aff'd*, No. 1166-06-2 (Va. Ct. App. Sept. 12, 2006); *Weaver v. Fairfax Cnty. Police Dep't*, VWC 175-50-13 (May 31, 2000) (tachycardia is a form of heart disease); *Woodard v. Lee County*, VWC 146-45-13 (Aug. 15, 2019) (atrial fibrillation is a form of heart disease); and *Soltow v. Fairfax Cnty. Bd. of Sup'vrs*, 77 O.W.C. 154, VWC 181-49-00 (May 19, 1998) ("no dispute" that a claimant with fatal cardiac arrhythmia is entitled to the presumption).

In *Bunting v. City of Suffolk Fire*, VWC 219-09-56 (Nov. 2, 2005), the Commission distinguished between tachycardia (rapid heart rate) caused by heart disease and that caused by a dysfunction of the nervous system, finding the latter was not covered by the presumption. The Commission stated that the General Assembly intended to limit the presumption of compensability to diseases of the heart, to the exclusion of all other diseases of the body that tangentially affect the heart. The Commission also gave great weight to the treating physician's diagnosis, rejecting the diagnosis of heart disease from a doctor who examined the claimant once.

In *Snellings v. Stafford County Fire & Rescue Department*, 62 Va. App. 568, 750 S.E.2d 223 (2013), the Court of Appeals noted that while hypertension or heart disease can cause a stroke, a stroke is not itself evidence of heart disease or hypertension. The

court held that the plaintiff must provide evidence that the hypertension or heart disease *caused* the stroke before the presumption applies.

Even though the employee died suddenly, there was no autopsy, and a physical examination conducted a month before death did not reveal heart disease, the Court of Appeals held that credible evidence supported the Commission's finding that death was caused by heart disease. *Waynesboro City Police v. Coffey*, 35 Va. App. 264, 544 S.E.2d 860 (2001). In *Smith v. City of Alexandria*, the deputy commissioner held that angina pectoris is a "symptom of possible heart disease, [but] it is not a heart disease." 62 O.I.C. 419, VWC 107-54-05 (1983). The opinion was affirmed in unpublished form by the full Commission.

Even after providing life-saving heart surgery, temporary total disability benefits, and medical treatment for the lifetime of the claimant as the result of a presumption claim, the locality may be liable for "severely marked disfigurement" resulting from heart surgery under Va. Code § 65.2-503. To recover for such permanent partial disability, a claimant must prove that he has reached his maximum degree of medical improvement. *Montalbano v. Richmond Ford, LLC*, 57 Va. App. 235, 701 S.E.2d 72 (2010); *Cafaro Constr. Co. v. Strother*, 15 Va. App. 656, 426 S.E.2d 489 (1993); *McLure v. Ingalls Steel Co.*, 60 O.I.C. 307, VWC 560-476 (1981). The basis for such a decision must be a physician's opinion. *Hood v. Atl. States Tree Expert Co.*, 60 O.I.C. 212, VWC 584-316 (1981); see *City of Roanoke v. Williams*, No. 1218-97-3 (Va. Ct. App. Dec. 23, 1997) (unpubl.) (claimant did not prove that he had reached maximum degree of medical improvement within six months of heart surgery). Compensation is payable only for disfigurement that is "severely marked, conspicuous and noticeable." *Hall v. Newport News Shipbuilding*, 68 O.I.C. 154, VWC 130-15-18 (1989); see *Martin v. Fed. Reserve Bank*, 67 O.I.C. 149, VWC 122-21-42 (1988) (full Commission finding that six-inch scar from back surgery not sufficiently disfiguring). On remand in *Williams*, VWC 181-01-34 (May 15, 1998), the Deputy Commissioner concluded that the heart surgery scar was not sufficiently disfiguring to be compensable.

8-5.02(d) Certain Cancers

Volunteer or salaried firefighters, Department of Emergency Management hazardous materials officers, commercial vehicle enforcement officers or motor carrier safety troopers employed by the Department of State Police, and full-time sworn members of the enforcement division of the DMV are entitled under Va. Code § 65.2-402(C) to a rebuttable presumption that, under certain circumstances, enumerated types of cancer are compensable. Leukemia, or pancreatic, prostate, rectal, throat, breast, or ovarian cancer that causes the death of a covered employee or any health condition or impairment of such covered employee resulting in total or partial disability shall be presumed to be an occupational disease. The Act also covers colon, brain, and testicular cancer, for those diagnosed on or after July 1, 2020. *Id.* To be eligible, the claimant must have completed five years of service in the qualifying position. Previously, the employee was required to demonstrate contact in the line of duty with a known or suspected carcinogen; that requirement has been eliminated for claims with a date of communication occurring on or after July 1, 2020.

Simply having one of the specified diseases does not trigger the presumption if no disability, partial or total, is shown through an inability to work or perform activities of daily living. *Jadot v. Fairfax Cnty.*, VWC 000-0021-2869 (Oct. 17, 2012).

8-5.02(e) Certain Infectious Diseases

A salaried or volunteer firefighter, paramedic, EMT, member of a locality's police department, or a sheriff or deputy sheriff with hepatitis, meningococcal meningitis, tuberculosis or HIV that results in death or total or partial disability who can document occupational exposure to blood or body fluids is rebuttably presumed to have an

occupational disease. Va. Code § 65.2-402.1. The presumption also applies to correctional officers and members of the enforcement division of the Department of Motor Vehicles diagnosed with hepatitis, meningococcal meningitis, or HIV on or after July 1, 2020. *Id.* Occupational exposure is an exposure occurring during the performance of job duties that places an employee at risk of infection. Exposure is deemed documented if it occurred prior to July 1, 2002. After that date, the employee must give notice, written or otherwise, of the exposure to the employer.

COVID-19 is presumed to be a covered occupational disease when it causes the death or total or partial disability of any health care provider who, as part of his employment is directly involved in diagnosing or treating persons known or suspected to have COVID-19. Va. Code § 65.2-402.1(B)(1). In those cases, the COVID-19 virus is established by a positive diagnostic test and signs and symptoms of the disease that require medical treatment. *Id.* The COVID-19 presumption also applies to firefighters (including EMT personnel), law enforcement officers, correctional officers, and regional jail officers. Va. Code § 65.2-402.1(B)(2). For those employees, the COVID-19 virus is established by a positive diagnostic test for COVID-19, an incubation period consistent with COVID-19, and signs and symptoms of the disease that require medical treatment. *Id.*

For health care providers, the presumption applies to any death or disability caused by COVID-19 occurring on or after March 12, 2020, and prior to July 1, 2020, if the claimant either (i) received a positive diagnosis of COVID-19 from a licensed healthcare worker, after either a presumptive positive test or a laboratory-confirmed test for COVID-19, or (ii) presented with signs and symptoms of COVID-19 that required medical treatment. Va. Code § 65.2-402.1(F)(2). For death or disability occurring after July 1, 2020, and prior to December 31, 2022, both of the criteria must be met. *Id.*

For public safety employees, the presumption applies to any death or disability that occurred on or after July 1, 2020, and prior to December 31, 2022, if the claimant received a diagnosis of COVID-19 from a licensed physician, after either a presumptive positive test or a laboratory-confirmed test for COVID-19 and presented with signs and symptoms of COVID-19 that required medical treatment. Va. Code § 65.2-402.1(F)(3).

An employee who is not partially or totally disabled by the disease but who tests positive for a listed infectious disease is still entitled to make a claim for medical benefits, including an annual medical examination to measure the progress of the condition, and any other medical treatment, prophylactic or otherwise. Va. Code § 65.2-402.1(C).

If a vaccine or other form of prophylaxis is medically indicated for the listed diseases, the employer may require covered employees to undergo such immunization or prophylaxis unless a physician determines in writing that it would pose a significant health risk. Absent the physician's written determination, refusing or failing to undergo the immunization or prophylaxis eliminates the presumption. Va. Code § 65.2-402.1(E)(1). For healthcare workers, this includes a COVID-19 vaccine with an Emergency Use Authorization issued by the Food and Drug Administration. Va. Code § 65.2-402.1(E)(2).

8-5.03 Covered Employees

The statute grants the benefit of the rebuttable presumption to, essentially, three groups of local employees. Salaried or volunteer firefighters are entitled to a presumption that a "respiratory disease" or one of the identified types of cancer, causing death, or any health condition or impairment that results in total or partial disability, is an occupational disease. Va. Code § 65.2-402(A); see *Wessell v. Washington Metro. Airports Auth.*, VWC 168-20-21 (May 17, 1999) (applies to all firefighters whether publicly or privately employed). Salaried or volunteer firefighters, as well as certain law enforcement employees, including members of county, city, or town police departments and sheriffs and deputy sheriffs, are similarly

entitled to a rebuttable presumption that hypertension or heart disease causing death, or any health condition or impairment that results in total or partial disability, is an occupational disease if they "have completed five years of service in their position." Va. Code § 65.2-402(B). Salaried or volunteer emergency medical services personnel are also covered if the locality has adopted a resolution so providing. Va. Code § 65.2-402(B). Salaried or volunteer EMS personnel are also covered under the infectious disease presumption. Va. Code § 65.2-402.1(A). Correctional officers and those in the Department of Motor Vehicles enforcement division are now covered under the infectious disease presumption, so long as the diagnosis occurred on or after July 1, 2020. *Id.* The groups of covered employees are subject to annual expansion, and should be monitored closely.

The determination whether an employee is covered by the Presumption Act, however, is not always an easy call. A dispatcher performing largely clerical tasks is not entitled to the rebuttable presumption. *Fisher v. City of Williamsburg*, 58 O.I.C. 125, VWC 570-882 (1979). An employee who works in a supply room and who is occasionally called upon to bring supplies to the scene of a fire and is classified as a firefighter is entitled to the benefit of the rebuttable presumption. *Rogers v. Fairfax Cnty.*, 68 O.I.C. 53, VWC 125-86-91 (1989) (full Commission noting that while injurious exposure is not a condition of entitlement to the presumption, it may have probative value in rebutting the presumption) (affirmed in unpublished opinion of the Court of Appeals Apr. 3, 1990). A jailer who is neither classified, trained, nor sworn as a deputy sheriff is not entitled to the rebuttable presumption. *Wallace v. Piedmont Reg'l Jail*, 71 O.W.C. 148, VWC 149-49-39 (1992). Full-time, duly sworn deputy sheriffs, even though designated as courtroom security officers or correctional officers, seeing to the care and confinement of inmates, are entitled to coverage under the Presumption Act. *Cnty. of Augusta Jail v. Cook*, 16 Va. App. 247, 430 S.E.2d 546 (1993). A juvenile corrections officer who is not a deputy sheriff is not entitled to the presumption. *Lineberry v. Natural Bridge Learning Center*, VWC 208-27-95 (Jan. 24, 2003). A state trooper, even though assigned to the less strenuous task of overseeing drivers' examinations, is entitled to the benefit of the statutory presumption. *Link v. Commonwealth*, 71 O.W.C. 143, VWC 155-19-20 (1992). An EMT who has no cross-training as a firefighter is not entitled to the benefit of the rebuttable presumption. *Hall v. City of Newport News*, VWC 148-28-23 (Nov. 13, 1991).

8-5.04 Disability or Impairment

In order to invoke the statute, an employee must prove by a preponderance of the evidence that he has sustained disability or impairment from the subject condition. *Tomes v. James City Cnty. Fire*, 39 Va. App. 424, 573 S.E.2d 312 (2002); *Delaney v. City of Fairfax Fire & Rescue*, No. 1588-93-4 (Va. Ct. App. May 31, 1994) (unpubl.); *Bristol Police Dep't v. Broome*, 7 Va. App. 161, 372 S.E.2d 204 (1988); *Christy v. Town of Abingdon*, VWC VA00001105397 (Feb. 28, 2017). "Disability from a disease has been defined as the stage when the disease prevents the employee from performing his work efficiently." *Salyer v. Clinchfield Coal Corp.*, 191 Va. 331, 61 S.E.2d 16 (1950).

In *Lipscomb v. City of Lynchburg*, No. 2157-13-3 (Va. Ct. App. May 27, 2014) (unpubl.), the Court of Appeals held a retired fireman was not entitled to the presumption, nor medical benefits resulting from heart disease, when he failed to prove an entitlement to some form of economic indemnity or restoration. Absent a showing of actual lost wages, a claimant could prove such entitlement through evidence of the loss of his earning capacity or opportunity. Clarifying *Lipscomb* in *Samartino v. Fairfax County Fire & Rescue*, 64 Va. App. 499, 769 S.E.2d 692 (2015), the Court of Appeals stated that the right to economic indemnity is only one factor in determining if a person is disabled as a result of illness; its absence is not dispositive of a finding that a claimant is not disabled. See also *Ezell v. James City Cnty.*, VWC VA02000013694 (July 12, 2016) (following *Samartino*, lack of economic indemnity did not prohibit application of the presumption); *Cohn v. City of Virginia Beach*, VWC VA00000796047 (June 15, 2016) (claimant did not have to prove entitlement to economic indemnity, but could invoke presumption with proof of inability

to perform work efficiently); *Kesovich v. City of Norfolk*, VWC VA02000016715 (Sept. 11, 2015) (for the purposes of the presumption, disability may be proven without a corresponding wage loss; no citation to *Lipscomb or Samartino*); *Shires v. City of Richmond*, VWC 020-0000-6218 (Mar. 20, 2012) (in the absence of work incapacity, an otherwise eligible claimant, such as a fire fighter or police officer, is not afforded the rebuttable presumption that his disease is work-related); *Taylor v. Loudoun Cnty. Fire & Rescue*, VWC 237-84-61 (Apr. 9, 2010) (same); *Mongle v. City of Norton Police*, VWC 217-57-23 (May 26, 2006) (presumption not applicable to hypertension that does not result in disability or death); *Harrison v. Richmond City Police*, VWC 211-47-36 (Oct. 26, 2005) (failure to prove disability from hypertension); *Buckner v. City of Richmond*, 61 O.I.C. 83, VWC 104-52-72 (1982); *Davis v. City of Richmond*, 59 O.I.C. 63, VWC 665-227 (1980) (medical experts disagree on whether claimant had impairment).

An employee who misses work as a precautionary measure because of a condition, rather than disability caused by the condition, has not established a period of disability due to a compensable condition. *Delaney v. City of Fairfax Fire & Rescue*, No. 1588-93-4 (Va. Ct. App. May 31, 1994) (unpubl.) (court finding no period of disability established when employee misses one day of work due to removal from workplace as a precautionary measure for cardiac dysrhythmia); *accord Lussen v. City of Roanoke*, No. 1705-03-3 (Va. Ct. App. Dec. 16, 2003) (unpubl.) (restriction to office duty as precautionary measure does not indicate disability in the absence of lost time from work or lost wages as a result); *Keen v. City of Manassas*, VWC VA00000877652 (Jan. 31, 2017) (light duty work was precautionary because of abnormal stress test resulting in a false positive, not because of actual disability caused by the disease). Visits to doctors to monitor hypertension do not constitute evidence of disability from work when doctors' notes indicated the employee was released for regular duty. *Smith v. City of Newport News Fire Dep't*, VWC 220-99-79 (Nov. 30, 2005). Medical evidence, and not lay testimony, is required to link a period of alleged disability with a particular condition. *Miller v. Commonwealth*, 61 O.I.C. 297, VWC 103-74-11 (1982). The medical evidence must be based upon a knowledge of the claimant's job duties. *Bristol Police Dep't v. Broome*, 7 Va. App. 161, 372 S.E.2d 204 (1988). The disability or impairment need not be continuous or for the full seven-day period referenced in Va. Code § 65.2-509. *Link v. Commonwealth*, 71 O.W.C. 143, VWC 155-19-20 (1992). The full Commission has ruled that the disability need not occur while a claimant is in the employ of the locality. *Revard v. Fairfax Cnty.*, 70 O.I.C. 154, VWC 141-15-60 (1991). The disability may have occurred prior to the date of communication of the diagnosis. *Leftwich v. City of Roanoke*, JCN VA00001204016 (Oct. 2, 2019).

In *Hollingsworth v. Arlington County*, a firefighter sought compensation for disability due to hypertension. One physician stated that while the claimant had hypertension, the condition was not at a level sufficient to render the claimant disabled. 66 O.I.C. 90, VWC 125-53-18 (1987). A second physician testified that the claimant was physically able to perform his regular duties, but it was "not medically in his interest to do it." *Id.* The full Commission held that the claimant was not entitled to the benefit of the statute because he had not demonstrated that he was disabled due to hypertension. *Id.* at 92-93. The full Commission noted by way of dicta that even if he were entitled to compensation, such an employee still had a duty to market his residual capacity to work. *Id.* at 92.

The claimant has the burden to prove his total disability and the periods of that disability. *Windsor v. Loomis Fargo & Co.*, No. 0790-11-4 (Va. Ct. App. Dec. 20, 2011); *Uninsured Emp'r's Fund v. Clark*, 26 Va. App. 277, 494 S.E.2d 474 (1998). An employee who is seeking compensation and is capable of light duty must prove a reasonable effort to market his residual work capacity during any period for which benefits are sought. This duty applies even though the claimant is working part time. *Cnty. of James City Fire Dep't v. Smith*, 54 Va. App. 448, 680 S.E.2d 307 (2009) (six factors determine if adequately marketing residual capacity) (citing *Nat'l Linen Serv. v. McGuinn*, 8 Va. App. 267, 380

S.E.2d 31 (1989)); *Bolton v. Newport News Shipyard Fire Dep't*, VWC 203-68-61 (July 23, 2002). In *Ingram v. Pittsylvania County Sheriff's Office*, VWC 189-22-73 (Apr. 12, 2001), the Commission determined that although the employee was diagnosed with hypertension, the presumption did not apply because he was not restricted from work and thus was not disabled. *Cf. Elder v. Prince George Cnty. Police*, VWC 194-05-47 (Oct. 13, 2000) (employee entitled to presumption and has partial disability as a result of hypertension, but no indemnity benefits because employee did not market his residual capacity). In *Mitchell v. City of Newport News Police*, VWC 206-11-80 (July 24, 2002), the Commission determined that a claim for medical benefits only does not give rise to the presumption. *Contra Bragg v. City of Charlottesville Fire Dep't*, VWC 020-0000-4061 (Oct. 12, 2011) (although claimant only filed for medical benefits, evidence showed was partially disabled for a period).

There is an exception to the above for the infectious disease presumption discussed in section 8-5.02(e). Covered employees who test positive for exposure to the enumerated infectious diseases but who have not yet incurred the requisite total or partial disability may still claim medical benefits pursuant to Va. Code § 65.2-603, including entitlement to an annual medical examination to measure the progress of the condition, if any, and any other medical treatment, prophylactic or otherwise. Va. Code § 65.2-402.1(C).

8-6 DEFENSES TO PRESUMPTION

8-6.01 Causation

In order to rebut the presumption, the employer must adduce competent medical evidence demonstrating that the employment did not cause the subject condition and that the subject condition was due to non-occupational causes. *Bass v. City of Richmond*, 258 Va. 103, 515 S.E.2d 557 (1999); *Doss v. Fairfax Cnty. Fire & Rescue Dep't*, 229 Va. 440, 331 S.E.2d 795 (1985); *Page v. City of Richmond*, 218 Va. 844, 241 S.E.2d 775 (1978); *Va. Dep't of State Police v. Talbert*, 1 Va. App. 250, 337 S.E.2d 307 (1985). That burden has been met upon submission of competent medical evidence that the claimant's condition was more than likely a hereditary phenomenon, *Doss v. Fairfax County Fire & Rescue Department*, 229 Va. 440, 331 S.E.2d 795 (1985), or a showing that the claimant's heart condition was "generally thought to be congenital" or was "probably" congenital. *Cook v. City of Waynesboro Police Dep't*, 225 Va. 23, 300 S.E.2d 746 (1983).

The employer has the burden of proof by a preponderance of the evidence on both prongs. *Bass, supra*. In meeting that standard, the employer is not required to exclude the possibility that the employment may have been the cause for the subject condition. *Augusta Cnty. Sheriff's Dep't v. Overbey*, 254 Va. 522, 492 S.E.2d 631 (1997). When a doctor excludes work stress as a causative factor based on current medical thinking regarding heart disease, however, the Court of Appeals has held such testimony is improper rebuttal evidence because it merely refutes the premise of the legislatively enacted presumption. *Metro. Wash. Airports Auth. v. Lusby*, 41 Va. App. 300, 585 S.E.2d 318 (2003); *Metro. Wash. Airports Auth. v. Bispo*, No. 0905-03-4 (Va. Ct. App. Aug. 19, 2003) (unpubl.); *Medlin v. Cnty. of Henrico Police*, 37 Va. App. 756, 561 S.E.2d 60 (2002); 34 Va. App. 396, 542 S.E.2d 33 (2001) (*Medlin II* and *Medlin I*, respectively); *Patton v. Loudoun Cnty. Bd. of Sup'vrs*, 36 Va. App. 392, 551 S.E.2d 6 (2001); *Waynesboro City Police v. Coffey*, 35 Va. App. 264, 544 S.E.2d 860 (2001); *Bristol City Fire Dep't v. Maine*, 35 Va. App. 109, 542 S.E.2d 822 (2001); *Godfrey v. Portsmouth City Fire Dep't*, No. 1950-00-1 (Va. Ct. App. Apr. 10, 2001) (unpubl.); *City of Portsmouth Sheriff's Dep't v. Torbert*, No. 2698-00-1 (Va. Ct. App. Mar. 27, 2001) (unpubl.); *Blankenship v. Metro. Wash. Airports Auth.*, VWC 212-81-82 (Jan. 18, 2005). As the Court of Appeals explained in *Goodwin v. Amherst County Sheriff's Office*, No. 0810-01-4 (Va. Ct. App. Jan. 29, 2002) (unpubl.):

as long as the current and authoritative medical findings apply to the claimant and his/her particular condition, physicians are free to rely on such findings

and testify accordingly. Further, to the extent that such findings generally negate the statutory presumption created by the legislature, employers are free to seek an appropriate remedy from the General Assembly.

The Court of Appeals has emphasized, however, that the presumption is not a conclusive one. In *Henrico County Division of Fire v. Woody*, 39 Va. App. 322, 572 S.E.2d 526 (2002), the court noted that *Medlin I* held only that "evidence that merely rebuts generally the underlying premise of the statute, which establishes a causal link between stress and heart disease, is not probative evidence for the purposes of overcoming the presumption." In *Woody*, all but one doctor had opined that work exposure to toxins was not a cause of the claimant's lung cancer. The Commission had held that *Medlin I* required a holding that if there was an exposure to toxins, the presumption could not be rebutted. The Court of Appeals reversed and remanded, stating that the Commission needed to weigh the evidence on the merits as to causation. *Cf. Metro. Wash. Airports Auth. v. Lusby*, 41 Va. App. 300, 585 S.E.2d 318 (2003) (evidence sufficiently weighed; presumption not rebutted). On remand, the Commission found that the employer had not rebutted the presumption. *Woody v. Henrico Cnty. Div. of Fire*, VWC 168-81-70 (Feb. 26, 2004).

A review of the cases reveals just how important the physician's testimony can be. *See, e.g., Waynesboro City Police v. Coffey*, 35 Va. App. 264, 544 S.E.2d 860 (2001) (classifying stress as a minor factor does not exclude it as a significant factor); *Herrera v. City of Richmond Police Dep't*, VWC VA000-0041-6036 (Jan. 15, 2013) (work stress minimized as factor, but not affirmatively excluded); *Bagwell v. City of Norfolk Police*, VWC 227-89-68 (June 25, 2007) (full Commission affirming a denial of benefits where treating physician discounted stress as a cause for retired police officer's heart attack and attributed heart attack to non-occupational causes); *McPhatter v. Norfolk City Sheriff's Office*, VWC 210-63-82 (July 26, 2005) (presumption rebutted when physician initially stated that work was not a causative factor even though later stated he could not categorically rule out occupational stress as a causative factor), *summarily aff'd*, No. 2031-05-1 (Va. Ct. App. Jan. 10, 2006); *Dooley v. Roanoke City Fire Dep't*, VWC 190-36-52 (June 12, 2000) (presumption not rebutted because physician statement that work was not "the" cause of disease does not mean not "a significant" cause of disease).

8-6.01(a) Presumption Rebutted

Cases in which courts have found the presumption rebutted include the following:

1. In *Woods v. Henrico County Division of Fire*, No. 1355-11-2 (Va. Ct. App. Feb. 14, 2012) (unpubl.), the appellate court held that when the record includes conflicting medical opinions, the opinion of the attending physician who is positive in his diagnosis of a disease is entitled to great weight. Thus, the presumption was rebutted when the doctor opined that the claimant's condition was genetic. Also, in *Carroll v. City of Newport News*, VWC 000-0044-9655 (May 24, 2012), the Commission held the presumption was rebutted based on the treating physician's opinion that the firefighter's heart attack was caused by high cholesterol and family history. The Commission refused to consider a post-hearing opinion of the same doctor that occupational stress was a likely contributor to the employee's development of premature coronary artery disease.
2. In *Augusta County Sheriff's Department v. Overbey*, 254 Va. 522, 492 S.E.2d 631 (1997), the Court held the employer established a non-work-related cause of claimant's heart disease based in part on the uncontradicted deposition testimony of the attending physician that several non-work-related risk factors "caused" the claimant's heart disease. *See also Coble v. Cnty. of Henrico Fire*, No. 1943-10-2 (Va. Ct.

App. Mar. 29, 2011) (unpubl.) (doctors' evidence supported Commission's conclusion that work-related stress did not cause condition and non-work-related conditions did).

3. In *Doss v. Fairfax County Fire & Rescue Department*, 229 Va. 440, 331 S.E.2d 795 (1985), a physician said that the claimant's respiratory disease was "related to allergic asthma and that this asthma is more than likely a hereditary phenomenon," that there was no "clear-cut incident related to his work as a fireman . . . that might incriminate an on the job exposure as the precipitating cause of an underlying pathologic process such as allergic/hereditary asthma," and that with "certain stimulants and/or irritants there may very well be an exacerbation of his symptomatology." This evidence sufficiently rebutted the presumption. *Id.*
4. In *Snyder v. County of York Fire*, VWC 190-67-18 (Oct. 22, 2004), the Commission held that the presumption was rebutted. While there was evidence that the firefighter was exposed to various toxins during his work, that evidence did not establish that the exposure was a causative factor in his development of lung cancer. Rather, the evidence supported the finding that the decedent's disease was caused solely by his smoking. The Court of Appeals summarily affirmed. No. 2714-04-1 (Va. Ct. App. Mar. 15, 2005).
5. In *Cook v. City of Waynesboro Police Department*, 225 Va. 23, 300 S.E.2d 746 (1983), a physician opined that the claimant's heart condition is "generally thought to be congenital" and that the physician has "never read of a case or seen an individual whose [similar] condition was brought on by stress or was in any way related to stress." 225 Va. 23, 300 S.E.2d 746 (1983). The Virginia Supreme Court held that such evidence sufficiently rebutted the presumption. *Id.*
6. In *Montgomery v. City of Portsmouth*, 4 Va. App. 525, 358 S.E.2d 762 (1987), the Court of Appeals held that a physician's statement that the claimant's heart disease was "not service connected but [was] caused by, and . . . aggravated by, his marked obesity and . . . over-indulgence in alcohol" sufficiently rebutted the presumption.
7. In *Delp v. City of Galax Police*, No. 1393-00-3 (Va. Ct. App. Feb. 27, 2001) (unpubl.), the Court of Appeals held the employer had rebutted the presumption with a preponderance of the evidence that showed heavy smoking, family history, and diabetes caused the disease, and that work stress, while not definitively excluded as a cause, was only a possibility. See also *Bagwell v. City of Norfolk Police*, VWC 227-89-68 (June 25, 2007) (doctor stated stress not a factor; heredity and lifestyle were causes); *McPhatter v. Norfolk City Sheriff's Office*, VWC 210-63-82 (July 26, 2005) (presumption rebutted when physician initially stated that work was not a causative factor even though later stated he could not categorically rule out occupational stress as a causative factor), summarily *aff'd*, No. 2031-05-1 (Va. Ct. App. Jan. 10, 2006).
8. *Watkins v. Amherst Cnty. Sheriff's Office*, VWC 176-54-53 (July 21, 2000) (medical evidence substantial that stress is not a risk factor in the development of heart disease; while job stress may cause the condition to become symptomatic, it does not cause disease).

9. In *Lordi v. Chesterfield County Fire Department*, VWC 188-86-76 (July 11, 2000), the Commission found the presumption rebutted based on the treating physicians' statements that smoking was a "very likely contributor" to the heart disease and that there was no evidence it was causally related to employment. The Commission also found that typically greater weight should be given to the positive opinion of the treating physician.
10. The presumption was rebutted because identifying work stress as a risk factor does not establish work as a cause of heart disease. *Mays v. Amherst Cnty. Sheriff's Office*, VWC 178-55-67 (Jan. 8, 2001); cf. section 8-6.01(b)(2), (b)(5) (employer must prove that work stress is not a factor).
11. The presumption was rebutted because physicians testified that work environment did not contribute in any way to the claimant's heart disease. *Lockhart v. Russell Cnty. Sheriff's Office*, VWC 191-14-60 (Oct. 10, 2000). But see more recent Court of Appeals cases cited in section 8-6.01.
12. See also *Jones v. City of Richmond Fire Dep't*, VWC 196-24-78 (Oct. 26, 2000) (Commission noting that a physician's statement that he cannot exclude the claimant's employment as a contributing cause is of little benefit to a claimant because the physician may be unable to exclude the employment for any of a number of reasons); *Jones v. City of Richmond*, VWC 196-00-03 (June 29, 2000); *Devers v. Alexandria City Fire Dep't*, VWC 169-56-37 (June 23, 2000); *Kissinger v. Portsmouth City Fire Dep't*, VWC 189-29-50 (May 18, 2000).
13. The presumption was rebutted when a physician excluded the claimant's employment as contributing to the claimant's coronary artery disease and heart attack and attributed his condition to his marked and long-standing obesity, hypertension, and elevated lipids. *Woodfolk v. Charlottesville City Police*, VWC 208-17-64 (Nov. 12, 2002).
14. The presumption was rebutted based on the opinion of the treating cardiologist that the claimant's atrioventricular nodal reentrant tachycardia (AVNRT) was "a pre-existing condition that [the claimant] was born with" and it could not be ascertained what caused the condition to become symptomatic, leading to the conclusion that the AVNRT was "a pre-existing condition that was not caused by his employment, but became symptomatic . . . possibly due to work related stress." *Thomson v. Old Dominion University*, 24 WC UNP VA00001946819 (Jan. 24, 2024).

8-6.01(b) Presumption Not Rebutted

Cases in which courts have found that the presumption was not rebutted include the following:

1. In *County of Amherst v. Brockman*, 224 Va. 391, 297 S.E.2d 805 (1982), the Virginia Supreme Court concluded that a physician's statement that claimant's coronary artery disease was not caused by claimant's occupation was insufficient to rebut the presumption.
2. The showing of risk factors alone is not sufficient to establish by a preponderance of the evidence a non-work-related cause. The employer

must affirmatively prove a causal connection between the non-work-related factors and the disease. *Metro. Wash. Airports Auth. v. Bailey*, No. 2790-01-4 (Va. Ct. App. Aug. 13, 2002) (unpubl.); *City of Portsmouth Sheriff's Dep't v. Torbert*, No. 2698-00-1 (Va. Ct. App. Mar. 27, 2001) (unpubl.); *City of Portsmouth Sheriff's Dep't v. Clark*, 30 Va. App. 545, 518 S.E.2d 342 (1999); *Eppes v. Prince Edward Cnty.*, VWC VA00001023144 (June 23, 2016); *Clark v. Town of South Boston Police*, VWC 196-09-31 (Sept. 11, 2002); see also *Miller v. City of Norfolk Fire & Paramedical*, VWC 206-43-08 (Feb. 12, 2003) (considering the claim under Va. Code § 65.2-402(A), Commission ruled that in the absence of medical documentation stating that claimant's lung cancer was not related to employment as a firefighter and was related to some other cause, such as smoking, employer failed to meet its burden of proof). Note the difference in the medical testimony given in the consolidated cases of *Medlin v. County of Henrico Police*, 34 Va. App. 396, 542 S.E.2d 33 (2001).

3. In *City of Richmond Fire Department v. Dean*, 30 Va. App. 306, 516 S.E.2d 709 (1999), the Court of Appeals held that when the medical evidence was that the precipitating cause of the heart block was unknown, the second prong for presumption rebuttal was not proved even though the evidence showed work factors were not the cause.
4. In *Henrico County Sheriff's Office v. McQuay*, No. 2241-98-2 (Va. Ct. App. Aug. 17, 1999) (unpubl.), the Court of Appeals held that the record supported the conclusion the county failed to rebut the statutory presumption by excluding work stress as a contributing factor.
5. In interpreting *Bass v. City of Richmond*, 258 Va. 103, 515 S.E.2d 557 (1999), the Court of Appeals stated that the Virginia Supreme Court "implicitly" held evidence that work-related stress is one of several factors contributing to heart disease, and if found credible by the Commission, is sufficient to rebut the presumption. *Tazewell Cnty. Sheriff's Office v. Owens*, No. 0005-99-3 (Va. Ct. App. June 29, 1999) (unpubl.); see also *Amherst Cnty. Sheriff's Dep't v. Martin*, No. 1641-03-4 (Va. Ct. App. June 1, 2004) (unpubl.) (although employer proved that non-work elements were a causative factor, it failed to prove that work-related stress was not a possible cause when doctors testified it was a possible minor risk); *Brandon v. City of Richmond Fire*, VWC 212-18-37 (Apr. 25, 2005) (same).
6. In *Virginia Department of State Police v. Talbert*, 1 Va. App. 250, 337 S.E.2d 307 (1985), the treating physician's opinion that "specific instances of job related stress" "played a major role" and "contributed primarily" in causing the claimant's heart disease convinced the Court of Appeals that the presumption had not been rebutted. See also *Barton v. City of Danville Fire Dep't*, VWC 000-0030-0287 (Jan. 12, 2012) (greater weight given to treating physician's opinion that occupational stress was a contributing factor to employee's heart disease).
7. On remand in *Bass*, the Commission held the presumption was not rebutted based on evidence that the stress of the claimant's work probably, to some measure, was a contributing cause. VWC 179-62-10 (Apr. 6, 2000); see also *Town of Wytheville Law Enf't v. Wheeler*, No. 2689-02-3 (Va. Ct. App. Apr. 8, 2003) (unpubl.); *Hudson v. City of Danville Fire Dep't*, VWC 194-61-19 (Mar. 17, 2003) (must exclude from

consideration evidence that merely contradicts generally the premise of the presumption).

8. Evidence that job stress accelerated the development of the claimant's heart disease implicates job stress as a cause of the disease. *Tirpak v. City of Hopewell*, VWC 174-25-40 (Apr. 6, 2000).
9. *Coble v. Portsmouth City Fire Dep't*, VWC 189-20-42 (May 16, 2000) (evidence that physician did not know if work was a factor or that work might be a factor does not rebut presumption); see also *Falls v. Giles Cnty. Sheriff's Office*, VWC 181-80-50 (May 31, 2000); *Weaver v. Fairfax Cnty. Police Dep't*, VWC 175-50-13 (May 31, 2000); *Wallace v. Town of Farmville*, VWC 183-37-58 (Apr. 6, 2000); *Holley v. City of Richmond Fire Dep't*, VWC 183-24-80 (Sept. 24, 1999).
10. The evidence that claimant's heart disease resulted from a virus did not prove a non-work-related cause of the heart disease sufficient to rebut the presumption, because the evidence supported findings not only that claimant probably contracted the virus through work-related exposure but also that claimant's job stress increased his susceptibility to the virus. *Town of Purcellville Police v. Bromser-Kloeden*, 35 Va. App. 252, 544 S.E.2d 381 (2001).
11. In several cases, the Commission found the conflicting medical evidence regarding stress as a factor in heart disease to be in "equipoise" and thus the presumption was not rebutted. *Ward v. New Kent Cnty. Sheriff's Office*, VWC 186-40-90 (May 31, 2000); *Wood v. Augusta Cnty. Sheriff's Office*, VWC 182-32-37 (May 31, 2000); *Whitt v. Montgomery Cnty. Sheriff's Dep't*, VWC 190-47-48 (May 17, 2000); *Woolard v. Norfolk Fire Serv.*, VWC 189-22-19 (May 6, 2000); see also *Gossom v. Lynchburg City Fire Dep't*, VWC 196-72-66 (Feb. 6, 2004) (employer's burden not met because doctors vacillated).

8-6.01(c) Judicial Review

The determination whether the employer has met this burden is made by the Commission after exercising its role as finder of fact. In this role, the Commission resolves all conflicts in the evidence and determines the weight to be accorded the various evidentiary submissions. The award of the Commission is conclusive and binding as to all questions of fact. See *Woods v. Henrico Cnty. Div. of Fire*, No. 1355-11-2 (Va. Ct. App. Feb. 14, 2012) (unpubl.) (conflicting medical opinions are an issue of fact); *Metro. Wash. Airports Auth. v. Bispo*, No. 0905-03-4 (Va. Ct. App. Aug. 19, 2003) (unpubl.) (same).

On appeal from this determination, the reviewing court must assess whether there is credible evidence to support the Commission's award. Thus, unlike the Commission, the reviewing court is not charged with determining anew whether the employer's evidence of causation should be accorded sufficient weight to constitute a preponderance of the evidence on that issue. *Bass v. City of Richmond Police Dep't*, 258 Va. 103, 515 S.E.2d 557 (1999). Even if multiple inferences are suggested by the evidence, a court will not second guess the inference adopted by the Commission if it is supported by credible evidence. *Layne v. Crist Elec. Contractor, Inc.*, 64 Va. App. 342, 768 S.E.2d 261 (2015).

Note, however, that the Commission does not owe similar deference to the factual findings of the deputy commissioner. In *King William County v. Jones*, 65 Va. App. 536, 779 S.E.2d 213 (2015), *rev'd en banc on other grounds*, 66 Va. App. 531, 789 S.E.2d 133 (2016), the court stated that the "statutory scheme makes clear that the Commission reviewing a decision of a deputy commissioner sits as fact finder and that the facts it finds

are binding on this Court on appellate review.” A limited exception exists if the deputy commissioner makes a specific finding with regard to witness credibility based on demeanor or appearance. *Id.* (citing *Goodyear Tire & Rubber Co. v. Pierce*, 5 Va. App. 374, 363 S.E.2d 433 (1987)).

8-6.02 Condition Pre-Existing Employment

A second defense available to the employer is that the subject condition pre-existed the employee's employment. Virginia Code § 65.2-402(D) provides, in general, that the rebuttable presumption applies only where the employee, if requested by his employer, underwent a pre-employment physical examination, and the employee was found to be free of the conditions subject to the presumption. For non-COVID-19 infectious diseases, the presumption is not applicable until six months following the pre-employment examination, unless the person can demonstrate a documented exposure during the six-month period. Va. Code § 65.2-402.1(F)(1). The presumption applies where an examination conducted under the direction and control of the employer fails to make a positive finding of the disease that subsequently brings about the disability or death of the employee. *Berry v. Cnty. of Henrico*, 219 Va. 259, 247 S.E.2d 389 (1978); *Arnold v. City of Norfolk Sheriff's Office*, VWC 197-62-80 (Nov. 4, 2002) (pre-existing condition of hypertension does not preclude presumption for heart disease); see *Brown v. Loudoun Cnty. Bd. of Sup'rs*, No. 2138-96-4 (Va. Ct. App. Apr. 1, 1997) (unpubl.) (diagnosis of “probable” hypertension at pre-employment physical renders presumption inapplicable); see also *Allen v. City of Norfolk Police Dep't*, No. 097-7-589 (Va. Ct. App. Aug. 26, 1997) (unpubl.) (no presumption because pre-employment physical showed hypertension). *But cf. Cnty. of York Fire & Rescue v. Dinse*, No. 0879-97-4 (Va. Ct. App. Sep. 9, 1997) (unpubl.) (although some indirect evidence of pre-employment history of hypertension, not substantial enough to negate application of presumption because pre-employment physical did not disclose any hypertension). Failure by an employer to request that an employee undergo a pre-employment physical, however, precludes an employer from asserting that the employee's condition pre-existed his employment. *Town of Waverly Law Enf't v. Owens*, 51 Va. App. 277, 657 S.E.2d 161 (2008).

The Virginia Supreme Court has held that an employee is entitled to the rebuttable presumption where he was not given a physical examination prior to beginning employment. *Cnty. of Amherst v. Brockman*, 224 Va. 391, 297 S.E.2d 805 (1982); *Waynesboro Sheriff's Dep't v. Harter*, 222 Va. 564, 281 S.E.2d 911 (1981); *Owens v. Town of Waverly Law Enf't*, VWC 224-42-95 (Apr. 23, 2007). Similarly, an employee is entitled to the rebuttable presumption even if the statute had not been enacted at the time the employee began his employment, and the employer did not administer pre-employment physical at the time the employee was hired. *Bell v. Page Cnty.*, 61 O.I.C. 31, VWC 101-93-76 (1982). In *Johnson v. County of Henrico*, the full Commission found that a firefighter was not entitled to the presumption for an obstructive lung disorder when a diagnosis of bilateral bronchiectasis was the basis for the employee's discharge from the military and was diagnosed in the employee's pre-employment physical. 60 O.I.C. 234, VWC 672-985 (1981). In that case, the full Commission noted that there was no evidence that claimant's condition had been cured or arrested at the time of his employment. *Id.* In *Dizon v. City of Norfolk Sheriff Department*, 75 O.W.C. 122, VWC 174-02-59 (Mar. 19, 1996), the Commission held that a deputy sheriff suffering from a heart condition was not entitled to the presumption because he failed to disclose at his pre-employment physical that he had received a military medical discharge because of a heart attack.

In at least one case, the full Commission held that evidence of the pre-existing condition must be adduced during the course of a physical examination conducted at the request of the locality before, not after, employment. In *Strickland v. City of Norfolk*, 63 O.I.C. 340, VWC 104-18-01 (1983), the employee was hospitalized ten days before he began his employment. During hospitalization, the claimant's treating physician noted a heart murmur, which was confirmed through an electrocardiogram. The claimant did not

undergo a pre-employment examination administered by the locality. The medical evidence, including the EKG that was performed ten days before the claimant's employment began and an EKG that was performed approximately one year later, demonstrated that the claimant had heart disease at the time his employment began. *Id.* In a 2-1 decision, the full Commission held that since the locality waited approximately one year to conduct an examination of the claimant, the claimant was entitled to the presumption, even though in retrospect his heart condition predated his employment. *Id.*

8-6.03 Statute of Limitations

A third defense available to the employing locality is the statute of limitations. A claim for benefits arising out of an occupational disease must be filed within two years after the employee received a communication that he has an occupational disease or within five years after the date of last exposure to the cause for the disease, whichever first occurs. Va. Code § 65.2-406(A)(7). For cancers listed in § 65.2-402(C)—leukemia or pancreatic, prostate, rectal, throat, ovarian, breast, colon, brain, or testicular cancer—the statute of limitations is two years after the diagnosis is communicated to the employee or within ten years from the date of the last exposure, except that workers' compensation benefits are barred in those cases if the employee is 65 years or older. Va. Code §§ 65.2-406(A)(6), 65.2-406(C).

The statute begins to run on the "date of communication," which is either the date the employee is informed of both the qualifying medical condition and that it was caused by his employment, or the date the claimant first learns that he has a qualifying disease and at the same time or later learns that his condition is an occupational disease for which compensation may be awarded. Va. Code § 65.2-403; *City of Alexandria v. Cronin*, 20 Va. App. 503, 458 S.E.2d 314 (1995), *aff'd*, 252 Va. 1, 471 S.E.2d 184 (1996); *Garrison v. Prince William Cnty. Bd. of Supervisors*, 220 Va. 913, 265 S.E.2d 687 (1980); *City of Newport News v. Kahikina*, 71 Va. App. 536, 838 S.E.2d 70 (2020) (limitations period began when physician first indicated heart disease may be related to police officer's job, not earlier diagnosis of cardiomyopathy because there was no notice of causal connection). The date of last exposure is the last date on which an employee was in the workplace and exposed to the cause of the condition. See *Booth v. City of Roanoke*, VWC VA00001052152 (Apr. 6, 2016) (claim barred when last day of employment was in 1984 and claim was filed in 2015); *Turner v. City of Norfolk Fire*, VWC 224-35-34 (Jan. 7, 2007) (similar facts); *Meyer v. City of Roanoke*, VWC 214-92-66 (Oct. 23, 2003) (statute of limitations barred claim of a claimant who retired effective July 1, 1998, was not in the workplace after June 2, 1998, did not file his application for workers' compensation benefits until June 20, 2003, and was never told by a physician that his heart condition was due to his employment). In *Renick v. City of Roanoke Police*, VWC 217-10-05 (Nov. 7, 2005), the Commission held that a claimant was not injuriously exposed to hazards of work during vacation time just prior to retirement, and thus a claim filed more than five years after the last day of actual work was barred. The Commission stated that mere employment did not constitute presumptive injurious exposure. *Id.* A nonsuit does not toll the statute of limitations, nor does Va. Code § 8.01-380 apply to workers' compensation cases. *Wilkes v. City of Richmond Fire Dep't*, VWC 198-15-56 (May 16, 2002); *Allison v. Petersburg Fire Dep't*, VWC 185-09-52 (May 19, 2000).

It is not necessary that an employee receive a diagnosis and communication of an occupational disease in order to file a claim; compensation may be claimed any time after the first day of disability. *Revard v. Fairfax Cnty.*, 70 O.I.C. 154, VWC 141-15-60 (1991); *Pennington v. Commonwealth*, 61 O.I.C. 322, VWC 100-54-87 (1982); *cf. Cnty. of Amherst v. Brockman*, 224 Va. 391, 297 S.E.2d 805 (1982); *Garrison v. Prince William Cnty. Bd. of Sup'vrs*, 220 Va. 913, 265 S.E.2d 687 (1980) (Court holding that the communication must include a statement that the condition arose out of and in the course of his employment). The significance of the claimant's awareness that the condition may be work-related varies. *Compare Owens v. York Cnty. Fire & Rescue*, 38 Va. App. 354, 564 S.E.2d 150 (2002) (awareness hypertension compensable and communication of a diagnosis of high blood pressure commenced statute) and *Daniel v. Wise Cnty.*, VWC

VA0000033-84-63 (May 28, 2013) (claimant's comments that high blood pressure due to stress at work coupled with diagnosis of hypertension was communication for statute of limitations purposes), *with Christy v. Town of Abingdon*, VWC VA00001105397 (Feb. 28, 2017) (claimant's belief that hypertension was work-related was not sufficient to show understanding that it was an occupational disease for which compensation could be awarded).

It is not necessary that the communication that the employee's disease was work-related be from a physician before the statute begins to run. *Fitzgerald v. Henrico Cnty. Sheriff's Office*, VWC 241-12-36 (Mar. 10, 2010) (communication from employer to claimant in ICU that he may or may not have coverage under heart/lung/hypertension act found sufficient), *aff'd*, No. 0682-10-2 (Va. Ct. App. Aug. 31, 2010); *Robinson v. Wise Cnty. Sheriff's Office*, VWC 203-42-63 (June 11, 2002) (communication from employer sufficient even though claimant did not take it seriously); *see also Wright v. Richmond City Fire Dep't*, VWC 232-52-28 (Apr. 30, 2010) (date of diagnosis and medication for hypertension not triggering date when high blood pressure readings at earlier physician visits); section 8-10.02.

In *City of Alexandria v. Cronin*, 20 Va. App. 503, 458 S.E.2d 314 (1995), *aff'd mem.*, 252 Va. 1, 471 S.E.2d 184 (1996), the court held the statute of limitations barred the firefighter's claim because the fact that he filed for service-connected disability indicated that he was aware more than two years before his death that his heart disease was work-related. *See Bandy v. City of Roanoke Fire Dep't*, No. 1496-94-3 (Va. Ct. App. Mar. 14, 1995) (unpubl.) (testimony by physician that it was "reasonable to assume" that he told claimant that the reason he was imposing work restrictions was that work was aggravating hypertension was sufficient evidence of communication to commence statute of limitations); *Arnold v. Norfolk City Sheriff's Office*, VWC 197-62-80 (Oct. 11, 2000) (in absence of a communication from a physician regarding causation, the filing of a claim was the first knowledge of a presumptive causal relationship between the alleged occupational disease and employment); *Maine v. Bristol City Fire Dep't*, VWC 183-73-5071 (May 31, 2000) (communication made when attorney informed employee of rights); *Ward v. New Kent Cnty. Sheriff's Office*, VWC 186-40-90 (May 31, 2000) (same); *Clark v. City of Richmond*, VWC 173-14-17 (Feb. 26, 1996) (communication of disease and completion of work-related illness form sufficient to commence statute of limitations). *But cf. City of Richmond Police Dep't v. Bass*, 26 Va. App. 121, 493 S.E.2d 661 (1997) (insufficient communication or awareness of condition to begin running of statute of limitations), *rev'd on other grounds*, 258 Va. 103, 515 S.E.2d 557 (1999); *Beamon v. Danville City Fire*, VWC 238-07-75 (July 8, 2009) (physician's communication that claimant had heart disease and that profession was "stressful" not sufficient communication that disease was work-related); *Wood v. Augusta Cnty. Sheriff's Office*, VWC 182-32-37 (June 7, 2001) (physician's statement that he "very likely" told employee of causation not sufficient to establish communication); *Town of Bluefield v. Asbury*, No. 0755-96-3 (Va. Ct. App. Aug. 27, 1996) (unpubl.) (statute of limitations did not begin to run because no awareness upon communication of disease that it was work-related).

In *Tomes v. James City County Fire*, 39 Va. App. 424, 573 S.E.2d 312 (2002), the Court of Appeals held that the statute of limitations did not bar a claim for a condition that worsened when the first communicated diagnosis, which was made outside the limitations period, was for a non-compensable disease. Expanding on *Tomes*, the Court of Appeals in *Samartino v. Fairfax County Fire & Rescue*, 64 Va. App. 499, 769 S.E.2d 692 (2015), defined the "diagnosis of the disease" to encompass not only the identification of the name of the disease but also the identification of the disease's symptomatic progression and impact on quality of life and ability to perform tasks. Thus, if a patient's symptoms change or worsen, he may be diagnosed with a more severe stage of a disease and consequently trigger the beginning of a new filing period. *See also Barton v. City of Danville Fire Department*, VWC 000-0030-0287 (Jan. 12, 2012), in which a firefighter had an abnormal

EKG, underwent a cardiac catheterization, and filed a workers' compensation claim. Two doctors responded to the insurer that the patient had non-obstructive coronary artery disease but that it was not caused by his job. The insurer denied the workers' compensation claim and the employee did not pursue the claim. Twelve years later the employee was diagnosed with coronary artery disease and underwent bypass surgery. The employer claimed that the statute of limitations barred a workers' compensation claim. The employee testified that he had never been told he had heart disease, and the Commission found that there had been no communication of a diagnosis of an occupational disease. *See also Hobson v. Russell Cnty.*, VWC VA02000017214 (July 29, 2015) (similar facts).

If the statute of limitations has run to exclude a claim for benefits, the employer is also barred from requesting a hearing to determine the compensability of the claim. *Intercept Youth Servs., Inc. v. Estate of Lopez*, 71 Va. App. 760, 840 S.E. 2d 25 (2020).

The Workers' Compensation Act does not require that an employer ensure that an employee files a claim with the Commission. In *Harrison v. Richmond City Police*, VWC 211-47-36 (Oct. 26, 2005), the Commission held that the employer's failure to instruct claimant to file a claim with the Commission was not a bar to the statute of limitations defense or grounds to toll the limitation period.

8-7 PROCEDURAL

The Virginia Supreme Court held that an employee's failure to seek a rehearing or reconsideration by the Commission when it rendered a decision on grounds different from those raised or addressed in the proceedings meant that the issue was not preserved for appeal under the collateral objection rule. *Williams v. Gloucester Sheriff's Dep't*, 266 Va. 409, 587 S.E.2d 546 (2003).

In *Brock v. Voith Siemens Hydro Power Generation*, 59 Va. App. 39, 716 S.E.2d 485 (2011), the court held that the principles of res judicata apply in workers' compensation cases. *See also Boukhira v. George Mason Univ.*, No. 0204-15-4 (Va. Ct. App. Dec. 8, 2015) (unpubl.); *Starbucks Coffee Co. v. Shy*, 61 Va. App. 229, 734 S.E.2d 683 (2012). In *Brock*, the claimant filed a claim alleging injuries to multiple body parts. Following a hearing the parties stipulated regarding injury to a single body part only (the shoulder). The claimant then filed a new application requesting a finding that the injuries to his other body parts were also a result of the work accident. The appellate court affirmed the Commission's finding that the later application was barred by res judicata, stating that multiple hearings regarding the various body parts would "waste considerable time and expense on the part of the Commission."

The General Assembly responded to *Brock* and similar cases with Va. Code § 65.2-706.2, which states: "No order issued by the Commission awarding or denying benefits shall bar by res judicata any claim by an employee or cause a waiver, abandonment, or dismissal of any claim by an employee if the order does not expressly adjudicate such claim." Thus, claimants may raise multiple successive claims regarding different injuries stemming from the same accident, so long as the claims are brought within the two-year statute of limitations, and absent any language in the Commission's order to the contrary.

A hearing on a claim adjudicates all issues raised or that could have been raised unless specific issues are expressly preserved for a later ruling. *K & L Trucking Co. v. Thurber*, 1 Va. App. 213, 337 S.E.2d 299 (1985). Res judicata does not, however, apply to voluntary agreements entered before an employee has actually filed a claim. *Advance Auto Ins. v. Craft*, 63 Va. App. 502, 759 S.E.2d 17 (2014); *see also Tesfaye v. CPS-Wash. DC*, VWC VA00000313190 (Apr. 3, 2014) (because the claim never proceeded to hearing, agreement forms were signed, and the agreement forms did not contain any warning about waiver of other claims, res judicata did not apply to the claimant's later attempt to

assert additional injuries as part of the original accident). Moreover, answering a question left unresolved by *Craft*, the court in *County of Henrico v. O'Neil*, 75 Va. App. 312, 876 S.E.2d 210 (2022), held that if a claimant files a claim and enters into an award agreement before an evidentiary hearing is scheduled on the claim, res judicata does *not* preclude the claimant from filing additional claims. The act of filing an initial claim for benefits does not automatically or necessarily trigger res judicata; rather, *Craft* states only that res judicata cannot be triggered *before* a claim is filed. *Id.* Footnote 6 of the opinion states: "We note that Code § 65.2-706.2 was enacted after the Commission's final order and it was not briefed by the parties. We therefore do not consider it here."

If the Commission or a court makes a finding in a final unappealed order based on a hearing or a factual stipulation of the parties that the claim relating to an accident, injury, disease, or death did not arise out of or in the course of the employee's employment, then that finding is res judicata between the parties and estops them from arguing before a court or the Commission that the accident is barred by the exclusivity provisions of the Workers' Compensation Act. A court order is res judicata to a non-party provided certain notice provisions are met. Va. Code § 65.2-307(B).

8-8 POLICY CONCERNS

Given the state of scientific knowledge about the causes of heart disease, hypertension, certain respiratory diseases, and cancer, employers cannot seriously expect to limit their liability under the heart/lung presumption by focusing solely on the health and risk factors of prospective employees, although there are benefits to be gained by encouraging "healthy" life choices in employees. Attention must also be paid to the provisions of the Workers' Compensation Act. In most cases, the affirmative obligations imposed on employers by the Act are opportunities to assist the employee in getting competent treatment and to limit the employer's wage liability by getting the employee back to meaningful work.

The Presumption Act exposes local governments to considerable liability for disability and medical treatment, including medication for hypertension and elevated levels of cholesterol, repeated catheterizations for progressive heart disease, angioplasty, and open-heart surgery. Amendments to the Presumption Act indicate that the legislature is receptive to lobbyists' efforts to expand coverage of the Presumption Act. If such efforts go unchallenged, the Court's language in *Morris v. Morris*, 238 Va. 578, 385 S.E.2d 858 (1989), is in danger of becoming moot:

The General Assembly created the Workers' Compensation scheme as a carefully balanced societal exchange between the interests of employers, employees, insurers, and the public. Although a prolific source of litigation, that legislative balance has served society well for more than 70 years. In striking the balance between those competing interests, the General Assembly had, and has, the option of expanding the limits of coverage to a point where the Workers' Compensation scheme would amount to a general plan of health insurance. The General Assembly has declined frequent invitations to do so . . . and this Court, while recognizing that the remedial purpose of the Act entitles it to liberal construction, has consistently declined similar invitations.

Id.

8-9 EMPLOYER'S OBLIGATIONS

When an employee's injury is found compensable, the employer has an obligation to provide medical attention, wage indemnity, and, in appropriate cases, vocational rehabilitation.

8-9.01 Duty to Provide Medical Treatment

The employer must furnish to the injured employee, free of charge¹⁰ as long as necessary, a physician chosen by the employee from a panel of at least three physicians selected by the employer "and such other necessary medical attention" for treatment related to the employee's compensable injury or occupational disease. The employer must offer a panel of physicians and begin providing necessary medical benefits related to a compensable injury or occupational disease when the employer becomes aware of the condition or the need for a new treatment or service. It must continue to provide all necessary medical benefits related to the compensable condition as long as the employee needs them. This obligation does not end when the employee quits or is terminated. Va. Code § 65.2-603(A).

The employee has a concomitant duty to accept reasonable medical treatment or risk the loss of benefits under the Act. Va. Code § 65.2-603(B). The employee's unjustified refusal to accept medical services provided by the employer bars further compensation until refusal ceases unless, in the opinion of the Commission, the circumstances justified the refusal. *7-Eleven v. Fore*, No. 1722-12-2 (Va. Ct. App. Mar. 26, 2013) (unpubl.) (painful nature of the surgery and the lack of adequate assurances of full recovery support refusal); *Richmond Mem'l Hosp. v. Allen*, 3 Va. App. 314, 349 S.E.2d 419 (1986) (employee retained unauthorized doctor, but this was not refusal of medical care). An employee may seek private medical attention, but such unauthorized services may not be compensable. *Richmond Mem'l Hosp.*, *supra* (citing *Breckenridge v. Marval Poultry Co.*, 228 Va. 191, 319 S.E.2d 769 (1984)). A verbal cure of an unjustified refusal of medical services (indication of willingness without taking curative action) must be made in good faith, as demonstrated by an affirmative act or showing of circumstances mitigating the failure to act. *Fairfax Cnty. Sch. Bd. v. Rose*, 29 Va. App. 32, 509 S.E.2d 525 (1999) (on rehearing *en banc*).

The employee bears the burden to prove that claimed medical care is related to a compensable condition. *McGregor v. Crystal Food Corp.*, 1 Va. App. 507, 339 S.E.2d 917 (1986). In weighing the claimant's evidence, "the Commission must generally rely upon the expertise of the treating physician in determining whether the current problem is casually connected to the original injury." *Craig v. Farm Fresh Supermarkets*, VWC 155-93-30 (1995); *Allen v. NES Merchandising, Inc.*, VWC 161-08-48 (1994) (where a physician appeared to have relied upon an inaccurate history of how the accident occurred, claimant had not met the burden of proof). While a physician need not state "the magic words 'reasonable medical certainty,'" the physician does have to state an opinion that the claimed condition, more probably than not, arose from the compensable injury. *Allen v. NES Merchandising, Inc.*, VWC 161-08-48 (1994).

¹⁰ Requirements regarding payment to health care providers and limitations on claims by health care providers are set forth in Va. Code §§ 65.2-605, 65.2-605.1, and 65.2-821.1; *see also Atlantic Orthopaedic v. Portsmouth*, 73 Va. App. 157, 857 S.E.2d 155 (2021) (discussing time limits for filing claims by health care provider for reimbursement by city employer); *Summit Pharmacy v. Costco Wholesale*, 73 Va. App. 96, 855 S.E.2d 866 (2021) (discussing time limits for filing claims for additional payments by employer for prescriptions provided to employee). [Fee schedules](#) are available on the Commission's website. The medical fee schedule became effective January 1, 2018, and applies to any dates of service on or after this date, regardless of the date of injury. The fee schedules set amounts based on a reimbursement objective, which is the average of all amounts paid to providers in the same category of providers for the medical service in the same medical community. Reimbursements for medical services provided to treat traumatic injuries and serious burns are excluded from the fee schedules, and liability for their treatment costs will be based, absent a contract, on 80 percent of the provider's charges. However, the required reimbursement will be 100 percent of the provider's charges if the employer unsuccessfully contests the compensability of the claim.

An electronic infrastructure for case management, claims, and payments is available on the Commission's [website](#).

8-9.02 When Employee May Choose Physician

Generally, the employer is not required by the Workers' Compensation Act to pay for the services of a physician whose selection has not been previously approved by the employer; that is, unauthorized services. The employer may, however, be required to pay for reasonable and necessary treatment related to the covered condition by unapproved physicians under some circumstances, such as those described below.

8-9.02(a) Employer Denies Compensability

If the employer denies that the condition is compensable, then the employer is not required to offer the employee a panel. *Bradley v. Southland Corp.*, 3 Va. App. 627, 352 S.E.2d 718 (1987). The employer's denial of a claim is construed as a refusal to provide treatment, however, and the employee may select a physician of his or her own choosing, who becomes the treating physician. If the claim is thereafter determined to be compensable, the employer is liable for the costs of treatment by the employee's physician. *Marriott Int'l, Inc. v. Carter*, 34 Va. App. 209, 539 S.E.2d 738 (2001); *Goodyear Tire & Rubber Co. v. Pierce*, 9 Va. App. 120, 384 S.E.2d 333 (1989). Where a claim is awarded but later the employer denies that additional medical treatment by an unauthorized physician is causally related to the accident, the employer is not responsible for such treatment. *Gardner v. Spotsylvania Cnty. Sch. Bd.*, No. 2132-09-2 (Va. Ct. App. Feb. 23, 2010) (unpubl.); cf. *McIntyre v. DMHMRSAS E. State Hosp.*, No. 2361-10-1 (Va. Ct. App. June 28, 2011) (unpubl.) (employer letter denying future payments on claim is failure to provide medical care as a matter of law, and employee entitled to seek own physician).

8-9.02(b) Employer Refuses to Offer Panel

If the employer refuses to offer a panel of three physicians, the employee can choose his or her own treating physician at the employer's expense. *Davis v. Brown & Williamson Tobacco Co.*, 3 Va. App. 123, 348 S.E.2d 420 (1986). "Refusal" has been construed as an intentional or technical failure to provide a suitable panel of at least three physicians. If the employer directs the employee to a panel of physicians but disclaims responsibility for paying, the employee may select a treating physician not listed on the employer's panel. *Bradley v. Southland Corp.*, 3 Va. App. 627, 352 S.E.2d 718 (1987).

8-9.02(c) Panel Not Offered When Required

If the employer fails to provide a panel within a reasonable time, then the employee may select a treating physician of his own choice. *Goodyear Tire & Rubber Co. v. Pierce*, 9 Va. App. 120, 384 S.E.2d 333 (1989). The determination of what is a "reasonable" period within which the employer must offer a panel is made on a case-by-case basis and will depend on the circumstances. *Peninsula Transp. Dist. Comm'n v. Gibbs*, 228 Va. 614, 324 S.E.2d 662 (1985); *Southland Corp. v. Welch*, 33 Va. App. 633, 536 S.E.2d 443 (2000) (under circumstances, six days between injury and notification of the panel of physicians was timely).

8-9.02(d) Employer Offers Improper Panel

The required panel must contain at least three physicians who do not share a community of interest in a joint practice. Va. Code § 65.2-603(A)(1); *Burns v. Badishche Corp.*, 61 O.I.C. 87 (1982). The physicians identified on the panel need only have the expertise necessary to treat and manage the employee's condition; they need not engage in specialties of the employee's choosing. *Savino v. CVS Pharmacy*, VWC 174-13-09 (1996). The panel physicians must be specifically identified; simply referring an employee to a clinic is insufficient under the Act. *Dump Furniture Store/Haynes Furniture Co. v. Holloway*, No. 3400-01-1 (Va. Ct. App. Oct. 1, 2002); *Goodyear Tire & Rubber Co. v. Pierce*, 9 Va. App. 120, 384 S.E.2d 333 (1989). Further, the physicians must be located within a "reasonable" distance from the claimant's home. The question of "reasonableness" is determined on a case-by-case basis and will depend on such factors as the distance the employee must travel to physicians the employee has accepted, whether the employee's condition affects his or

her ability to travel comfortably, and whether the question of location of the panel physician was raised by the employee. *Ashley v. L.F. Franklin & Sons, Inc.*, VWC 165-20-49 (1995).

8-9.02(e) Employer Acquiesces in Treatment by Another Physician

Stafford Cnty. Sheriff's Office v. DeBord, 22 Va. App. 312, 469 S.E.2d 88 (1996) (employee who sought treatment from a non-panel physician was nevertheless entitled to benefits because employer failed to timely object).

8-9.02(f) Emergency Treatment

If the employee is able to prove that he required emergency care and therefore could not seek the employer's approval of a physician, the employer may be liable for the emergency treatment. Va. Code § 65.2-603(C); *McGregor v. Crystal Food Corp.*, 1 Va. App. 507, 339 S.E.2d 917 (1986) (employee has the burden of proving that other necessary medical care, including emergency medical care by other than an authorized physician, should be paid by the employer). Under some circumstances, treatment may be the responsibility of the employer even when no emergency exists, if the employee has a good-faith belief that he or she needs emergency treatment. *Payne v. Master Roofing & Siding, Inc.*, 1 Va. App. 413, 339 S.E.2d 559 (1986) (emergency treatment was authorized and the responsibility of the employer, where the claimant tried unsuccessfully to reach the treating physician and his subjective symptoms made him believe he needed emergency treatment for condition resulting from compensable accident).

8-9.02(g) Abandonment or Release by Treating Physician

If an employee needs medical care related to a compensable condition that the treating physician will not provide, either because the physician has abandoned the care of the employee or because the physician has released the employee from care, the employee is entitled to a new panel of physicians provided by the employer. *Dan River, Inc. v. Turner*, 3 Va. App. 592, 352 S.E.2d 18 (1987) (when an employee has been released or abandoned by the treating physician, and the employer fails to offer the employee a new panel, the employee is once again free to select a treating physician of his or her choice).

8-9.02(h) "Other Good Reason"

Virginia Code § 65.2-603(C) authorizes an employee to seek treatment at the employer's expense from a physician other than the treating physician in cases of emergency or "for other good reason." *Shenandoah Products, Inc. v. Whitlock*, 15 Va. App. 207, 421 S.E.2d 483 (1992) (where treatment provided by the employer was inadequate for the employee's condition and the unauthorized treatment was medically reasonable and necessary, the employer was held responsible for payment notwithstanding lack of prior approval). To establish "other good reason," the employee must prove: (1) the claimant acted in good faith in seeking the unauthorized treatment; (2) "the treatment provided by the employer was inadequate treatment for the employee's condition[,]" and (3) "the unauthorized treatment . . . was medically reasonable and necessary." *Id.*

8-9.03 Application for Change of Physicians

Once the employee has selected a treating physician, either from a panel, or independently when the employer has failed to provide a panel, the employee may not seek the treatment of another physician unless referred by the first physician, confronted with an emergency, or given permission by the employer and/or its insurer or the Commission. *Breckenridge v. Marval Poultry Co.*, 228 Va. 191, 319 S.E.2d 769 (1984). If the employer fails to provide medical treatment, Va. Code § 65.2-603 empowers the Commission to authorize the treatment recommended if it is found to be reasonable, necessary, and related to the industrial accident. The employer may also be able to request a change of physicians as well. See *Allen & Rocks, Inc. v. Briggs*, 28 Va. App. 662, 508 S.E.2d 335 (1998). Otherwise, the employer may monitor treatment and insist that the employee accepts reasonable treatment, but it may not manage the employee's treatment. *Jensen Press v. Ale*, 1 Va. App. 153, 336 S.E.2d 522 (1985) (quoting *Beauchamp v. Cummins & Hart*, 60 O.I.C. 37

(1982)) ("[N]either the employer nor its insurance carrier may limit the treating physician in the medical specialist, or treating facilities to which the claimant may be referred for treatment.").

8-9.04 Treating Physician

Once the treating physician has been selected, by whatever method, the employee has a duty to accept reasonable treatment or not to refuse reasonable treatment recommended by the treating physician. *Chesapeake Masonry Corp. v. Wiggington*, 229 Va. 227, 327 S.E.2d 121 (1985); *Biafore v. Kitchin Equip. Co.*, 18 Va. App. 474, 445 S.E.2d 496 (1994), *aff'd*, No. 0652-95-1 (Va. Ct. App. Nov. 28, 1995) (employee is not required to submit to surgery where treating physician has not unambiguously recommended it). As a general rule, the courts defer to the unequivocal opinion of the treating physician, giving greater weight to it than that of a specialist or other physician's opinion. *Pilot Freight Carriers, Inc. v. Reeves*, 1 Va. App. 435, 339 S.E.2d 570 (1986).

The treating physician is charged with managing the employee's treatment for a compensable condition; the treating physician is, therefore, authorized to refer the employee to other physicians and specialists as he deems medically necessary. The employer is responsible to pay for such treatment by other physicians. *Jensen Press v. Ale*, 1 Va. App. 153, 336 S.E.2d 522 (1985).

8-9.05 Medical Records

Parties are required to "promptly" forward all relevant medical reports to the Commission and all related medical reports to the opposing party. Va. Code § 65.2-902; [Commission Rule 4.2](#); Commission Order Clarifying Commission Rules 2.2(B)(3) and 4.2 (July 1, 2013); see *Gene Forbes Enters. v. Cooper*, No. 2320-14-2 (Va. Ct. App. June 9, 2015) (unpubl.) (Commission has discretion to deny admission of medical report that was not promptly provided); cf. *Irby v. Lifepoint Health and Safety Nat'l Casualty Corp.*, No. 0662-20-3 (Va. Ct. App. Nov. 17, 2020) (unpubl.) ("[T]he Commission has broad authority to impose sanctions on employers or carriers who neglect to timely file a completed agreement.") Medical records are presumed admissible. *Phelps v. Sec. Transp. & Delivery*, 65 O.I.C. 345 (1986) (medical opinions and records filed with Commission are admissible), *aff'd*, 38 Va. App. 744, 568 S.E.2d 416 (2002); *Hassell v. Arlington Cnty. Human Servs.*, 29 O.W.C. 141 (2000) (Commission does have authority to exclude medical evidence in egregious cases).

Virginia Code § 65.2-604 and Commission Rule 4.2 require any health care provider attending an injured employee to provide employers or insurers with the claimant's medical records upon request. Virginia Code § 65.2-607(A) waives the physician-patient privilege as to all physicians and all proceedings under the Act. The Commission may remove a treating physician who refuses to provide medical reports to the employer and may require the employee to select a new treating physician from a new panel. *Wiggins v. Fairfax Park Ltd. P'ship*, 22 Va. App. 432, 470 S.E.2d 591 (1996).

8-9.06 Other Services

8-9.06(a) Medical

Pursuant to Va. Code § 65.2-603, an employee is entitled to other medical services, such as medication, specialist services, and nursing care if: (1) the medical service is causally related to the compensable condition; (2) the medical service is necessary; and (3) the treating physician has made a referral to or prescribed the other medical service. *Volvo White Truck Corp. v. Hedge*, 1 Va. App. 195, 336 S.E.2d 903 (1985); *Warren Trucking Co. v. Chandler*, 221 Va. 1108, 277 S.E.2d 488 (1981) (home nursing care allowed);¹¹ *Am.*

¹¹ When the compensability of home health care by a spouse is at issue, four additional requirements must be met: (1) the employer knows of the employee's need for medical attention at home as a result of the industrial accident; (2) the medical care is performed under the direction and control of a physician; (3) the care rendered by the spouse is of the type usually rendered by

Armoured Found. Inc. v. Lettery, No. 1968-11-2 (Va. Ct. App. May 1, 2012) (unpubl.) (gym membership for independent pool therapy allowed). The employee has the burden of proof on these issues. *Milette v. Haymes Bros.*, No. 2670-05-3 (Va. Ct. App. June 6, 2006) (unpubl.).

8-9.06(a)(1) Psychiatric Care

If the employee can carry the burden of proving that psychiatric care is necessary as a result of a compensable condition, then the employer must pay for that care. *Watkins v. Halco Eng'g Inc.*, 225 Va. 97, 300 S.E.2d 761 (1983). If there is medical evidence linking mental health problems to the initial physical injury, the employer must pay for psychological hospitalization, home health care, and mileage expenses related to the mental health problems. *Dana Corp. v. Snyder*, No. 1969-98-3 (Va. Ct. App. Feb. 23, 1999) (unpubl.); see also *Gossom v. City of Lynchburg Fire*, VWC 196-72-66 (Feb. 6, 2006) (post-traumatic stress disorder compensable because derived from heart disease). Where, however, the evidence shows that "a number of factors, including substantial preexisting problems, contributed to the need for hospitalization and psychiatric treatment," the claimant has not shown the required causal relationship, even where there is medical evidence that being out of work due to disability and waiting for adjudication of his workers' compensation claims by the Commission exacerbated the need for psychiatric hospitalization. *Maldoven v. Mark Winkler Co.*, VWC 151-54-14 (1995). But see *Volvo Cars v. Altizer*, No. 1329-99-3 (Va. Ct. App. Oct. 19, 1999) (unpubl.) (although depression was pre-existing, the increased depression tied to the injury was compensable). A reviewing court is to give great deference to the Commission's findings with regard to the causal relationship between the compensable injury and a mental health problem. *Amelia Sand Co. v. Ellyson*, 43 Va. App. 406, 598 S.E.2d 750 (2004).

Law enforcement officers and firefighters who have demonstrated compensable PTSD, anxiety disorder, or depressive disorder are entitled to "any combination of medical treatment prescribed by a board-certified psychiatrist or a licensed psychologist," and temporary partial or total incapacity benefits, for up to fifty-two weeks following diagnosis. Va. Code §§ 65.2-107(C), (D); see section 8-2.08.

8-9.06(b) Transportation

The employer is responsible for the reasonable and necessary costs of travel to the physician's office and to other appointments in connection with the claimant's medical treatment. *Hamil v. Lowe's of N. Manassas, Va.*, VWC 208-73-39 (May 30, 2003).

8-9.07 Second Accident and Compensable Consequences

The employer responsible for a work injury owes for compensable consequences of the initial injury, including aggravations of the injury. See, e.g., *Leonard v. Arnold*, 218 Va. 210, 237 S.E.2d 97 (1977). There are two exceptions to that general rule: if the injured worker suffers a second compensable workers' compensation injury by accident or if the change in condition was caused by claimant's intentional conduct. *Hayes v. Healthcare Sols. Med. Supply, LLC*, VWC 204-61-08 (Nov. 9, 2004). As stated in *Morris v. Badger Powhatan/Figgie Int'l Inc.*, 3 Va. App. 276, 283 (1986):

Once the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional conduct.

trained attendants and beyond the scope of normal household duties; and (4) there is a means to determine with proper certainty the reasonable value of the services performed by the spouse. *Chandler, supra*; *Cumberland Hospital v. Ross*, 70 Va. App. 761, 833 S.E.2d 479 (2019).

(emphasis added); *Jaime v. State Police*, 20 VWC 136-45-97 (Dec. 15, 2020) ("consequence of a consequence" doctrine applies to claimant's stroke; hypertension led to posterior reversible encephalopathy syndrome, which caused stroke).

For example, the employer is responsible for the consequences of additional injuries sustained by the employee in traveling to or from doctor appointments or in receiving medical care, on the theory that the employee is required to seek treatment, and thus, he was exposed to the risk as a condition of employment. *Immer & Co. v. Brosnahan*, 207 Va. 720, 152 S.E.2d 254 (1967); see also *Masonite Corp. v. Dean*, No. 0516-20-2 (Va. Ct. App. Nov. 10, 2020) (unpubl.) (claimant entitled to benefits for new injuries sustained during physical therapy for first work-related injury). However, the link of causation must directly connect the original accidental injury with the additional injury for which compensation is sought. *Amoco Foam Products Co. v. Johnson*, 257 Va. 29, 510 S.E.2d 443 (1999); *Hardin v. Hecht's*, VWC 180-79-30 (Oct. 14, 2011).

The facts of *Amoco Foam Products*, *supra*, are helpful in illustrating the scope of the compensable consequences doctrine. In that case, the claimant suffered a compensable injury to her left ankle in 1992. *Id.* In 1994, while still recovering, her left ankle "gave way" and claimant fell and injured her right knee. *Id.* The 1994 injury to claimant's right knee was directly caused by her compensable 1992 left ankle injury, and therefore it was ruled a compensable consequence of her compensable 1992 left ankle injury. *Id.* Then, in 1995, the claimant's right knee "gave out" and she fell again, causing a further right knee injury. The Virginia Supreme Court ruled that the third injury in 1995 was causally connected to the second injury—i.e., a consequence of a consequence—and was therefore too attenuated from the original injury to fall within the compensable consequences doctrine. *Id.* Stated differently, the compensable consequences doctrine applies only to an injury with a direct causal connection to an original compensable injury. *Id.*; see also *Merck & Co. v. Vincent*, 299 Va. 705, 858 S.E.2d 190 (2021).

8-9.08 Two-Cause Rule

The two-cause rule applies when two conditions, one compensable and the other not, combine to produce the same disabling condition and the compensable cause arising out of "the employment is a contributing factor to the disability." *Smith v. Fieldcrest Mills, Inc.*, 224 Va. 24, 294 S.E.2d 805 (1982). For example, in *Bergmann v. L & W Drywall*, 222 Va. 30, 278 S.E.2d 801 (1981), medical evidence showed that a worker suffered from a neurological disability caused by both his work-related injury and a non-job-related illness. Similarly, in *Smith*, a worker was totally disabled by a "respiratory ailment" caused in part by smoking and in "significant" part by the hazardous ambient conditions of her employment. In both cases, the injuries were deemed compensable because both causes (one compensable and one not compensable) combined to produce the same disabling condition.

However, workers' compensation law distinguishes between preexisting conditions that are solely responsible for a total disability and preexisting conditions that combine with a work-related injury to create a total disability. Thus, the two-cause rule did not apply when an employee had a preexisting condition, worked for many years, had a compensable injury that reduced his work capacity, and then the preexisting condition independently deteriorated causing complete disability. *Carrington v. Aquatic Co.*, 297 Va. 520, 829 S.E.2d 530 (2019).

8-9.09 Consequences of Malpractice

Although the employer is not liable to a covered employee for damages for a treating physician's malpractice, the consequences of malpractice are deemed part of the injury resulting from the accident, and the employer is required to pay the expenses of all treatment of the injuries caused by such malpractice. Va. Code § 65.2-605(J); *Fauver v. Bell*, 192 Va. 518, 65 S.E.2d 575 (1951) (under common law, liable employer is responsible

for all aggravation of a covered injury, even if caused by third-party tortfeasor). The employer is, however, subrogated to the employee's right to recover medical expenses caused by malpractice from the physician. Further, if the employer can demonstrate that the malpractice prolonged the employee's period of disability, thus causing the payment of benefits that would not otherwise have been necessary, the employer may recover these expenses from the physician as well. *Rodgers v. Giant Food*, VWC 145-82-01 (Feb. 27, 1996). When, however, the Commission denied as time-barred a subsequent claim for medical benefits claimed needed as a result of malpractice, the employer was not entitled to a lien against the damages awarded in the malpractice suit. *Thompson v. Alhadeff*, No. CL 05-152 (City of Roanoke Cir. Ct. Oct. 11, 2011).

8-9.10 Duty to Provide Benefits

8-9.10(a) Wage Benefits

When an employee has a compensable condition, the employer is responsible for wage benefits under the Act to compensate the employee for losses in "earnings," whether the employee's disability is total or partial, permanent or temporary.

When incapacity from work is total (temporary total disability, or TTD), the employer must pay 66 2/3 percent of the employee's average weekly wage (AWW), up to a statutory maximum, during incapacity up to a total of 500 weeks. Va. Code §§ 65.2-500, 65.2-518.

When incapacity from work is partial (temporary partial disability, or TPD), the employer must pay 66 2/3 percent of the difference between the AWW before the injury and the AWW after the injury, up to a statutory maximum, during incapacity. Employees not eligible for lawful employment cannot receive wage benefits during partial incapacity. Va. Code §§ 65.2-502, 65.2-518.

A temporarily partially disabled employee who is not under an award for wage loss benefits has a duty to market his or her remaining capacity to work to receive an award of temporary partial or temporary total disability benefits. *Nat'l Linen Serv. v. McGuinn*, 8 Va. App. 267, 380 S.E.2d 31 (1989) (setting forth six factors to consider); see also *Ford Motor Co. v. Favinger*, 275 Va. 83, 654 S.E.2d 575 (2008); *CVS of Va., Inc. v. Plunkett*, 57 Va. App. 373, 702 S.E.2d 578 (2010) (duty to mitigate wage loss to the full extent of the hours worked pre-injury). In *King William County v. Jones*, 66 Va. App. 531, 789 S.E.2d 133 (2016) (en banc), the employee had been working light duty and then was laid off, along with rest of janitorial staff. The employee submitted marketing evidence, but the Court of Appeals denied the claim because she offered "no evidence to establish that her inability to find other employment was in any way related to her injury." But see *Sills v. Abacus Corp.*, VWC VA00001156102 (June 27, 2017) (distinguishing the facts from *Jones*, finding *Sills* was a "typical case of partial disability," and holding that submission of marketing evidence was sufficient to prove entitlement to disability benefits).

When an employee has permanently lost a certain amount of the use of certain body parts (permanent partial disability, or "PPD"), the employer must pay 66 2/3 percent of the AWW, up to a statutory maximum, for a statutorily scheduled period of weeks. This amount is payable after the completion of temporary total disability benefits (TTD), or simultaneously with temporary partial disability benefits (TPD). Va. Code § 65.2-503. PPD by default is paid on a weekly basis, but if the parties agree and the Commission consents, PPD can be paid in a lump sum. If PPD is paid in a lump sum, the employer and carrier are entitled to a statutory discount of 4 percent. Va. Code § 65.2-522. Before receiving PPD, the claimant must demonstrate that the injury has reached maximum medical improvement. *County of Spotsylvania v. Hart*, 218 Va. 565, 238 S.E.2d 813 (1977). When determining loss of use of a body part, the claimant's pre-surgery or pre-prosthetic state should be used. Thus, when a workplace accident caused a traumatic cataract in the right eye, and the implanting of an intraocular lens significantly improved the claimant's vision,

he was nonetheless awarded benefits for the total loss of the use of his eye based on his vision prior to the surgery. *Creative Dimensions Group v. Hill*, 16 Va. App. 439, 430 S.E.2d 718 (1993). The court reasoned that corrective surgery was an imperfect substitute for the claimant's natural vision. Likewise, when a firefighter suffered a work-related hip injury, eventually resulting in hip replacement surgery, his loss-of-use compensation award was based on his pre-surgery functionality. *Loudoun Cnty. v. Richardson*, 298 Va. 528, 841 S.E.2d 629 (2020). In addition to the claimant's "irreplaceable loss of [his] natural joint," the Court considered that the surgery carried a nontrivial risk of complications, that he would likely require additional surgeries, and that his activities would be permanently restricted for the rest of his life. *Id.*

Incapacity from work is considered permanent and total (permanent total disability, or "PTD") when the employee loses the use of two listed body parts in the same accident, or as a compensable consequence of an injury sustained in the original accident; suffers injury resulting in total paralysis; or suffers brain injury rendering the employee permanently unemployable in gainful employment. Va. Code § 65.2-503(C). The statutory terms "in the same accident" has been interpreted to include compensable consequences of that same accident. *Merck & Co., Inc. v. Vincent*, 299 Va. 705, 858 S.E.2d 190 (2021) (discussing "in the same accident" standard and reversing lower court holding that two disabling injuries occurred in the same accident); *Amoco Foam Products Co. v. Johnson*, 257 Va. 29, 510 S.E.2d 443 (1999) (holding that compensable consequence doctrine applies only when the second injury has a "direct causal connection" to the original, compensable injury). The employer must pay 66 2/3 percent of the employee's AWW before the compensable injury for the employee's *lifetime* with no 500-week limit. Va. Code §§ 65.2-500(D), 65.2-503(C), 65.2-518. An employee with permanent or temporary total disability is under no obligation to market any remaining work capacity and may voluntarily exit the labor force. *Starbucks Coffee Co. v. Shy*, 61 Va. App. 229, 734 S.E.2d 683 (2012).

The total compensation payable to an employee shall not exceed 500 weeks, nor shall it exceed a statutory maximum, except in cases of PTD defined in Va. Code § 65.2-503(C) and certain coal workers' injuries. Va. Code § 65.2-518. When TPD and PPD payments are made simultaneously, each combined payment counts as two weeks against the total maximum allowable period of 500 weeks. Va. Code § 65.2-503(E)(2); *E.I. du Pont de Nemours & Co. v. Eggleston*, 264 Va. 13, 563 S.E.2d 685 (2002).

Pursuant to Va. Code § 65.2-520, an employer may request that the Commission approve that sick pay paid to an employee during the period of disability be credited against any workers' compensation payment. Such approval of the treatment of sick leave pay as payment of workers' compensation benefits is conditioned upon the employer simultaneously reinstating the employee's sick leave. *Augusta Cnty. Sch. Bd. v. Humphreys*, 53 Va. App. 355, 672 S.E.2d 117 (2009); *see also City of Danville v. Tate*, 289 Va. 1, 766 S.E.2d 900 (2015) (city employer failed to request sick pay credit so Va. Code § 65.2-520 was not implicated, and city regulation provided for reimbursement of worker's compensation payment, not sick leave); *N. Virginia Cmty. Coll. v. Easwarachandran*, No. 0213-20-2 (Va. Ct. App. July 21, 2020) (unpubl.) (employer not entitled to credit for sick leave wages paid during period of disability when the sick leave used was reinstated after it had expired).

An employee who is terminated for justified cause and for reasons not concerning his disability is not entitled to receive compensation benefits. *Chesapeake & Potomac Tel. Co. v. Murphy*, 12 Va. App. 633, 406 S.E.2d 190, *aff'd en banc*, 13 Va. App. 304, 411 S.E.2d 444 (1991). The employer is not required to prove that the employee's wrongful act was intentional, willful, or deliberate to justify a termination for cause and a forfeiture of compensation benefits. *Riverside Behavioral Ctrs. v. Teel*, No. 2143-14-1 (Va. Ct. App. May 12, 2015) (unpubl.). Termination for justified cause results in permanent forfeiture

of disability benefits with no opportunity to cure. *See, e.g., Barton v. Allied Waste Indus., Inc.*, No. 2215-12-4 (Va. Ct. App. July 23, 2013) (unpubl.).

8-9.10(a)(1) Effect of Retirement, Furlough, or Termination

Reversing the full Commission and the Court of Appeals, the Virginia Supreme Court held in *McKellar v. Northrop Grumman Shipbuilding, Inc.*, 290 Va. 349, 777 S.E.2d 857 (2015), that a claimant is entitled to TTD benefits after retirement when the claimant is totally disabled due to the work accident. After announcing his retirement but before its effective date, the claimant was injured in a compensable work accident and placed on light duty. He then retired as scheduled. Sometime later his doctors opined that he was totally disabled. The claimant then filed a workers' compensation claim for TTD benefits. The Commission and Court of Appeals denied the claim on the basis that the claimant's retirement caused his wage loss.

The Supreme Court explained that the standards differ for application of Va. Code § 65.2-500(A), which governs cases of total incapacity, and application of Va. Code § 65.2-502(A), which governs cases of partial incapacity. The Court held that in cases of total incapacity (§ 65.2-500(A)), the appropriate test is whether a worker has lost the capacity to earn wages, which is more of a medical issue; whereas, in cases of partial incapacity (§ 65.2-502(A)), the applicable test is whether there has been economic loss, which brings the proximate cause argument into play. The Court of Appeals has stated that an "economic loss analysis . . . requir[es] proof that a claimant suffered an actual economic loss in the labor market and did not merely lose the theoretical capacity to perform abstract job functions." *King William Cnty. v. Jones*, 66 Va. App. 531, 789 S.E.2d 133 (2016) (en banc) (overruling *Metro Mach. Corp. v. Lamb*, 33 Va. App. 187, 532 S.E.2d 337 (2000) and *Metro Mach. Corp. v. Sowers*, 33 Va. App. 197, 532 S.E.2d 341 (2000)).

Because the claimant in *McKellar* was totally disabled after retirement, he could not seek employment to supplement his retirement income. Therefore, the Supreme Court held that the claimant was entitled to TTD benefits because his total disability meant that he had lost his earning capacity.

It is important to note that the case law is still valid regarding partially disabled employees and proximate cause of wage loss. Importantly, the *McKellar* decision held that *Utility Trailer Manufacturing Co. v. Testerman*, 58 Va. App. 474, 711 S.E.2d 232 (2011), involving furloughs of an employee on light duty, did not apply to the *McKellar* facts because *Testerman* was only applicable to partially disabled employees. Therefore, the Supreme Court tacitly indicated that the *Testerman* line of cases was still good law given the correct set of facts. The Court of Appeals expressly so held in *King William County v. Jones*, 66 Va. App. 531, 789 S.E.2d 133 (2016) (en banc) (overruling *Metro Mach. Corp. v. Lamb*, 33 Va. App. 187, 532 S.E.2d 337 (2000) and *Metro Mach. Corp. v. Sowers*, 33 Va. App. 197, 532 S.E.2d 341 (2000)).

Thus, when the claimant is released to light duty and his wage loss thereafter is not caused by his work accident, the employer may still prevail on the defense that the work accident is not the proximate cause of economic loss. *See Util. Trailer Mfg. Co. v. Testerman*, 58 Va. App. 474, 711 S.E.2d 232 (2011) (a furlough from work of pre-defined and limited duration, applicable to all employees, does not justify an award for lost wages to a worker with a partial incapacity); *cf. Carr v. Atkinson/Clark/Shea*, 63 Va. App. 281, 756 S.E.2d 191 (2014) (employee entitled to wage benefits when there are irregular, unexpected, and repeated furloughs, each for an undefined duration). The *King William* court expanded the application of *Utility Trailer*, which was expressly limited to furlough situations, to other situations in which the employee ceases to work for reasons other than the work-related disability. *King William, supra* (en banc). In all such cases the employee must show that the economic loss is causally related to the disability. On the merits in *King William*, the court found that neither the termination itself nor the lack of

subsequent employment was related to the partial disability. Although the claimant unsuccessfully sought employment with numerous potential employers after being laid off by employer, there was no evidence that she was unsuccessful *because of* her partial disability.

In sum, if a totally disabled claimant has retired or voluntarily left the workforce, he is still eligible for TTD benefits because he has lost the capacity to earn wages. If a partially disabled claimant is claiming disability benefits, the Commission will look to whether there has been economic loss causally related to the work accident, which depends upon the unique facts of each case.

8-9.10(a)(2) Average Weekly Wage

The employer's liability for wage benefits is determined by reference to the employee's average weekly wage (AWW) for the fifty-two-week period prior to the injury or diagnosis of occupational disease. The AWW is calculated as set forth in Va. Code § 65.2-101:

1. If the employee has been employed in the same position for the fifty-two weeks prior to the injury, the employee's AWW is computed by dividing the "earnings" for those fifty-two weeks by fifty-two. Any periods of lost time longer than seven days in those fifty-two weeks are excluded from the calculation.
2. If the employee worked in the position for less than fifty-two weeks prior to the disability, the AWW is calculated by dividing the total "earnings" by the number of weeks worked in the position. Va. Code § 65.2-101; *Ellen Kaye, Inc. v. Wigglesworth*, 34 Va. App. 390, 542 S.E.2d 30 (2001) (seasonal employee).
3. If the methods set forth in (1) and (2) are impractical or unfair, then the employee's AWW can be computed by using the AWW of a person employed in the same grade as the covered employee, and under the same conditions, who works in the same class of employment in the same locality or community as the covered employee. Va. Code § 65.2-101; *Jenkins v. Blake Constr. Co.*, VWC 167-27-52 (1995).
4. If, for "exceptional reasons," all of these methods produce results that are unfair to either the employer or the employee, then the AWW can be computed by any method which would "most nearly approximate the amount which the employee would be earning were it not for the injury." Va. Code § 65.2-101; *Thorpe v. Ted Bowling Constr.*, 283 Va. 808, 724 S.E.2d 728 (2012) (proper to divide a \$2,500 one-time payment by fifty-two when there was no other evidence that the claimant engaged in this type of work on a regular basis); *Uninsured Emp'r's Fund v. Thrush*, 255 Va. 14, 496 S.E.2d 57 (1998) (no "exceptional reason" justified projecting earnings into a forty-hour workweek for a laborer who was hired for only one day); *Seminario v. Fairfax Cnty. Pub. Schs.*, No. 0362-14-4 (Va. Ct. App. Dec. 9, 2014) (unpubl.) (salary of teacher who did not work summer months should be divided by fifty-two weeks); *Key Risk Ins. Co. v. Crews*, 60 Va. App. 335, 727 S.E.2d 436 (2012) (cannot impute minimum wage when sole proprietor's business operated at a loss and decedent received no wages).

8-9.10(a)(3) "Earnings" for Computing the Average Weekly Wage

"Earnings" include all compensation that an employee receives, both in the form of wages and in the form of payments in lieu of wages. Vacation time, meal allowances, board allowances, tips, bonuses, overtime, and other perquisites must be included as "earnings"

for the purpose of calculating the AWW. The value of fringe benefits, such as the employer's contributions to life and health insurance benefits, is not considered for the purpose of calculating the AWW. *Gajan v. Bradlick Co.*, 4 Va. App. 213, 355 S.E.2d 899 (1987) (the value of hospitalization and health insurance premiums paid to a third party is not included as part of "earnings" because these payments differ in character and purpose from direct payments made to the employee to compensate the employee for work performed or to reimburse the employee the costs of doing the work). Any incentive or signing bonuses with a payback provision should be included in the average weekly wage calculation, as illustrated in the following example:

The claimant also received a \$10,000 signing bonus that was contingent upon her working for two years, and she would have been required to repay a portion of the bonus if she left employment before this period ended. The Deputy Commissioner found the economic gain the claimant received from this bonus was incremental in nature, and that it would be unfair to include the entire signing bonus in the average weekly wage calculation. The Deputy Commissioner instead included a pro rata share of \$96.15 per week (\$10,000 divided by the 104 weeks before the repayment obligation ended). The inclusion of this amount in the average weekly wage is not disputed on review.

Tickle v. Mary Washington Healthcare, 22 WC UNP VA 00001675868 (Nov. 19, 2019).

8-9.10(a)(4) Earnings From Two or More Jobs

Generally, if an employee is working two or more jobs for different employers, his earnings from those jobs are not aggregated for the purposes of determining the AWW, if his job duties in each position are not of the same character. *Uninsured Emp'r's Fund v. Thrush*, 255 Va. 14, 496 S.E.2d 57 (1998). If, however, the employee performs jobs of separate natures for the same employer, the wages are aggregated for computation of the AWW. *Dinwiddie Cnty. Sch. Bd. v. Cole*, 258 Va. 430, 520 S.E.2d 650 (1999). Further, if an employee is employed in two or more jobs at once, and the services the employee performs in each of those jobs are of a similar nature, the earnings from the multiple jobs can be aggregated to determine the AWW. *Sleiman v. Chesapeake City Finance*, VWC 152-61-00 (Mar. 22, 1995). In *County of Frederick Fire & Rescue v. Dodson*, 20 Va. App. 440, 457 S.E.2d 783 (1995), the claimant, a part-time firefighter/paramedic who worked full time as a cardiac technician and emergency room nurse at a hospital, was injured in the firefighting job and was disabled from both jobs. Her workers' compensation benefits were drawn from the firefighting job. She was released to return to work only at the hospital. Her wages from both jobs were aggregated to determine her AWW because the majority of her duties for both jobs were similar, i.e., paramedic, in nature.

Wages from similar work as a regular employee and as an independent contractor can be combined under certain circumstances to formulate the AWW. *Wood Prods. v. James*, 20 Va. App. 116, 455 S.E.2d 722 (1995) (even though independent contractors are not covered under the workers' compensation system, in an appropriate case, earnings from similar independent contractor work may be aggregated when calculating a claimant's average weekly wage).

8-9.10(b) Death Benefits

If death results from a compensable accident within nine years from the date of injury, the employer is responsible for compensation at 66 2/3 percent of the deceased employee's AWW for a period of 500 weeks from the date of injury for total dependents or up to 400 weeks for partial dependents (dependents are defined in Va. Code §§ 65.2-515, 65.2-516). Any periods of disability paid to the employee while living are deducted from the total weeks paid. The employer is also responsible for burial expenses up to \$10,000, and the deceased's transportation up to \$1,000. Va. Code § 65.2-512; see Va. Code §§ 65.2-515 through 65.2-

517 regarding dependents. The dependence of a spouse ends upon death or remarriage, and the amount previously received is then divided among children until they reach eighteen years of age or, if full-time students, twenty-three years, or longer if incapacitated; or, if there are no children, among destitute parents. Va. Code § 65.2-517.

8-9.10(c) Cost of Living Supplements

The employer must pay a cost-of-living supplement to employees with awards for total disability and to dependents of deceased injured employees in certain circumstances. Va. Code § 65.2-709. The purpose of this provision is to ensure that the value of awards is not diminished over time by inflation. *Circuit City Stores v. Bower*, 243 Va. 183, 413 S.E.2d 55 (1992) (citing *Dep't of Highways v. Williams*, 1 Va. App. 349, 338 S.E.2d 660 (1986)). Cost-of-living supplements are payable to claimants who are (1) receiving combined benefits under the Act and under federal disability that total less than 80 percent of the average monthly earnings of the claimant before disability or death, or (2) receiving disability benefits under the Act and who are *not* receiving federal disability benefits. Va. Code § 65.2-709(A)(1) and (2).

As the cost-of-living supplement changes, a claimant with an existing award must make a change of condition application to take advantage of any available increase. *Powhatan Corr. Ctr. v. Mitchell-Riggleman*, 40 Va. App. 491, 579 S.E.2d 696 (2003).

8-9.10(d) Vocational Rehabilitation

Employers may be required to provide injured employees who are eligible for lawful employment with reasonable and necessary vocational rehabilitation. Va. Code § 65.2-603. Vocational rehabilitation services must be provided by a certified rehabilitation provider. Va. Code § 65.2-603(A)(3). The employer has no duty to provide these services unless and until the Commission orders them; a doctor cannot impose the duty on the employer by prescription. *Myers v. Adelphia Cable*, VWC 198-10-67 (Jan. 5, 2001). The employer should have the opportunity to offer the employee light-duty employment or selective employment before being obliged to provide vocational rehabilitation or retraining. *Kelly v. Appalachian Learning Ctr.*, 62 O.I.C. 262, VWC 108-48-88 (1983).

Virginia Code § 65.2-603(B) imposes a duty on the employee to accept vocational rehabilitation services. The burden is on the employee to justify a refusal to do so. *Ilg v. UPS, Inc.*, 284 Va. 294, 726 S.E.2d 21 (2012). Whether the claimant unjustifiably refused vocational services is a question of fact. *Anderson v. Anderson*, 65 Va. App. 354, 778 S.E.2d 132 (2015). If the employee unjustifiably refuses to cooperate with vocational rehabilitation, the employee may be barred from receiving wage benefits (but may still receive medical treatment and permanent disability payments) during the period of refusal. The claimant may not refuse to meet with vocational rehabilitation counselors provided by the employer. *Pourzynal v. J.C. Penney Co.*, VWC 154-43-95 (Oct. 7, 1994).

Since the employer's responsibility to pay wage benefits is limited to reimbursing the employee for wage loss, an effective way to limit liability in cases where compensation has been awarded may be to provide the employee with light-duty employment and/or vocational rehabilitation and put the employee back to work in a job within his or her physical capacities as close to the preinjury wage as possible.

8-10 OTHER REQUIREMENTS

8-10.01 Statutes of Limitation and Other Time Periods

The employee must file his initial claim¹² within two years after the accident. Va. Code § 65.2-601. This limitations period can be tolled if the requirements of Va. Code § 65.2-602

¹² Although [Commission Rule 1.1](#) describes information that should be included in the claim, a claim without all such information is still sufficient if it fairly apprises the Commission of the identity of the employer, the date of the accident, the location of the accident, and the injuries suffered.

are met. See *Falls Church Cabinetry v. Jewell*, 60 Va. App. 134, 724 S.E.2d 236 (2012). A change of condition application is due within two years after compensation is last paid, except as to permanency claims, which are subject to a three-year limit. Va. Code § 65.2-708. The statute of limitations runs anew under each successive award of compensation for a particular compensable injury and is triggered on the last day for which compensation was paid. *Ford Motor Co. v. Gordon*, 281 Va. 543, 708 S.E.2d 846 (2011). In *Prince William County School Board v. Rahim*, 58 Va. App. 493, 711 S.E.2d 241 (2011), *aff'd per curiam*, 284 Va. 316, 733 S.E.2d 235 (2012), the en banc Court of Appeals in a 5-4 decision overturned previous case law and construed the language of Va. Code § 65.2-708 to apply to previous medical-only awards so as to trigger the provisions of Va. Code § 65.2-708(C) and extend the period within which a claimant has to file an initial claim for compensation benefits when working light duty for the employer at or above his pre-injury wage. The General Assembly subsequently amended Va. Code § 65.2-708(A) so that Va. Code § 65.2-708, including subpart (C), only applies when a previous award of compensation exists. See *Northampton Cnty. v. Somers*, No. 0542-15-4 (Va. Ct. App. Oct. 20, 2015) (unpubl.). The General Assembly also provided that post-injury wages are compensation paid pursuant to an award for compensation although they do not result in a reduction of the maximum number of weeks of compensation benefits as described in Va. Code §§ 65.2-500 and 65.2-518. The voluntary payment of compensation alone does not waive an employer's right to rely on the two-year limitation of Va. Code § 65.2-708 or constitute a de facto award. *Roske v. Culbertson Co.*, 62 Va. App. 512, 749 S.E.2d 550 (2013).

In an unpublished opinion, the Court of Appeals held that whether the need to take a break is a work restriction that defines an injured employee's work capacity is a factual determination; accordingly, it upheld the Commission's finding that an employee who needed such breaks was performing light duty at his pre-injury wage such that the tolling provisions of Va. Code § 65.2-708(C) applied. *City of Fredericksburg v. Wilson*, No. 0723-13-4 (Va. Ct. App. Oct. 29, 2013) (unpubl.).

A claim for temporary total or temporary partial disability must be filed within one year after an award for permanent partial disability ends unless there is an actual change in condition. Va. Code §§ 65.2-501, 65.2-708; *see also Diaz v. Wilderness Resort Ass'n*, 56 Va. App. 104, 691 S.E.2d 517 (2010). A claim for medical benefits as a result of a compensable consequence is governed by the statute of limitations set forth in Va. Code § 65.2-708(A). *Tricord Homes, Inc. v. Smith*, No. 0863-08-2 (Va. Ct. App. Dec. 30, 2008) (unpubl.).

As long as a claimant files an application or claim under Va. Code § 65.2-708 within the applicable limitation period, evidence supporting that claim may be presented after the limitation period has expired. *Target Corp. v. Velasquez*, No. 0576-12-4 (Va. Ct. App. Jan. 8, 2013) (unpubl.) (relying on *Johnson v. Smith*, 16 Va. App. 167, 428 S.E.2d 508 (1993)).

A claimant is entitled to benefits for a new claim filed more than two years after an accident when given a new diagnosis for symptoms that were specified during the limitations period. *J.L. Kent & Sons, Inc. v. Kilby*, No. 1161-14-2 (Va. Ct. App. Jan. 27, 2015) (unpubl.); *Corp. Res. Mgmt. v. Southers*, 51 Va. App. 118, 655 S.E.2d 34 (2008).

An appeal from a Deputy Commissioner's opinion to the full Commission must be filed with the Commission within thirty days after issuance of an award. Va. Code § 65.2-705. An appeal from a decision of the full Commission to the Virginia Court of Appeals

Cochran Indus. v. Meadows, 63 Va. App. 218, 755 S.E.2d 489 (2014); *cf. Hogan v. NPC Int'l, Inc.*, No. 0245-13-3 (Va. Ct. App. Dec. 10, 2013) (when claim stated incorrect date of injury, no claim was made and amendment with correct date was untimely).

must be filed with the Clerk of the Commission, with a copy to the court, within thirty days after the date of the award. Va. Code § 65.2-706.

8-10.02 Date of Entitlement to Benefits for Occupational Diseases

An employee is entitled to workers' compensation benefits from the date of the first communication that the employee has an occupational disease, not from when medical evidence indicates the disability was incurred. Va. Code § 65.2-403(A). In *Tomes v. James City County Fire*, 39 Va. App. 424, 573 S.E.2d 312 (2002), the Court of Appeals held that the statute of limitations did not bar a claim for a condition that worsened when the first communicated diagnosis, which was made outside the limitations period, was for a non-compensable disease. Expanding on *Tomes*, the Court of Appeals in *Samartino v. Fairfax County Fire & Rescue*, 64 Va. App. 499, 769 S.E.2d 692 (2015), defined the "diagnosis of the disease" to encompass not only the identification of the name of the disease but also the identification of the disease's symptomatic progression and impact on quality of life and ability to perform tasks. Thus, if a patient's symptoms change or worsen, he may be diagnosed with a more severe stage of a disease and consequently trigger the beginning of a new filing period.

An employee is entitled to medical benefits fifteen days prior to the date of communication. Va. Code § 65.2-403(B). A claimant who undergoes expensive treatment for a heart attack may not be reimbursed for such medical treatment if the first communication of the occupational diagnosis to the employer occurs more than fifteen days after the treatment. See *Meyer v. City of Roanoke*, VWC 214-92-66 (Oct. 23, 2003) (Deputy Commissioner finding that employing locality received notice of claim from Commission and not claimant and was therefore not liable for medical expenses incurred approximately 180 days prior to that notification).

Furthermore, Va. Code § 65.2-600(D) provides that no compensation or medical benefits shall be payable "unless such written notice [of the injury by accident] is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Commission . . . and the Commission is satisfied that the employer has not been prejudiced" by such lack of notice. Thus, under certain circumstances, an employing locality may not be liable for benefits if an employee does not notify the locality in a timely fashion of his allegation that his heart condition is due to his employment.

The Commission found that a general knowledge of the presumption law coupled with a personal belief (not communicated by a doctor) that his heart disease was related to work stress did not constitute a communication so as to start the entitlement date. *Price v. Town of Vienna Police*, VWC 198-37-13 (May 28, 2002). In *Robinson v. Wise County Sheriff's Office*, however, the Commission found that knowledge of heart disease and a statement by the employer that the employee could file a claim constituted a sufficient communication. VWC 203-42-63 (June 11, 2002 [vacating Deputy Commissioner's Opinion and remanding] and June 20, 2003 [affirming Deputy Commissioner's subsequent Opinion]). The Commission has determined that the analysis is the same as for determining when the statute of limitations begins to run. *Maine v. Bristol City Fire Dep't*, VWC 183-73-71 (May 31, 2000); see section 8-6.03. In *Rahn v. City of Virginia Beach Sheriff's Department*, VWC 159-85-78 (Sept. 28, 1994), the Commission determined that when there never was a communication of a diagnosis of an occupational disease, a claimant's right to compensation and medical coverage accrued on the date the claimant chose to assert his rights, namely the date of application. *Accord Arnold v. Norfolk City Sheriff's Office*, VWC 197-62-80 (Oct. 11, 2000).

8-10.03 Duty to Insure or Self-Insure

An employer covered by the Act "shall insure the payment of compensation to his employees." Va. Code § 65.2-800. This obligation may be discharged by purchasing

insurance or by receiving a certificate from the Workers' Compensation Commission, issued pursuant to Va. Code § 65.2-808, authorizing the employer to be an individual self-insured, or by participating in a group self-insurance association meeting the requirements of Va. Code § 65.2-802, licensed by the State Corporation Commission. Va. Code § 65.2-801. Employers must file proof of insurance with the Workers' Compensation Commission annually or "as often as may be necessary." Va. Code § 65.2-804. The employer may not deduct the cost of insurance from the wages of its employees. Va. Code § 65.2-807.

The employer and insurer must notify its employees and the Commission of cancellation of insurance. Va. Code § 65.2-804. The Commission may order the employer to suspend business and operations until the employer is in compliance with all provisions of the Workers' Compensation Act. Va. Code § 65.2-805. In addition to civil penalties provided by Va. Code § 65.2-805, an employer who is found to have knowingly and intentionally violated Va. Code §§ 65.2-800 or 65.2-804 is guilty of a Class 2 misdemeanor. Va. Code § 65.2-806. If an employer fails to comply with these insurance provisions, the employer is liable for civil penalties. The employer can also be held liable to employees under either the Workers' Compensation Act or in a lawsuit for personal injuries or death by accident. If an employee files suit for personal injuries against an employer who has violated Va. Code §§ 65.2-800 or 65.2-804, the employer may not defend that suit on the grounds that the employee was negligent, the injury was caused by the negligence of a fellow employee, or the employee assumed the risk of injury. Va. Code § 65.2-805.¹³ This provision, however, does not extend to create a civil cause of action against a negligent co-worker even when the employer failed to obtain insurance. *Wade v. Scott Recycling, L.L.C.*, 87 Va. Cir. 112 (City of Roanoke 2013) (injuries caused by a negligent coworker are costs of doing business that should fall on an employer) (construing *Feitig v. Chalkley*, 185 Va. 96, 38 S.E.2d 73 (1946)).

8-10.04 Liability of Statutory Employers

Where an owner contracts with another to perform work within the owner's trade, business, or occupation, the owner is liable for workers' compensation to the contractor's employees in the same manner as if directly employed. This liability is applied in ascending order as to contracting parties. Va. Code § 65.2-302; *Jeffreys v. Uninsured Employer's Fund*, 297 Va. 82, 823 S.E.2d 476 (2019); *Nichols v. VVKR, Inc.*, 241 Va. 516, 403 S.E.2d 698 (1991); *Falls Church Constr. Corp. v. Valle*, 21 Va. App. 351, 464 S.E.2d 517 (1995). This section does not apply to independent contractors. *Shell Oil Co. v. Leftwich*, 212 Va. 715, 187 S.E.2d 162 (1972). Although liable to the employee, the principal employer has the right of indemnity and a cause of action against any person who would have been liable to pay compensation to the employee independently of Va. Code §§ 65.2-302 or 65.2-303 or against an intermediate contractor. Va. Code § 65.2-304; *Race Fork Coal Co. v. Turner*, 5 Va. App. 350, 363 S.E.2d 423 (1987), *rev'd on other grounds*, 237 Va. 639, 379 S.E.2d 341 (1989). See *Roberson v. SMG Food & Beverage, LLC*, No. 3:20CV277-HEH (E.D. Va. Jul. 21, 2020), for a comprehensive discussion of the statutory employer tests and exceptions.

A governmental entity can be the statutory employer of the employees of contractors and subcontractors if it hires them to perform work that the governmental entity is required or authorized by law to do. *Nelson v. USPS*, 189 F. Supp. 2d 450 (2002) (question of whether a contractor's employee is the owner's "statutory employee" is jurisdictional and may be raised at any time, and court may consider evidence outside the pleadings); *Roberts v. City of Alexandria*, 246 Va. 17, 431 S.E.2d 275 (1993); *Ford v. City*

¹³ Note that a circuit court has held that Va. Code § 65.2-805 creates strict liability for a non-compliant employer. *Wade v. Scott Recycling, L.L.C.*, 89 Va. Cir. 319 (City of Roanoke 2014) (statute provides that an employer "shall be liable . . . at law in a suit instituted by the employee . . . to recover damages for personal injury or death by accident"). The legal reasoning of this opinion is questionable as it does not address why restrictions on affirmative defenses would be required if there is strict liability.

of *Richmond*, 239 Va. 664, 391 S.E.2d 270 (1990); *Henderson v. Cent. Tel. Co.*, 233 Va. 377, 355 S.E.2d 596 (1987); *Va. Polytechnic & State Univ. v. Frye*, 6 Va. App. 589, 371 S.E.2d 34 (1988). This risk should be considered in making decisions to privatize government functions.

If there is a risk that a contractor's employee may be considered the owner's statutory employee, making the owner liable for workers' compensation, the owner should protect itself by expressly contracting with the contractor to indemnify and hold the owner harmless for all losses, including workers' compensation as well as general liability. See *Safeway, Inc. v. DPI Midatlantic, Inc.*, 270 Va. 285, 619 S.E.2d 76 (2005).

8-10.05 Duty of Non-Retaliation

Employers are prohibited from discharging an employee solely because the employee intends to file or has filed a workers' compensation claim or testifies in such a proceeding. Virginia Code § 65.2-308 creates a statutory right of action in circuit court for the benefit of an employee retaliated against in violation of this section, and the employee may obtain reinstatement, back pay, actual damages, attorney's fees, and other relief.

In *Taylor v. Wal-Mart Stores Inc.*, 376 F. Supp. 2d 653 (E.D. Va. 2005), *aff'd* No. 05-1884 (4th Cir. Dec. 20, 2005), an employee alleged that he was terminated in violation of Va. Code § 65.2-308 in retaliation for pursuing his workers' compensation rights. The court reviewed his workers' compensation history and disagreed, finding that under Virginia law, merely alleging closeness in time between filing a workers' compensation claim and the alleged retaliatory act is insufficient to show a violation under Va. Code § 65.2-308. See *Jordan v. Clay's Rest Home, Inc.*, 253 Va. 185, 483 S.E.2d 203 (1997); see also *O'Connell v. Isocor Corp.*, 56 F. Supp. 2d 649 (E.D. Va. 1999) (finding that even separation of just one day between insurance interview and termination insufficient to establish *prima facie* case under Virginia law).

8-11 SUBROGATION AND SETTLEMENT

8-11.01 Third-Party Practice; Subrogation in General

Virginia Code § 65.2-309 provides that a workers' compensation claim against an employer creates a lien in favor of the employer against any recovery that the injured employee may have against a third party for such injury, occupational disease, or death. Pursuant to Va. Code § 65.2-309, once a workers' compensation claim is made, an employer has a right to enforce, in its own name or in the name of the injured employee or his personal representative, the legal liability of a third party. Certain restrictions apply if the right of subrogation is exercised through arbitration. See *Liberty Mut. Ins. Co. v. Fisher*, 263 Va. 78, 557 S.E.2d 209 (2002) (citing *Safety-Kleen Corp. v. Van Hoy*, 225 Va. 64, 300 S.E.2d 750 (1983)); *Sheris v. Sheris Co.*, 212 Va. 825, 188 S.E.2d 367 (1972); *Feitig v. Chalkley*, 185 Va. 96, 38 S.E.2d 73 (1946).

Virginia Code § 65.2-310 protects an employer's lien in an action brought by an employee or her personal representative against a third party. *Liberty Mut. Ins. Co. v. Fisher*, 263 Va. 78, 557 S.E.2d 209 (2002) (citing *Circuit City Stores, Inc. v. Bower*, 243 Va. 183, 413 S.E.2d 55 (1992)). At any time before a verdict is reached in an action, an employer may petition the court to ascertain the amount of its lien and deduct from that amount certain fees and expenses incurred by the plaintiff. If a judgment is obtained in an action, the court must order the judgment debtor to reimburse the employer this sum from the amount of the judgment. An employer may assert its statutory lien against any recovery obtained in an action brought against a third party liable for the employee's injury or death. *Id.* (employer's lien rights created by Va. Code § 65.2-309 may be enforced in any action against a negligent third party that is resolved by a compromise settlement, irrespective of whether the action is initiated by an employer, its employee, or the employee's personal representative).

In *Yellow Freight Systems v. Courtaulds Performance Films, Inc.*, 266 Va. 57, 580 S.E.2d 812 (2003), an employer filed a petition for subrogation prior to a verdict in the employee's third-party lawsuit but after the employee entered into a compromise settlement with release of liability as to the third party. The Court ruled the employer lost its right to subrogation. In such a case, consider whether the employer may still have a cause of action for unjust enrichment.

If the employer sues the third party and collects more than the workers' compensation lien, the employee is entitled to the excess less a proportionate share for reasonable expenses and attorney's fees as provided in Va. Code § 65.2-311. The employer cannot satisfy its right to subrogation by a compromise settlement with the third-party tortfeasor without the Commission's and the employee's approval. Va. Code § 65.2-309(C). A local government attorney employed by the employer should consider whether suing in the employee's name or suing for damages in excess of the workers' compensation lien may create additional ethical responsibilities as to the employee or may create a conflict between the parties in the event of a disagreement as to settlement or litigation strategy. Draft a well-crafted letter to the employee setting forth the terms of the relationship prior to suit. An employer, as subrogee, is a "real party in interest" to the third-party action. *Ingram v. Link Belt Power Shovel Co.*, 94 F.R.D. 196 (W.D. Va. 1982).

If the employee or his attorney recovers proceeds without satisfying the employer's workers' compensation lien, the employer can recover its lien as a credit against future benefits or through a civil action against the employee. Va. Code § 65.2-309(D). The employee must take care to seek the employer's approval prior to settling a third-party action, so as not to prejudice the employer's right of subrogation. *Noblin v. Randolph Corp.*, 180 Va. 345, 23 S.E.2d 209 (1942). The penalty for prejudice to the employer's right of subrogation is loss of the employee's right to future compensation. *Stone v. George W. Helme Co.*, 184 Va. 1051, 37 S.E.2d 70 (1946); *Overhead Door Co. v. Lewis*, 22 Va. App. 240, 468 S.E.2d 700 (1996); *White Elec. Co. v. Bak*, 22 Va. App. 17, 467 S.E.2d 827 (1996).

The employer has a right of subrogation against uninsured or underinsured motorist coverage provided by and at the expense of the employer. Va. Code § 65.2-309.1. The employer is not a beneficiary of the employee's private automobile insurance contract; therefore, if the employee is entitled to recover from his private insurer's uninsured motorist coverage, the employer cannot enforce its right of subrogation against such funds. *Lumb v. McLane Food Ctr.*, 79 O.W.C. 159 (2000).

8-11.02 Settlements

Liability for compensable cases may be limited by settlement, as discussed herein.

8-11.02(a) Lump Sum Settlements

Lump sum settlements are agreements to pay awarded benefits in advance of their due date, to permit the employer to pay the liquidated value of an outstanding award (typically one for permanent disability or death benefits) at the present value, thus giving the employer a discount. The Commission must approve a lump sum settlement. Va. Code § 65.2-522.

8-11.02(b) Compromise Settlements

Compromise settlements extinguish a claim and include the release of rights by the parties. They must be approved by the Commission. Va. Code § 65.2-701. The Commission may approve a compromise settlement only if it is "clearly" of the opinion that the settlement will serve the best interest of the employee or his dependents. [Forms](#) are available on the Commission's website.

In *Smith-Adams v. Fairfax County School Board*, 67 Va. App. 584, 798 S.E.2d 466 (2017), the Court of Appeals held that when a compromise settlement was not acted upon by the Commission because of an oversight, the Commission properly exercised its equitable powers to deny compensation.

Once the Commission orders compensation, the employer must make the payment directly to the employee in accordance with [Commission Rule 9.2](#), and it must do so within fourteen days or as ordered. Attorney's fees, if ordered, are paid directly to the attorney or as ordered. The employer must receive timely and reasonable notice of an employee's request for attorney's fees. Va. Code § 65.2-714; *Marks v. Henrico Doctors' Hospital/HCA*, 73 Va. App. 293, 858 S.E.2d 825 (2021) (affirming Commission's interpretation of § 65.2-714, in conjunction with Commission Rule 6.2, to require timely and reasonable notice of request for attorney's fees). If payments are late, a penalty may be assessed against the employer. Va. Code § 65.2-524; *White v. Giant Food*, VWC 129-57-22 (Oct. 25, 1990).

The Commission can set aside an agreement upon evidence of fraud, mistake, or imposition. See, e.g., *Irby v. Lifepoint Health and Safety Nat'l Casualty Corp.*, No. 0662-20-3 (Va. Ct. App. Nov. 17, 2020) (unpubl.) (Commission had authority to set aside agreement and vacate award where the agreement form contained only the claimant's signature and not signature of employer or insurer). Imposition empowers the Commission in appropriate cases to render decisions based on justice shown by the total circumstances even though no fraud, mistake, or concealment has been shown. The purpose of the doctrine is to prevent an employer's use of its superior knowledge of, or experience with, the Workers' Compensation Act, or to use an economic advantage to cause an unjust deprivation to the employee of benefits provided by the Act. *Strong v. Old Dominion Power Co.*, 35 Va. App. 119, 543 S.E.2d 598 (2001). The application of the doctrine, however, requires a threshold showing of unfairness. *Hampton Inn v. King*, 58 Va. App. 286, 708 S.E.2d 450 (2011) (weight loss plan not covered under compromise agreement). In *Dealer's Lot v. Jenkins*, No. 2441-11-3 (Va. Ct. App. Nov. 20, 2012) (unpubl.), the appellate court held that the doctrine of imposition applied when pre-approval for surgery was given by the employer even though the surgery was in fact for an unrelated condition and the employer asserted the approval was only conditional.

The voluntary payment of compensation alone does not constitute a de facto award. *Roske v. Culbertson Co.*, 62 Va. App. 512, 749 S.E.2d 550 (2013); see also *Kelley v. Monticello Area Cmty. Action Agency*, No. 1083-16-3 (Va. Ct. App. Dec. 13, 2016) (unpubl.) (de facto awards grounded in estoppel and do not apply when claimant is not prejudiced); *Harrison v. Richmond City Police*, VWC 211-47-36 (Oct. 26, 2006) (employer's voluntary payment of medical expenses for an alleged work-related condition did not constitute an implied agreement of compensability justifying the imposition of a de facto award).

In *Tyco Electronics v. VanPelt*, 62 Va. App. 160, 743 S.E.2d 293 (2013), the court held that even though an agreement did not specify the exact nature of the injury, the intended coverage could be inferred from the parties' actions subsequent to the agreement. Thus, the court found that a ten-year history of paying for treatment indicated an intention to expand the scope and nature of the employee's injuries.

8-12 OTHER CONSIDERATIONS

8-12.01 Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities. See also Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.; Virginians with Disabilities Act, Va. Code §§ 51.5-1 et seq. One must be a "qualified individual with a disability" to be a member of the class protected by the ADA. To be a "qualified individual," a claimant must prove he can perform the essential functions of the job in issue, with or without reasonable accommodation. The ADA does not require the employer of an employee

with a disability to rewrite job descriptions to eliminate essential job functions that the employee's disability will not allow him or her to perform. *Taylor v. Wal-Mart Stores, Inc.*, 376 F. Supp. 2d 653 (E.D. Va. 2005), *aff'd*, No. 05-1884 (4th Cir. Dec. 20, 2005). An individual has a "disability" under the ADA if he (1) has a physical or mental impairment that substantially limits one or more of his major life activities that are of central importance to the daily lives of most people, or (2) has a record of such impairment, or (3) is regarded as having such impairment. *Wiggins v. DaVita Tidewater, LLC*, 451 F. Supp. 2d 789 (E.D. Va. 2006) (in ADA suit alleging failure to accommodate and hostile work environment, plaintiff failed to prove her mental impairment limited her ability to work; at most, she proved an inability to work with a particular supervisor).

In *Taylor v. Wal-Mart Stores Inc.*, *supra*, an employee conceded that he could not fulfill his essential job function of lifting up to one hundred pounds, but contended his employer fired him in violation of his ADA rights. The court found that requiring the employer to hire additional personnel to perform the employee's essential job function would be unreasonable as a matter of law. The employee further alleged that he was terminated in violation of Va. Code § 65.2-308 in retaliation for pursuing his workers' compensation rights. The court reviewed his workers' compensation history and disagreed, finding that merely alleging closeness in time between filing a workers' compensation claim and the alleged retaliatory act is insufficient to show a violation under Va. Code § 65.2-308.

The ADA limits the scope of information that employers may seek and disclose about their employees' non-work-related medical conditions. *Wiggins v. DaVita Tidewater, LLC*, 451 F. Supp. 2d 789 (E.D. Va. 2006). Compare Va. Code §§ 65.2-604, 65.2-607 and 65.2-902, which allow employers broad access to employees' medical records in workers' compensation cases. In *Wiggins*, the court described this limitation as follows:

After an employee has begun working, an employer may not require a medical examination nor make inquiries into an employee's disability unless the exam or inquiry is shown to be "job-related and consistent with business necessity." Employers are allowed to gather disability information from current employees in two ways. First, they may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program Second, the employer may make inquiries into the ability of an employee to perform job-related functions. The ADA requires that all information received by employers from these two channels be kept confidential.

Id. (finding alleged communication of medical information was not an unlawful disclosure under the ADA, because plaintiff did not obtain the information from an employee health program or employer-mandated medical examination).

The employer should exercise care in establishing truly "essential" functions of a job. Such analysis should focus on the employee's day-to-day job activities. Carefully drafted physical capabilities forms are useful in the workers' compensation context for providing guidelines to the treating physician for establishing light duty restrictions. Such an evidentiary foundation may be necessary in proving to the Commission what work the employee can and cannot perform.

When the employee gets to maximum medical improvement (MMI) and has a functional capacity examination (FCE) with a disability rating and permanent restrictions endorsed by the treating physician, and as a result, the employee cannot perform the essential functions of their current position with or without a reasonable accommodation, then the employer is faced with an ADA scenario similar to that seen in *Wilburn v. City of*

Roanoke, No. 7:14-CV-00255 (W.D. Va. Aug. 27, 2015).¹⁴ In *Wilburn*, a police officer injured his left wrist and hand and could no longer perform the essential functions of a police officer. At this point, the workers' compensation case and the ADA case overlapped, and the employer had to decide how to proceed regarding employment while the workers' compensation case proceeded. In this case, the officer requested a reasonable accommodation, which initiated the "interactive process" in which both the employee and the employer have a good faith duty to discuss the employee's limitations and potential accommodations.

In *Wilburn*, the possible accommodations included a transfer to another sworn position within the police department, or to another position somewhere within the city. *Id.* In a case of this type, if there are no open positions available within a reasonable period of time, or if the employee rejects all of the open positions, then the employer has the option to terminate the employment relationship. *Id.* Meanwhile, the workers' compensation case continues with regard to permanent partial disability (PPD), continued light duty until a new position is found, the necessity to market the employee's remaining work capacity, and payment of 66 2/3 percent of the difference between the new job's pay and the AWW at the time of the original accident.

8-12.02 Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.

The Family and Medical Leave Act (FMLA) requires employers to allow qualifying employees up to twelve weeks' unpaid leave during any twelve-month period for their own serious health condition, including conditions resulting from a workers' compensation claim, or to care for an ailing family member. See Chapter 6, Federal Employment Law, section 6-7 for a full discussion.

FMLA leave and time the employee is taken out of work for a workers' compensation injury may run concurrently, as long as the injury qualifies as a "serious health condition" and the employer designates the leave as FMLA leave. 29 C.F.R. §§ 825.207-08.

In addition, occasions may arise when an employee with a compensable injury is proposed to be terminated for cause or for inability to perform an essential job function, and requests FMLA leave. Such an employee should be allowed twelve weeks' FMLA leave prior to termination if he qualifies for such leave. The fact that the employee is entitled to workers' compensation disability benefits does not preclude termination after the twelve weeks' FMLA leave, so long as the employer pays the disability award and complies with other Commission orders and the employer's internal policies. The employer, however, must take care in assessing the reasons for termination such that no discrimination is directed against an injured employee. The employer must not interfere with the employee's rights or retaliate against the employee because he filed a workers' compensation claim, because he is disabled or perceived as such, or because he requested FMLA leave.

8-12.03 Ombudsman Program

The Commission is authorized to establish an Ombudsman program and appoint an ombudsman to administer the program. Va. Code § 65.2-205(A). "The purpose of the Ombudsman program shall be to provide neutral educational information and assistance to persons who are not represented by an attorney, including those persons who have claims pending or docketed before the Commission." *Id.* The ombudsman must be an attorney licensed by the Virginia State Bar, in active status and in good standing. *Id.* All materials contained in the ombudsman's and Ombudsman program personnel's case files and communications with those receiving assistance shall be confidential, not subject to disclosure, and not admissible in any proceeding (absent threatened injury, plans to

¹⁴ Former LGA President Tim Spencer tried this case.

commit a crime, or the like). Va. Code § 65.2-205(B). The ombudsman and the Ombudsman program personnel are immune from civil liability in the performance of their duties. Va. Code § 65.2-205(C).

8-13 CONCLUSIONS

As the Virginia Supreme Court described in *Feitig v. Chalkley*, 185 Va. 96, 38 S.E.2d 73 (1946), the purpose of the Virginia Workers' Compensation Act is to compensate an employee for loss of the opportunity to work and is liberally construed in favor of the employee. The system, however, is based upon a *quid pro quo*, and the Commission seeks to achieve fairness between the employee and the employer. *Roller v. Basic Constr. Co.*, 238 Va. 321, 384 S.E.2d 323 (1989). An explanation of this *quid pro quo* was given by the Supreme Court that could be used to achieve the desired fairness:

Before focusing on the specific provisions governing this case, we must address [Claimant's] overarching assertion that the Workers' Compensation Act should receive "a liberal construction and application of the law in favor of the worker" in order to "accomplish the purpose of the Legislature in enacting our Workers' Compensation statute," Appellant's Br. at 7, 28-29. We frequently apply this simple principle but guard against doing so simplistically.

Our caution stems from the unique nature of the Workers' Compensation Act. The Act reflects a legislative "quid pro quo" that gave workers the right to assert no-fault liability against their employers (a right that they had never possessed) and took from them the right to sue their employers in tort for negligence (a right that they had possessed under the common law). The liberal-construction principle, if misapplied, could upset this delicate balance. A view of the Act's coverage that is too broad would authorize an award of compensation benefits but would bar a tort recovery, and a view that is too narrow would authorize a tort recovery but would bar an award of compensation benefits.

[Claimant] contends that he lost his claim for compensation benefits because the Court of Appeals and the Commission had failed to interpret Code § 65.2-302 liberally in his favor. This result is illiberal, however, only because [Claimant] has no viable negligence claim against the [Defendants]. If he had such a claim and had asserted it, the [Defendants]—not [Claimant]—would be insisting that Code § 65.2-302 be construed broadly. See Code § 65.2-307(A); Pascal, *supra*, § 2.08[3][a], at 2-36 (4th ed. 2011). A precedent-setting construction of the Act cannot depend on whether the injured worker is before the Commission seeking an expansive application of the Act's coverage or before a circuit court seeking a restrictive application. A uniform principle of law, by its nature, cannot fluctuate based upon the forum in which it is advocated or the identity of its advocates.

Rightly applied, the liberal-construction principle means only that an interpretation of the Workers' Compensation Act should take into account the humane, beneficent purposes embedded in the legislative *quid pro quo*. That interpretative preset does not "permit a liberal construction to change the meaning of the statutory language or the purpose of the Act," *American Furniture Co. v. Doane*, 230 Va. 39, 42, 334 S.E.2d 548 (1985), or "authorize the amendment, alteration, or extension of its provisions," *Van Geuder v. Commonwealth*, 192 Va. 548, 553, 65 S.E.2d 565 (1951) (citation omitted). Nor does the principle "go to the extent of requiring that every claim asserted should be allowed," *id.* (citation omitted), or permit the Act to be "converted into a form of health insurance," *Doane*, 230 Va. at 42. Instead, the Act

should be liberally interpreted consistent with its text and its underlying quid-pro-quo purpose to benefit all workers.

Jeffreys v. Uninsured Employer's Fund, 297 Va. 82, 823 S.E.2d 476 (2019) (footnotes omitted) (emphasis added).

Employers serve their own business needs, as well as their employees' needs, by ensuring their employees return to full health and productive employment as soon as possible. The following are suggestions for achieving this goal. Employers should:

- develop policies and procedures based on sound industry practices for hiring, training, and equipping employees;
- establish and enforce safety rules;
- establish risk management practices that track the incidence and cause of employee accidents;
- provide for immediate reporting and thorough investigation of accidents, including taking recorded statements of employee and witnesses where appropriate;
- immediately refer all workers' compensation litigation to legal counsel for prompt handling, and work closely with counsel to provide background information and investigative materials;
- provide physicians' panels made up of at least three skilled physicians from different practices in the locality who are responsive to employees' health care needs and cognizant of employers' needs for thorough, objective reporting and assessment of workplace requirements;
- provide employees and health care providers with expert assistance in monitoring (but not managing) health care and coordinating return-to-work efforts and provide, where appropriate, expert vocational rehabilitation assistance;
- be responsive to employees' medical needs and physicians' restrictions and be proactive in providing temporary light duty when consistent with the employer's business needs; and
- regularly audit accident and claims files for patterns of losses, assessment of health care provision and return to work efforts, and development of loss control techniques.

Ideally, the interests of employees and employers will harmonize, and they will cooperate in an effort to return the employee to health and productive employment. Good communication and good-faith interactions are essential to achieve the intent of the Virginia Workers' Compensation Act, which is fairness to all parties.