

# **STRATEGIES FOR DEFENSE OF WORKERS' COMPENSATION CLAIMS**

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## **I. INTRODUCTION**

This paper provides a brief introduction to some important defenses which may be available to employers under the Virginia Workers' Compensation Act. It is not intended as a comprehensive examination of those defenses, nor does it address every issue which should be considered in defense of workers' compensation claims. Moreover, the law continues to evolve as the Virginia Workers' Compensation Commission and the Courts issue new decisions and legislative changes are adopted. The reader is encouraged to use this paper as a tool for understanding potential workers' compensation defenses, but to consult their insurance carriers and legal counsel before taking action or making decisions in regard to the defense of any claim.

## **II. DEFENSES TO WORKERS COMPENSATION CLAIMS**

### **1. NO COVERAGE**

The Act provides a number of exclusions from coverage for certain employers and workers, including the following.

#### **a. Fewer Than Three Employees**

In general, the Virginia Workers' Compensation Act applies to all employers. The Act excludes, however, employers having fewer than three regular employees in Virginia, unless the employer and employees voluntarily agree to coverage. Va. Code § 65.2-101(2)(h). To prevail on this defense, the employer must prove that it had fewer than three employees working in Virginia. If it does, it may still be subject to the Act if the commission finds that, at the time of the accident, the employer's "established mode of operating the business" regularly required three or more employees. *Perry v. Deslisle*, 46 Va. App. 57, 64 (2005).

#### **b. Casual Labor**

The Act excludes casual labor from coverage. Va. Code § 65.2-101(2)(e). Casual labor is workers who perform work not normally performed by the employer. *See Board of Supervisors v. Boaz*, 176 Va. 126 (1940).

#### **c. Domestic Servants**

The Act excludes domestic servants from coverage. Va. Code § 65.2-101(2)(e).

**d. Farm Laborers**

The Act excludes from coverage farm and horticultural laborers, unless the employer regularly has in service more than three full-time employees. Va. Code § 65.2-101(2)(g).

**2. NO EMPLOYMENT RELATIONSHIP**

**a. Employment Relationship Required**

The Virginia Workers' Compensation Act applies only to employees. An independent contractor is not entitled to benefits. The status of a worker as an employee or independent contractor is a source of frequent dispute. In determining whether a worker is an employee, the power to direct and control the worker in the performance of his work is the most important consideration. Other considerations include the right to hire, the power to discharge, and the obligation to pay wages. *See, e.g., Phillips v. Brinkley*, 194 Va. 62 (1952); *Coker v. Garrett*, 191 Va. 747 (1951). Execution of an independent contractor agreement may be considered, but is not controlling. *See Cunningham v. Special Touch, Inc.*, VWC File No. 229-64-44 (Jan. 30, 2008).

**b. Statutory Employers and Employees**

An employer may become the statutory employer of workers of a subcontractor.

The Act provides:

A. When any person (referred to in this section as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the

work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

B. When any person (referred to in this section as “contractor”) contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (referred to in this section as “subcontractor”) for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if that worker had been immediately employed by him.

C. When the subcontractor in turn contracts with still another person (also referred to as “subcontractor”) for the performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or contractor shall be the same as the liability imposed by subsections A and B of this section.

Va. Code § 65.2-302.

The status of an employer as a statutory employer can be important for at least two reasons. First, if the immediate employer of an injured worker is uninsured, the statutory employer and its insurance carrier can be liable for workers’ compensation for that worker. Second, the exclusivity of the Act (discussed below) can shield the statutory employer from tort liability to the worker for injuries allegedly caused by the statutory employer.

**c. Borrowed Employee Doctrine**

The borrowed employee doctrine was recognized under the Virginia Workers' Compensation Act in *Ideal Steam Laundry v. Williams*, 153 Va. 176, 149 (1929). There, the court stated:

[A] servant may be transferred from his service for one master -- who may have made the express contract of employment of the servant and may pay the latter his wages, and be his general master -- to the service of another person other than his general master; in which case -- (1) The special master is alone liable to third persons for injuries caused by such acts as the special servant may commit in the course of his employment; (2) the special servant must look to the special master for his indemnity, if he is injured, while the stipulated work is in progress, by dangerous conditions resulting from the special master's failure to fulfil [sic] one of those duties which the law imposes upon the masters for the benefit and protection of their servants.

In *Metro Machine Corp. v. Mizenko*, 224 Va. 78, 82-83 (1992), the Court emphasized that there are a number of factors which should be considered in determining whether a worker is a borrowed employee but that the most important factor is control:

Under the borrowed servant doctrine, a worker, although directly employed by one entity, may be transferred to the service of another so that he becomes the employee of the second entity with all the legal consequences of the new relation. One of the legal consequences of the new relation is that workers' compensation is the injured employee's exclusive remedy against the second entity-employer.

[C]ontrol over the employee is the most important factor in consideration of the borrowed servant status, although it alone may not be dispositive. Factors generally accepted as appropriate considerations in this area ... include: (1) who has control over the employee and the work he is performing; (2) whether the work performed is that of the borrowing employer; (3) was there an agreement between

the original employer and the borrowing employer; (4) did the employee acquiesce in the new work situation; (5) did the original employer terminate its relationship with the employee; (6) who is responsible for furnishing the work place, work tools and working conditions; (7) the length of the employment and whether it implied acquiescence by the employee; (8) who had the right to discharge the employee; and (9) who was required to pay the employee.

In *Liberty Mutual Ins. Corp. v. Herndon*, No. 0936-11-3, 59 Va. App. 544 (Va. Ct. App. Feb. 7, 2012), the Virginia Court of Appeals found that the failure of the Deputy Commissioner to address each factor does not render the Commission's finding improper where the Commission clearly "impose[d] liability upon the employer who was most directly responsible for the employee's actions at the time of the injury."

### **3. NOT AN INJURY**

The Act defines "injury" as follows:

"Injury" means only injury by accident arising out of and in the course of the employment or occupational disease as defined in Chapter 4 (§ 65.2-400 et seq.) and does not include a disease in any form, except when it results naturally and unavoidably from either of the foregoing causes.

Va. Code § 65.2-101. For purposes of the Act, "an injury occurs when a lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability" but "[a] condition causing disability or pain will not be considered an injury for purposes of the Act unless accompanied by a sudden obvious mechanical or structural change in the body." *Snead v. Harbaugh*, 241 Va. 524 (1991).

Not every harm constitutes an "injury" under the Act. Injury to reputation, for example, is not to be an injury within the meaning of the Act. *Snead v. Harbaugh, supra*.

#### **4. NOT AN ACCIDENT**

##### **a. Accident Defined**

“A claimant establishes an injury by accident if there is (1) an identifiable incident; (2) that occurs 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.” *Teasley v. Montgomery Ward & Co.*, 14 Va. App. 45, 48 (1992), quoting *Chesterfield County v. Dunn*, 9 Va. App. 475, 476 (1990).

##### **b. Gradual Onset**

Usually, there is not “accident” if there is a gradual onset of symptoms such that the employee cannot attribute the injury to “any identifiable movement, incident, or event.” *Badische Corp. v. Starks*, 221 Va. 910, 914 (1981).

In *Badische Corp. v. Starks*, 221 Va. 910 (1981), the claimant had a history of back complaints and suffered gradual onset of pain in her lower back and leg while she was working. The Court held the claimant had not proven an accident because she had not “identified the injury with a movement made or action taken at a particular time at work and arising out of and in the course of the employment” and that “where the employee cannot so identify an incident causing his injury... he cannot recover compensation.” 221 Va. at 913.

In *Virginia Elec. & Power Co. v. Cogbill*, 223 Va. 354 (1982), the employee claimed he suffered a lumbar strain because of prolonged sitting and occasional bending forward in a chair. The Supreme Court found the claimant failed to prove an “accident”

within the meaning of the Act because she “suffered no sudden, obvious mechanical or structural change.” *Cogbill*, 223 Va. at

In *Southern Express v. Green*, 257 Va. 181 (1999), the employee suffered chilblains as a result of exposure to cold temperature in a walk-in cooler during a four-hour period. The Court ruled that this constituted an injury by accident under the Act “because the claimant proved that she sustained the injury at a particular time and place and upon a particular occasion, that it was caused by an identifiable incident, and that it resulted in a structural change in her body....” 257 Va. at 183.” “The evidence in this case shows that Green's chilblains were not an injury of gradual growth caused by the cumulative effect of many acts done or many exposures to conditions prevalent in the work, no one of which can be identified as the cause of the harm. Instead, the chilblains were the result of some particular piece of work done or condition encountered on a definite occasion. In other words, Green's chilblains resulted from a single exposure to cold temperature on a definite occasion during the performance of a specific piece of work, i.e., an identifiable incident. It was not caused by repeated exposures over a period of months or years.”

**c. Psychological Injuries**

“Whenever the injury is strictly psychological, it must be causally related to a physical injury or be causally related to an obvious sudden shock or fright arising in the course of employment. “ *Teasley v. Montgomery Ward & Co.*, 14 Va. App. at 45, 48 (1992), quoting *Chesterfield County v. Dunn*, 9 Va. App. 475, 477 (1990). “[A] nervous condition resulting from a sudden shock or fright without physical impact may be

compensable.” *Teasley*, 14 Va. App. at 48; see *Burlington Mills v. Hagood*, 177 Va. 204 (1941). “[A]n emotional problem resulting after a physical injury may be compensable.” *Teasley*, 14 Va. App. at 49; see *Womack and Continental Ins. v. Ellis*, 209 Va. 588 (1969). “However, disagreements over managerial decisions and conflicts with supervisory personnel that cause stressful consequences which result in purely psychological disability ordinarily are not compensable.... [C]onflicts of that nature, standing alone, which result in psychological disability are not sufficient to constitute an injury by accident.” *Teasley*, 14 Va. App. at 49. Post-traumatic stress disorder “may be compensable as an injury by accident, depending on the circumstances under which the condition developed,” or in some circumstances it may be an ordinary disease of life.” *Fairfax County Fire & Rescue Dep’t v. Mottram*, 263 Va. 365 (2002).

## **5. NOT ARISING OUT OF THE EMPLOYMENT**

### **a. Injury Must Arise Out of the Employment**

“[F]or an injury to be compensable under the Workers’ Compensation Act, the claimant must prove three elements: (1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment.” *Southland Corp. v. Parson*, 1 Va. App. 281, 283-84 (1985). “An accident arises out of the employment when there is a causal connection between the claimant’s injury and the conditions under which the employer requires the work to be performed.” *United Parcel Serv. of Am. v. Fetterman*, 230 Va. 257, 258 (1985).

**b. Actual Risk Test**

In determining whether an accident arises out of the employment, some states apply a “position risk” test. Virginia, however, applies an “actual risk” test. *Bernardo v. Carlson Cos. - TGIF*, No. 2590-11-2, 60 Va. App. 400 (Jul. 17, 2012). The Virginia Supreme Court has explained the actual risk test as follows:

[I]f the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises “out of” the employment. But [the applicable test] excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

*Simms v. Ruby Tuesday, Inc.*, 281 Va. 114, 122-23 (2011); *Bradshaw v. Aronovitch*, 170 Va. 329, 335 (1938). This description of the actual risk test, particularly the statements that “the causative danger must be peculiar to the work and not common to the neighborhood,” has been interpreted as meaning that under the actual risk test an injury does not arise out of the employment if it involves a hazard which would be encountered by the public as well as the worker.

However, in *Liberty Mutual Ins. Corp. v. Herndon*, No. 0936-11-3, 59 Va. App. 544 (2012), the Virginia Court of Appeals rejected that interpretation, stating:

The premise that “the causative danger must be peculiar to the work and not common to the neighborhood” is merely a part of the actual risk test, and it must be considered together with the recognition “that an injury is compensable if it appears to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. Therefore, whether the causative danger encountered by the claimant is something the public would commonly confront is not conclusive in determining whether the danger is an actual risk of employment. A denial of benefits based on the fact that the risk causing a claimant’s injury is common to the neighborhood presupposes the risk is not peculiar to the claimant’s work. However, if there is a causal relationship between the injury and the claimant’s work responsibilities, the risk may indeed be common to the neighborhood, insofar as it is one that the public might also regularly encounter outside the workplace. It matters not that the risk is common to the neighborhood in this sense, as long as the injury can fairly be traced to the employment as a contributing proximate cause.

*Liberty Mutual Ins. Corp. v. Herndon*, Opinion 10 (internal citations and quotations omitted). Explaining the principles applicable to the actual risk test, the Court stated:

[W]here a claimant has sufficiently proved the existence of a causal relationship between the injury and a hazard in the workplace that is uniquely dangerous and not something that would routinely be encountered by anyone, the injury necessarily arises out of the employment. .... If, however, a claimant cannot establish a causal relationship between a purported work hazard and his injury, the claimant cannot recover under the Workers’ Compensation Act.

Thus, where a claimant encounters a causative danger that the public might also be exposed to and is injured as a result, the claimant can recover so long as he encountered the danger as a part of his work responsibilities.

[W]here a claimant has sufficiently proved the existence of a causal relationship between the injury and a hazard in the workplace that is uniquely dangerous and not something

that would routinely be encountered by anyone, the injury necessarily arises out of the employment.

*Liberty Mutual Ins. Corp. v. Herndon*, Opinion 10-12 (internal citations and quotations omitted).

Applying these principals to the facts before it, the Court found the claimant's injury met the actual risk test. He was working on a structure under construction, close to a hole going down to the first and second floor where the staircase was going to be built. He did not remember what happened, and no one saw what happened, but it was apparent he had fallen into the hole while working with plywood because he was found laying at the bottom of the hole severely injured. The defendant argued the claimant could not meet the actual risk test because the reason for his fall was unknown and could not be determined. The Court disagreed, finding the circumstances of the injury sufficient to support a finding that the fall was causally related to a "uniquely dangerous" workplace hazard, and therefore finding the fall arose out of the claimant's employment. The Court contrasted the case before it with other "unexplained fall" cases such as *PYA / Monarch & Reliance Ins. Co. v. Harris*, 22 Va. App. 215 (1996). In those cases, the Court explained, it was impossible from the evidence to determine whether the claimant had been injured as a result of falling because of a workplace hazard or had been injured in some other way.

In *Bernardo v. Carlson Cos. - TGIF*, No. 2590-11-2, 60 Va. App. 400 (2012), the Virginia Court of Appeals emphasized that Virginia applies an actual risk test rather than a positional risk test to determine whether an injury arises out of the employment. The

positional risk test, the Court observed, “asks only if the injury occurred during the course of employment.” The actual risk test, the Court explained, requires more:

Virginia follows the actual risk doctrine, which excludes an injury which comes from a hazard to which the employee would have been equally exposed apart from the employment. An actual risk of employment is not merely the risk of being injured while at work. \*\*\* The actual risk standard ... necessarily excludes an injury caused by a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. \*\*\* The first premise of the actual risk doctrine requires a hazard or danger not equally present apart from the employment but rather one peculiar to the work.

*Bernardo* (internal citations and quotations omitted).

The Court observed that “perhaps the most common examples” of situations implicating the actual risk test involve employees tripping on steps while at work:

An employee who trips while walking up a staircase at work cannot recover compensation unless something about the steps (or some other condition of the workplace) presented a hazard or danger peculiar to the worksite. Even though the employer provided the steps, and encouraged the employee to use them, if there is nothing unusual about or wrong with the steps, an employee who trips over them cannot show the accident “arose out of” the employment.

On the other hand, if the steps are unusual because they are slightly higher than normal or otherwise peculiar, then tripping over them would involve an accident arising out of the employment. In such cases, the steps present an *enhanced* risk, qualitatively different from the steps most people walk up and down on and off the job.

*Bernardo* (internal citations and quotations omitted). In other words, a workplace condition which “increases the risk of injury,” compared to the condition to which the

public normally is exposed, will satisfy the actual risk test.<sup>1</sup> *Bernardo*; see *Jennings v. Richmond Public Schools*, No. 2479-11-2, 2012 Va. App. LEXIS 212 (Va. Ct. App. Jun. 26, 2012) (unpublished) (actual risk test not satisfied where claimant tripped over metal strip at threshold between tile floor and carpet, the metal strip was not unusual or defective, and nothing about her job, such as being required to hurry, exposed the claimant to a heightened risk of injury).

In *Bernardo*, the Court found the facts do not meet the actual risk test. The claimant was a waiter at a TGI Friday restaurant. He and the other waiters and waitresses were encouraged but not required, to sample the restaurant's food items. The claimant sampled a quesadilla, but swallowed it without chewing it fully. As a result he choked, and suffered an injury to his esophagus. There was nothing abnormal or unusual about the quesadilla -- it was not spicy, its temperature was not overly hot, and it did not contain any hard objects. Eating the quesadilla did not expose the claimant to any risk he would not have been exposed to outside his employment. Therefore, his injury did not arise out of his employment. "[T]he fact that Bernard ate the quesadilla to be a better waiter only establishes the injury occurred during the course of employment. The fact that the injury occurred at work adds nothing and answers nothing, when the inquiry is, did the injury arise out of the employment." *Bernardo*.

**c. Unexplained Falls**

In *G.C. Construction, LLC v. Cruz*, No. 1245-11-4 (Va. Ct. App. Mar. 6, 2012) (unpublished), the actual risk test was held satisfied in the context of an unexplained fall.

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<sup>1</sup> The Court noted that Virginia law recognizes the "street-risk rule," *Market Profiles, Inc. v. Hill*, 17 Va. App. 431 (1993), as an exception to the actual risk test.

The claimant, as part of his job, was walking on a roof 25 feet above ground to determine the source of a leak in a garage being constructed. The roof had snow, ice and water on it. The claimant was looking around to see if there was a tree or some other object through the roof. While doing so, he slipped or misstepped, causing him to fall from the roof and suffer injuries. The employer argued the claimant could not satisfy the actual risk test because he did not know what made him fall. The Commission disagreed on the grounds that “working at a height and falling from that height were risks of his employment.” The Court agreed the accident arose out of the claimant’s employment, but for a different reason. The Court held the accident met the actual risk test because “the claimant’s inattention to where he was walking, due to his work duty of looking for the source of the roof leak, precipitated his fall.” “Because he was not looking at his feet and was looking for a tree or something that caused the roof to leak, claimant’s injury occurred because of the performance of his job duties in a particular manner. Claimant’s employment exposed him to a danger that caused his injury, thus it arose out of his employment.”

*Blair v. Blair Construction*, JCN VA000 0051 4319 (Deputy Comm. Burchett Mar. 12, 2012), provides an example of a situation involving an unexplained fall in which the actual risk test is not satisfied. The claimant was doing roofing work for his employer and as part of that work was on the roof of a garage. A coworker was doing work on the ground below. The claimant attempted to climb down the ladder because he had a doctor’s appointment, but while doing so, he fell and suffered severe injuries. The claimant could not remember anything on the day of the accident, including how he was

injured. His coworker had seen him climbing down the ladder, but had turned away just before the claimant fell. The coworker saw the claimant falling, but did not know why he fell. The Deputy Commissioner observed that in some cases, including *G.C. Construction, LLC v. Cruz*, No. 1245-11-4 (Va. Ct. App. Mar. 6, 2012), *supra*, there was sufficient evidence to support an inference that the accident arose out of the claimant's employment. Deputy Commissioner, however, held that this was not such a case because, "as claimant and [the coworker] were unable to explain or identify a cause of claimant's fall, we conclude that there is no basis for such an inference." Therefore, the Deputy Commissioner held the evidence did not establish the accident arose out of the claimant's employment.

## **6. NOT ARISING IN THE COURSE OF THE EMPLOYMENT**

### **a. Injury Must Arise in the Course of the Employment**

"The phrase 'in the course of' employment refers to the time, place and circumstances under which the accident occurred. An 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." *Thore v. Chesterfield County Bd. of Supervisors*, 10 Va. App. 327, 331 (1990).

"An employee is deemed to be within the course of employment for a reasonable period while he winds up his affairs." *Thore*, 10 Va. App. at 331. "What constitutes a reasonable period to wind up affairs depends upon the particular job. Among the factors

to be considered are custom and whether the employee's activity bore any relation to his or her employment or was purely personal.” *Thore*, 10 Va. App. at 331. “In the majority of cases, a reasonable period will be the time it takes to gather personal belongings or to pick up a pay check.” *Thore*, 10 Va. App. at 331.

*Grand Union Co. v. Bynum*, 226 Va. 140 (1983), illustrates the distinction between the “arising out of” requirement and the “arising in the course of” requirement. In *Bynum*, criminals stalked a supermarket manager after the store closed, assaulted him at the home of an acquaintance, shot and killed him, and took his keys to the store. The Court ruled that the manager’s death arose out of his employment but not in the course of his employment. “Bynum had an identifiable place of employment and identifiable work hours. His duties might require occasional departure or deviation from them, but there is no evidence that he was so engaged at the time of his death. Rather, the evidence points to a time after he had completed his work for the day, was engaged in a series of social visits, and was neither at a place where the employee may reasonably be expected to be nor reasonably fulfilling the duties of his employment.” *Id.* at 144.

**b. Deviation from the Employment**

An injury can arise in the course of employment even if the employee temporarily is not performing his job duties at the time. An employee often is found to be injured outside the course of his employment where the deviation from employment is for a purely personal reason and is unrelated to the employment. An employee may be injured within the course of his employment, however, if the deviation is not for personal reasons or if it is insignificant.

**c. Going and Coming**

Injuries occurring while the employee is going to work or coming from work generally do not arise in the course of the employee's employment. *See Kendrick v. Nationwide Homes, Inc.*, 4 Va. App. 189 (1987). However, there are important exceptions. *See Kent v. Virginia-Carolina Chemical Co.*, 143 Va. 62 (1925). An injury can arise in the course of employment where the means of transportation is provided by the employer. It can arise in the course of employment where the employer pays the employee for his time in transit. It can arise in the course of employment where the route taken is the sole means in ingress and egress, or the means in ingress and egress are constructed by the employer. It can arise in the course of employment where the employee is still charged with some job duty.

**d. Personal Comfort Doctrine**

Injuries occurring while the employee is eating, resting, or using restroom facilities arise in the course of the employment if the employee is still charged with any employment-related duty at the time. *See Kraf Constr. Servs. v. Ingram*, 17 Va. App. 295 (1993).

**7. WILLFUL MISCONDUCT**

**a. In General**

The Virginia Workers' Compensation Act provides that "no compensation shall be awarded to the employee or his dependents for an injury or death caused by .... the employee's willful misconduct." Va. Code § 65.2-306(A)(1).

The Rules of the Virginia Workers' Compensation Commission impose a procedural prerequisite to use of the defenses under under Virginia Code section 65.2-306. Virginia Workers' Compensation Commission Rule 1.10 (formerly Rule 4) states: If the employer intends to rely upon a defense under § 65.2-306 of the Act, it shall give to the employee and file with the Commission no less than 15 days prior to the hearing, a notice of its intent to make such defense together with a statement of the particular act relied upon as showing willful misconduct. The failure to provide this notice can deprive the employer and carrier of the ability to assert this defense. *See Jenkins v. Webb*, 52 Va. App. 206 (2008).

**b. Self-Inflicted Injury**

Under the Virginia Workers' Compensation Act, "no compensation shall be awarded to the employee or his dependents for an injury or death caused by .... the employee's ... intentional self-inflicted injury." Va. Code § 65.2-306(A)(1).

Is suicide barred by Va. Code § 65.2-306(A)(1)? The answer may depend on the specific facts of the case.

In *Food Distributors and Century Indemnity Company v. Estate of Ball*, 24 Va. App. 692, 485 S.E.2d 155 (1997), the Virginia Court of Appeals found suicide was a compensable event. In *Food Distributors*, the decedent, Kenneth Ball, suffered a compensable shoulder injury while performing his job. He received successive surgeries for the injury, but ultimately was diagnosed with post-traumatic impingement syndrome resulting in chronic pain and ongoing disability. His pain and inability to work in turn led to depression, and ultimately to suicide. The Virginia Court of Appeals, applying the

doctrine of compensable consequences for the first time to a claim for suicide, adopted a “chain of causation” analysis and under that analysis found the suicide was compensable.

Subsequently, the Virginia Supreme Court issued its decision in *Amoco Foam Products Co. v. Johnson*, 257 Va. 29, 510 S.E.2d 443 (1999), in which it ruled that a consequence of a compensable consequence is not compensable. In *Amoco Foam Products* the claimant suffered a compensable left ankle injury. While the claimant was recovering from surgery for the injury, the ankle gave way, resulting in injury to her right knee. The right knee injury was a compensable consequence of the left ankle injury. Later, the claimant fell again due to ongoing pain in her right knee, causing a new injury to her right knee. The Supreme Court ruled that the second right knee injury did not arise out of the claimant’s employment and therefore was not compensable. Under *Amoco Foam Products*, if compensable injury “A” causes “B,” and “B” causes “C,” then “C” is not compensable. “C” would be compensable only if “A” directly caused “C.” See *Farmington Country Club, Inc. v. Marshall*, 47 Va. App. 15, 622 S.E.2d 233 (2005).

In *John Paul Plastering v. Johnson*, 265 Va. 237, 576 S.E.2d 447 (2003), the Virginia Supreme Court again applied this principle. The claimant in that case suffered a compensable injury to his wrist and back, and subsequently was diagnosed with chronic depression. Later, he was diagnosed with a structural change in his brain, described as a brain injury, resulting from his depression. He claimed to be totally disabled as a result of the wrist, back and brain injuries. The Supreme Court found the brain injury was not compensable, since it resulted from his depression rather than from the original wrist and back injury.

In *Farmington Country Club, Inc. v. Marshall*, 47 Va. App. 15, 622 S.E.2d 233 (2005), the Virginia Court of Appeals stated in a footnote that *Food Distributors* “has been implicitly overruled by” *Amoco Foam Products* and *John Paul Plastering*. *Farmington Country Club, Inc.*, 47 Va. App. at 25 n.3, 622 S.E.2d at 238 n.3 (2005).

Based on the preceding cases, it would appear that a suicide may be compensable if it can be established to be a direct consequence of a compensable injury. In most cases, however, that would seem to be unlikely, since the chain of causation normally would be expected to be injury causing depression, then depression causing suicide. *See, e.g., Estate of Perkins v. BOC Gases*, VWC File No. 222-28-15 (May 11, 2009) (denying benefits for suicide because it was a consequence of a compensable consequence).

**c. Intoxication**

**(1) In General**

The Act provides that “no compensation shall be awarded to the employee or his dependents for an injury or death caused by ... the employee’s intoxication,” Va. Code § 65.2-306(A)(3), or by “the employee’s use of a nonprescribed controlled substance identified as such in Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1,” Va. Code § 65.2-306(A)(6). The 15-day notice requirement under Virginia Workers’ Compensation Commission Rule 1.10 (formerly Rule 4) applies to this defense.

Intoxication is an affirmative defense, and the employer bears the burden of proving by a preponderance of the evidence that intoxication of the employee was a proximate cause of the injury. *Wyle v. Professional Services Industries*, 12 Va. App. 684, 406 S.E.2d 410 (1991). The employer must prove more than that the employee was

intoxicated; the employer must establish a causal link between the intoxication and the injury. *Elco Concrete Co. v. Tracy*, 1996 Va. App. LEXIS 445 (1996) (“although Tracy was intoxicated, a preponderance of the evidence did not show that his intoxication contributed to the accident”). In *Novak v. Michael B. Hill Construction Co.*, VWC File No. 231-99-55 (Mar. 27, 2009), for example, the Commission found the evidence was insufficient to establish causation, stating:

In the instant case, the fact that the claimant may have been smoking marijuana at some time prior to the accident was not found to be the proximate cause of his injuries. The evidence is that he used it at some point prior to his fall. Dr. Witorsch stated that the claimant probably smoked marijuana close in time to the fall. McGarry stated that there was no way to determine with any degree of precision when he used it. The statement that the claimant smoked marijuana “close in time” to the accident is insufficient to determine when he used it.

*Novak, supra*, at 7.

The intoxication defense requires proof that intoxication was one proximate cause of the claimant’s injuries. The employer is not required to prove intoxication was the only cause. If there were multiple causes, the employer need only prove intoxication was one of them. *Wyle v. Professional Services Industries*, 12 Va. App. 684, 406 S.E.2d 410 (1991) (“the commission was required to consider whether Wyle’s intoxication played any part in contributing to his injury, i.e., by affecting his balance or causing him to disregard the danger”).

## (2) **Statutory Presumption of Intoxication**

The Act established a presumption of intoxication under certain circumstances. It provides:

The person or entity asserting any of the defenses in this section shall have the burden of proof with respect thereto. However, if the employer raises as a defense the employee's intoxication or use of a nonprescribed controlled substance identified as such in Chapter 34 of Title 54.1, and there was at the time of the injury an amount of alcohol or nonprescribed controlled substance in the bodily fluids of the employee which (i) is equal to or greater than the standard set forth in § 18.2-266, or (ii) in the case of use of a nonprescribed controlled substance, yields a positive test result from a Substance Abuse and Mental Health Services Administration (SAMHSA) certified laboratory, there shall be a rebuttable presumption, which presumption shall not be available if the employee dies as a result of his injuries, that the employee was intoxicated due to the consumption of alcohol or using a nonprescribed controlled substance at the time of his injury. The employee may overcome such a presumption by clear and convincing evidence.

Va. Code § 65.2-306(B).

The presumption under Va. Code § 65.2-306(B) can be rebutted with clear and convincing evidence. For example, in *McFerrin v. Hall Electric Co.*, VWC File No. 221-39-46 (Apr. 24, 2006), *aff'd* No. 1275-06-02, 2006 Va. App. LEXIS 424 (Sep. 19, 2006), an employee who tested positive for marijuana rebutted the presumption through testimony by coworkers and other witnesses that the employee was functioning normally and did not appear intoxicated at the time of the injury.

### **(3) Advanced Intoxication**

In *American Safety Razor v. Hunter*, 2 Va. App. 258, 343 S.E.2d 461 (1986), the Virginia Court of Appeals recognized a separate defense based upon extreme intoxication. The Court stated:

An employee may abandon his employment by reaching an advanced state of intoxication which renders the employee

incapable of engaging in his duties. This result is not based upon a special statutory defense of intoxication. Rather, a severely intoxicated employee has removed himself from the scope of his employment. Any injuries thereafter suffered are not ‘in the course of’ the employment.

*American Safety Razor*, 2 Va. App. at 261, 343 S.E.2d at 463; see *Vaughan’s Landscaping and Maintenance v. Dodson*, 30 Va. App. 135 (1999). This defense does not apply where “an intoxicated employee continues actively to perform his duties.” *American Safety Razor*, *supra* (defense did not apply where the claimant “reported for work, began his assigned tasks, and suffered an industrial accident approximately one-half hour later”).

**d. Safety Rules and Appliances**

**(1) In General**

Under the Act, “no compensation shall be awarded to the employee or his dependents for an injury or death caused by .... the employee’s willful failure or refusal to use a safety appliance...” Va. Code § 65.2-306(A)(4), or “the employee’s willful breach of any reasonable rule or regulation adopted by the employer and brought, prior to the accident, to the knowledge of the employee,” Va. Code § 65.2-306(A)(5).

**(2) Elements**

To successfully assert the defense based on violation of a safety rule, the employer must establish “(1) that the safety rule [or other duty] was reasonable, (2) that the rule was known to [the employee], (3) that the rule was for [the employee’s] benefit, and (4) that [the employee] intentionally undertook the forbidden act.” *Buzzo v. Woolridge Trucking, Inc.*, 17 Va. App. 327, 332, 437 S.E.2d 205, 208 (1993), quoting

*Spruill v. C.W. Wright Constr. Co.*, 8 Va. App. 330, 334, 381 S.E.2d 359, 360-61 (1989).

“It is not necessary for the employer to prove that the employee purposefully determined to violate the rule, only that, ‘knowing the safety rule, the employee intentionally performed the forbidden act.’” *Buzzo*, 17 Va. App. at 332, 437 S.E.2d at 208-209.

Proof of negligence or even gross negligence by the employee, however, is not sufficient to establish the defense. *Buzzo*, 17 Va. App. at 332, 437 S.E.2d at 208. “Evidence of a hazardous act involving obvious danger, without more, is insufficient to bar recovery under the Act.” *Pitt v. Shackelford’s Restaurant*, 2012 Va. App. LEXIS 94 (Mar. 27, 2012) (unpub.).

In *Buzzo v. Woolridge Trucking, Inc.*, *supra*, a truck driver was killed as a result of driving the employer’s truck approximately fifty five miles per hour in a turn where the speed limit was thirty five miles per hour. Although there was evidence that the driver was negligent in driving the vehicle as he did, the evidence also established that the speedometer in the vehicle was not working at the time of the accident. Finding the evidence did not establish willful misconduct, the Court found:

The record must show that Buzzo’s negligent conduct was done with ‘a wrongful intention.’ We find it impossible, and illogical, to accuse Buzzo of ‘intentionally performing the forbidden act’ of speeding in violation of Code § 46.2-861 or his employer’s warnings when the evidence is clear that Woolridge, Inc. had not provided him with the means of accurately determining the speed of his vehicle. There is no evidence in the record, despite Buzzo’s being an experienced truck driver, that, under the given circumstances, he could determine his speed without a speedometer, using only the tachometer (assuming, in the light most favorable to Woolridge, Inc., that this device was working). Imputing that ability to Buzzo would be an act of mere speculation.

*Buzzo*, 17 Va. App. at 334, 437 S.E.2d at 209-210.

### (3) Rebuttal

“The employee may rebut the defense by showing that the rule was not kept alive by bona fide enforcement or that there was a valid reason for his inability to obey the rule.” *Buzzo*, 17 Va. App. at 332, 437 S.E.2d at 208. “Proof of a pattern or practice of failing to discipline employees guilty of willful violations of a safety rule defeats the defense afforded an employer by [Code § 65.2-306], ... when such violations occur under circumstances charging the employer with knowledge and acquiescence.” *Gwaltney of Smithfield, Ltd v. Hagins*, 32 Va. App. 386, 394, 528 S.E.2d 162, 166 (2000).

In *Gwaltney of Smithfield, Ltd. v. Hagins, supra*, the claimant worked at Gwaltney of Smithfield in the Production Department. She was given instructions on “hand safety” and was informed of the employer’s published safety rule: “Never put any body part, object or clothing into operating or cycling machinery.” While cleaning a machine that processed pigs’ feet, she turned the machine on and washed it with a hose. In an effort to remove a piece of meat that was stuck in the machine she placed her right hand into a tray while the machine was running. Her hand became caught in the machine and was severed. The employer defended on the grounds that she deliberately disregarded its safety rule by placing her hand into the machine while it was running. The evidence, however, showed that at least one of her supervisors regularly used his hand to remove stuck meat debris from the machine while it was running without fear of any disciplinary consequences, and that her supervisor instructed her to do the same. The commission found that employer’s safety rule was not being enforced strictly, and for that reason held the employer could not rely on the claimant’s violation of its safety rule.

In contrast, in *Pitt v. Shackleford's Restaurant*, 2012 Va. App. LEXIS 94 (Mar. 27, 2012) (unpub.), the Virginia Court of Appeals found the employer's enforcement of a safety rule sufficient. The claimant injured his hand when a meat slicer he was cleaning started up. The employer defended on the grounds that the injury occurred because the claimant was cleaning the slicer without disconnecting it from its power source. The claimant argued that the defense was not available to the employer because it failed to enforce its safety rule directing employees "never to touch this machine without training and authorization from your supervisor." The Court rejected the claimant's argument because, even though the employer did not train the claimant on a more specific safety rule requiring employees to unplug the slicer before cleaning it, that rule was posted above the machine and the claimant admitted he was aware of that rule from prior employment. *Pitt* suggests that an employee's actual knowledge of a safety rule may be sufficient to defeat a non-enforcement argument by the employee.

#### **(4) Unresolved Issue**

In *Pitt v. Shackleford's Restaurant*, 2012 Va. App. LEXIS 94 (Mar. 27, 2012) (unpub.), the Court of Appeals noted that "a conflict of law appears to exist in Virginia over whether an employer bears the burden of proving strict 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 strict enforcement. In *Peanut City Iron & Metal Co. v. Jenkins*, 207 Va. 399, 150 S.E.2d 120 (1966), the Supreme Court stated that "in order for [the employer and carrier] to prevail upon the defense of willful misconduct, on the

grounds that claimant intentionally violated a well known safety rule, they had to show that the rule was strictly enforced by the employer.” In *Buzzo, supra*, however, the Court of Appeals stated that “the employee may rebut the defense by showing that the rule was not kept alive by bona fide enforcement....” The Court in *Pitt* found it unnecessary to resolve the issue, because it found the employee’s actual knowledge of the safety rule dispositive.

**(5) *Mouhssine v. Crystal City Laundry***

In *Mouhssine v. Crystal City Laundry*, 62 Va. App. 65, 741 S.E.2d 808 (2013), the Virginia Court of Appeals provided helpful guidance to employers in regard to the standards for enforcement of safety rules.

In *Mouhssine*, the claimant was a laundry attendant. He injured his back at work while picking up dirty towels from a laundry cart and placing them in an industrial washing machine. At the time of the injury the employer has a written safety policy which stated:

**SCOPE:** The policy will apply to all Laundry associates.

**GENERAL:** All drivers and driver's helper and any other associates that load the linen on and off the trucks must wear a back brace and safety shoe.

**FAILURE TO DO SO WILL RESULT IN:** (1) Verbal Warning (2) First Written Warning (3) Second Written warning with Day of Decision (4) Third Written warning with recommendation for termination.

The claimant signed the written policy, but did so only after his injury. During regular staff meetings, however, management told employees including the claimant that “it’s part of your uniform and if you’re moving carts or working on the washroom area or

working on the truck it is required to have your back brace on at all time.” Furthermore, the claimant’s supervisors regularly instructed him to wear a back brace when doing heavy lifting. At the time of his back injury, however, the claimant was not wearing a back brace.

The claimant filed a claim for workers’ compensation seeking temporary total disability benefits for his back injury. The employer contended the claim should be denied because the claimant violated the employer’s safety rule by failing to wear a back brace. The deputy commissioner found that compensation was barred because the employer proved the claimant willfully disregarded a safety rule. On review, the commission affirmed the decision of the deputy commissioner because “the claimant knew he was required to wear the back brace when lifting heavy towels as well and that the employer proved that this rule was enforced by correcting employees and telling them to wear the brace.” On appeal to the Virginia Court of Appeals, the claimant did not argue challenge the commission’s finding that the employer proved the statutory elements of the defense. Instead, the claimant argued that the commission erred in finding the rule was “kept alive through bona fide enforcement:”

On brief, claimant argues that the safety rules advocated and endorsed by employer through the terms of the written policy were not enforced. In support of this argument, claimant references [the supervisor’s] testimony that he observed claimant not wearing a back brace (or without one properly secured) on four to six occasions. If the disciplinary terms of the written policy had been rigidly applied in his case, claimant notes, he would have been issued multiple written warnings and would have faced recommendation for termination upon a fourth violation of the written policy. [The supervisor] testified that claimant was never given a written warning. Instead, [the supervisor]

testified that he would give claimant verbal instructions to wear a back brace (and he testified that claimant always complied with those instructions). According to claimant, this evidence is an explicit example of how the safety rules at the Crystal City Laundry were not kept alive by bona fide enforcement.

Addressing this argument, the Virginia Court of Appeals observed that “while the Virginia Workers' Compensation Act (the Act) has never actually included any such language in its statutory text, Virginia’s case law addressing the defense afforded to employers under Code § 65.2-306(A)(5) (and its statutory predecessors) has included consideration of whether there was ‘strict enforcement’ or ‘bona fide enforcement’ of the applicable workplace safety rules since at least 1943.” As an example, the Court looked to *Peanut City Iron & Metal Co, Inc. v. Jenkins*, 207 Va. 399, 150 S.E.2d 120 (1966), in which the Virginia Supreme Court stated:

The statutory defense of willful disobedience of safety rules or willful failure to use a safety device will succeed only if the employee is given actual (as distinguished from constructive) notice of the rule and an understanding of the danger involved in its violation, if the rule is kept alive by bona fide enforcement, and if the employee had no valid excuse for the violation.

The most frequent ground for rejecting violation of rules as a defense, whether under the safety rule or willful misconduct defense, is lack of enforcement of the rule in practice. Habitual disregard of the rule has been made the basis of rejecting the defense.

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However, the Supreme Court's decision in *Jenkins* makes clear that the purpose of the enforcement of workplace safety rules analysis is to consider the employer's efforts to achieve its employees’ compliance with the workplace safety rule - not necessarily to focus on any specific punishment given to a particular employee who has failed

to comply. .... In this context, “strict enforcement” does not necessarily mean “harsh enforcement.” Indeed, in *Jenkins*, the Supreme Court held that the commission erred as a matter of law when it found that “the work rule was not strictly enforced because no punishment or penalty was assessed against claimant for his known violations of it.”

There, Jenkins worked for a company that salvaged junk cars, and this company instructed its employees "that before an automobile was dismantled with a blow torch air holes were to be made" by puncturing the gas tank with an axe or pick. This puncture rule was “preached” to Jenkins and other workers because “punctured gas tanks merely burn and do not explode.” Even though Jenkins was aware of the puncture rule, the company's president observed Jenkins on several occasions begin dismantling vehicles without having made the required puncture holes. On each occasion, the president would require Jenkins to make the correct puncture holes before proceeding - but the president “did not dock Jenkins’ salary or suspend him from work” (and there is no mention of any written reprimands). Following Jenkins' injury (which occurred while he was again violating the puncture rule), the commission found that the employer's proof of the defense that Jenkins willfully breached the puncture rule was “negated and rendered inapplicable as a defense herein in that evidence of repeated known violations by this employee in the past were without punishment or penalty of any kind except oral reprimand” by the employer.

It was in this context that the Supreme Court, however, reversed the commission and held that the issue of whether a workplace safety rule was strictly enforced by the employer is a mixed question of law and fact. The Supreme Court then held that the commission misapplied the law by focusing on the lack of any “punishment or penalty that was assessed against claimant for his known violations of it.” The Supreme Court instead referenced decisions from other states that considered whether “the employer connived at and waived the violation” of its workplace safety rule or virtually abrogated the rule by failing to enforce it.” At the heart of the matter, the Supreme Court concluded in *Jenkins*, there was “a conscientious, bona fide effort on behalf of the employer to

require claimant and the other employees to fully comply with the rule at all times.”

Applying these principles in *Mouhssine*, the Court of Appeals found that the commission correctly found that the employer proved that its safety rule was enforced “by correcting employees and telling them to wear the brace” and that in so doing the employer “made a bona fide effort to require claimant and its other laundry employees to comply with the back brace rule.” As in *Jenkins*, the Court of Appeals observed, “[the] employer’s work rule had not fallen into disuse; it was not so treated by employer as not to be controlling upon the employees, and [the] employer had not condoned or acquiesced in its violation.” Under *Jenkins*, the Court of Appeals observed, “the fact that claimant was never issued a formal penalty by his direct supervisor or by any other supervisor simply does not control the outcome of this case as a matter of law.”

*Mouhssine v. Crystal City Laundry* makes it clear that employers are not deprived of discretion in enforcing their safety rules, provided their efforts at enforcement are bona fide. This does not mean that employers should not follow their own safety rules, and indeed they should. However, the most appropriate means of enforcement may vary depending on the circumstances, and under *Mouhssine* employers may exercise reasonable discretion on selecting the means most appropriate under each particular circumstance.

## **8. REFUSAL OF VOCATIONAL REHABILITATION**

Under Virginia Code section 65.2-603(B), “the unjustified refusal of the employee to accept such medical service or vocational rehabilitation services when

provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless, in the opinion of the Commission, the circumstances justified the refusal. In any such case the Commission may order a change in the medical or hospital service or vocational rehabilitation services.”

In *Ilg v. United Parcel Service, Inc.*, 284 Va. 294 (2012), the claimant was a delivery truck driver who fell from his truck while at work. He filed a claim for benefits for “injury to his right hand and right knee.” The employer accepted the claim as compensable and voluntarily paid benefits. They executed several agreements to pay benefits, each of which listed the injury as “pain in right knee” but did not mention the injury to his right hand, and the Commission issued an order approving those agreements. Subsequently, a physician prepared fitness for duty evaluations for the claimant, one of which found him fit for restricted medium duty work because of “knee pain,” and the other finding him unable to work in any capacity because of “R knee / R hand.” The physician also opined that the condition of his hand was worsened by work hardening therapy the claimant was undergoing. Based on the evaluation finding him able to perform medium duty work, the employer directed him to participate in vocational rehabilitation. The claimant refused to participate in vocational rehabilitation on the grounds the other evaluation found him unable to work in any capacity.

Based on that refusal, the employer filed a change in condition application with the Commission seeking to suspend the claimant’s benefits pursuant to Virginia Code section 65.2-603(B) for unjustifiably refusing to participate in vocational rehabilitation.

A senior claims examiner denied the application, and the Commission upheld that denial. The Court of Appeals, relying on *American Furniture Co. v. Doane*, 230 Va. 39 (1985), reversed, holding that the Commission had awarded benefits for the injury to the claimant's knee but not the claimant's hand, and that "a medical condition not causally related to the work-related accidental injury *for which benefits were originally awarded* could not serve as the basis for the employee refusing to cooperate with vocational rehabilitation." On remand, the deputy commissioner held that the claimant had justifiably refused to cooperate with vocational rehabilitation because he suffered from a total disability. The Commission reversed, concluding that allowing the claimant to use his hand injury to justify his refusal would unlawfully convert the proceeding from one under section 65.2-708 (review of award on change in condition) to a proceeding under section 65.2-704 (award by Commission). The employer appealed this decision to the Court of Appeals, which affirmed the decision of the Commission suspending benefits.

On appeal, the Virginia Supreme Court framed the issue as whether the Commission and the Court of Appeal correctly concluded that "an employee may not assert a medical condition not causally related to the work-related accidental injury for which benefits were originally awarded as the basis for the employee refusing to cooperate with vocational rehabilitation." The Court first restated its holding in *American Furniture Co. v. Doane, supra*, on which the Commission and the Court of Appeals relied:

In *Doane*, the employee was awarded temporary total disability for a back injury arising out of and in the course of employment. After a deputy commissioner found that an arm impairment which prevented the employee from

performing selective employment was not causally connected to the industrial accident for which an award of benefits had been made, the employee's compensation was suspended because of her unjustified refusal of selective employment. The Commission reinstated benefits, concluding that the offered selective employment must be within the employee's capacity at the time offered, regardless of whether that capacity was affected by an unrelated injury.

Reversing the Commission, we held that employment suitable to an employee's capacity meant employment within the employee's residual capacity resulting from the industrial accident because an employer is liable for the condition of an employee resulting from an industrial accident. But an employer is not liable for conditions not causally related to the employee's work. Thus, we concluded that an employer, therefore, is absolved of liability for compensation if the employee refuses selective employment because of a physical condition unrelated to the original industrial accident and arising since the accident.

The Supreme Court then distinguished *Doane* from *Ilg*:

Our focus in *Doane* was on whether the employee's asserted justification for refusing selective employment was a condition causally related to the original industrial accident, not whether it arose from the specific injury described in the award of compensation benefits which the employer sought to suspend. The rationale of *Doane* does not resolve the inquiry in this case because *Ilg*'s asserted justification for refusing to participate in vocational rehabilitation is not "unrelated to the original industrial accident." Indeed, both UPS and the Commission were aware from his original application that *Ilg* claimed benefits for "injury to right hand and right knee" resulting from the industrial accident.

In contrast, the Court explained, "under the facts presented here, the inquiry is whether it was necessary for *Ilg* to first obtain an award of benefits under Code § 65.2-704 for his hand injury in order to assert a disability arising from that injury as

justification for refusing to accept and participate in vocational rehabilitation offered under an earlier award of benefits for his knee injury arising from the same industrial accident.” The Court acknowledged that “previously, we have not had occasion to address a case in which the issue presented was whether an employee receiving workers’ compensation benefits for partial or total disability has unjustifiably refused to participate in vocational rehabilitation offered by the employer under Code § 65.2-603.” The Court answered the question presented as follows:

There are obvious differences between what may be reasonably expected of the employee to participate in vocational rehabilitation and that which may be reasonably expected when selective employment is offered by the employer under Code § 65.2-510. Nevertheless, in *Doane* and subsequently in [*Ballweg v. Crowder Contracting Co.*, 247 Va. 205 (1994)], we stressed that when an employer offers selective employment to an injured employee suitable to his residual capacity, the burden of persuasion shifts to the employee to show justification for refusing the offer. *We are of opinion that this principle is equally applicable to cases involving the refusal to participate in vocational rehabilitation offered under Code § 65.2-603.*

In the present case, Ilg had filed a claim with the Commission for injuries to his right knee as well as his right hand. UPS accepted that claim and voluntarily paid disability benefits to Ilg. Dr. Peyton provided UPS with his medical opinion that Ilg was “unable to work in any capacity” because of injuries to his right knee and right hand. Ilg sought to justify his subsequent refusal to participate in vocational rehabilitation based on his hand injury. *Under such circumstances, it would be the height of form over substance to find that an asserted injury related to the industrial accident for which benefits have been awarded cannot justify the employee’s refusal of the employer’s offer of selective employment or of vocational rehabilitation unless that injury is also the subject of a prior award pursuant to Code § 65.2-704.*

The Court therefore remanded the case to the Court of Appeals, for remand to the Commission for an evidentiary proceeding at which the burden will be on the claimant to show that his refusal to participate in vocational rehabilitation was justified in light of his hand injury. The Court specifically declined to express any opinion as to whether the claimant might have been or might be entitled to request a Code § 65.2-704 proceeding to determine if he is entitled to compensation for the injury to his hand.

### **III. THE EXCLUSIVE REMEDY DOCTRINE**

The exclusive remedy doctrine can provide an employer with a defense to tort liability for a work-related injury, occupational disease or death.

#### **1. General Rule**

The Virginia Workers' Compensation Act provides the exclusive remedy for an employee who suffers an injury, illness or death covered by the Act. The Act provides:

The rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

Va. Code § 65.2-307(A). An employee is precluded from bringing a common law action against an employer for such injuries or illnesses. *Butler v. Southern States Coop., Inc.*, 270 Va. 459, 465, 620 S.E.2d 768, 772 (2005) (“when an employee sustains such an injury, the Act provides the sole and exclusive remedy available against the employer”).

## **2. Compensability Does Not Determine Exclusivity**

In *Giordano v. McBar Industries, Inc.*, 284 Va. 259, 729 S.E.2d 130 (2012), the Virginia Supreme Court made it clear that whether the Act is the exclusive remedy for an injury is not determined by whether the injury is compensable. The exclusivity of the Act is an independent determination, and the Act may be an employee's exclusive remedy even if the injury is not compensable.

In *Giordano*, Scott Giordano was employed by McBar Industries, Inc., which was the general contractor on a construction project involving the erection of a multi-story building. McBar used a number of subcontractors, including drywall subcontractor A. Bertozzi, Inc., which hired Virginia Builder's Supply, Inc. to deliver the drywall. Giordano was killed when the building collapsed as a result of Virginia Builder's Supply placing two tons of drywall it was delivering onto the second floor of the building. Giordano's ex-wife, Martha, filed a worker's compensation claim against McBar, Bertozzi, Virginia Builder's Supply and others. The Commission found Martha was not entitled to workers' compensation benefits because she was not a dependent. Martha then filed a wrongful death action against the defendants, who in response filed pleas in bar asserting worker's compensation was Martha's exclusive remedy. Martha opposed the pleas in bar on the grounds the Commission had held Giordano's death was non-compensable.

The Virginia Supreme Court rejected Martha's argument, stating, "contrary to Martha's argument, the applicability of the Act does not turn on the compensability of the

claim. Rather, the compensability of the claim turns, in part, on the Act's applicability."

*Giordano*, 284 Va. at 264, 729 S.E.2d at 133. The Court explained:

A particular claim may be non-compensable [under the Act] for one of two reasons: (1) it does not fall within the purview of the Act, or (2) while within the purview of the Act, certain defenses preclude recovery. ....

A successfully asserted defense under the Act may render a particular claim non-compensable; however, there is a significant difference between a claim arising within the purview of the Act that is subject to defenses and a claim that is not within the purview of the Act at all. In the former case, there is no recourse to common law remedies; in the latter case, there is.

*Id.*, 284 Va. at 264, 729 S.E.2d at 133. Applying those principles to the claim of McBar,

the Court stated:

In the present case, it is undisputed that Scott was an employee of Mc Bar and that his death was caused by an accident that occurred in the course of and arose out of his employment with McBar. Clearly, the Act applies and the defense asserted by McBar before the Commission, that Martha was not a dependent, merely rendered the claim non-compensable. As the Act applies, so must the exclusivity provision.

*Id.*, 284 Va. at 266, 729 S.E.2d at 134.

### **3. Strangers to the Business**

The exclusivity of the Act does not apply to a common law action for an employee's injury against a party which is a "stranger to the business." *Stone v. Door-Man Mfg. Co.*, 260 Va. 406, 412, 537 S.E.2d 305, 307-08 (2000).

The remedies afforded the employee under the act are exclusive of all his former remedies within the field of the

particular business, but the [A]ct does not extend to accidents caused by strangers to the business. If the employee is performing the duties of his employer and is injured by a stranger to the business, the compensation prescribed by the act is available to him, but that does not relieve the stranger of his full liability for the loss....

*Feitig v. Chalkley*, 185 Va. 96, 102, 38 S.E.2d 73, 75-76 (1946).

Whether a third party is a stranger to the business of the employer depends on the relationship between the employer and the third party and the context in which the relationship arises. For example, in *Bosher v. Jamerson*, 207 Va. 539, 151 S.E.2d 375 (1966), the plaintiff, Norvell Jamerson, was injured while working at a construction site of his employer, general contractor Re-Com Corporation. As part of the construction project, Re-Com was required to install a six inch sand base under a concrete floor. Re-Com ordered the sand from Southern Materials. Southern Materials had two methods of providing the sand, the first being for its customer to pick up the sand at its job site, and the second being for Southern Materials to deliver the sand to the customer's job site and dump or spread it as directed by the customer. Re-Com chose the second method. Southern Material hired Alton Bosher, the owner of a dump truck, to deliver the sand, and Bosher's employee, Fred Granderson, delivered it and spread it to a depth of six inches using chains with which the truck was equipped for that purpose. The Re-Com superintendent directed the movement of the truck by Granderson. Jamerson was struck by the truck and injured while it was maneuvering to dump and spread the sand. Jamerson received workers' compensation benefits from Re-Com, and sued Bosher for negligent injury by Granderson. Bosher argued that Jamerson's negligence action was barred by the exclusivity provisions of the Act. The Virginia Supreme Court stated: "The

test is whether at the time of the accident Granderson was performing work on behalf of his employer, Boshier, that was part of the trade, business or occupation of Jamerson's employer, Re-Com Corporation. If Granderson was performing such work, Boshier, though an independent contractor, is not an 'other party' [within the meaning of former Va. Code § 65.38] against whom Jamerson's right of action is preserved under the Workmen's Compensation Act, and Jamerson's right to recover for the injury is limited to the compensation provided under the Act." The Court found that the Act barred the common law action against Boshier, explaining:

In this case, Re-Com's contract with Reynolds required it to lay a six-inch sand base over the foundation area. Boshier, who undertook to deliver the sand ordered by Re-Com, was obligated to "spread [the sand] at such location and in such manner as directed by purchaser [Re-Com] or his representative on the job site." Furthermore, Boshier's driver Granderson was instructed "to deliver, dump, or spread as directed by the Re-Com supervisor." Granderson was engaged in the spreading operation inside the foundation area, as directed by the Re-Com supervisor, when he struck and injured Jamerson. At that time, Granderson was performing work that was part of the trade, business or occupation of Re-Com.

*Boshier v. Jamerson*, 207 Va. 542-43, 151 S.E.2d at 377.

In *Giordano v. McBar Industries, Inc.*, 284 Va. 259, 729 S.E.2d 130 (2012), in contrast, the Virginia Supreme Court reached a different conclusion. In this case, Scott Giordano was employed by McBar Industries, Inc. McBar was the general contractor on a construction project involving the erection of a multi-story building. McBar used a number of subcontractors, including drywall contractor A. Bertozzi, Inc. Bertozzi hired Virginia Builder's Supply, Inc. to deliver the drywall. Virginia Builder's Supply

delivered two tons of drywall to the second floor of the building in which Giordano was working, causing the building to collapse and killing Giordano. The estate of Giordano filed a wrongful death action against Virginia Builder's Supply (and others), but the Virginia Supreme Court argued the exclusivity provisions of Virginia Worker's Compensation Act barred such an action. Comparing the facts of this case to those of *Bosher, supra*, the Court stated:

The distinguishing factor between *Bosher* and the present case is that in *Bosher* the defendant was obligated to do more than just deliver sand; he was obligated to spread the sand in a specific manner using specialized equipment which constituted a step in the construction process. In the present case, Builder's Supply was merely obligated to deliver drywall and place it in specific locations which did not constitute a step in the construction process.

*Giordano*, 284 Va. at 269, 729 S.E.2d at 135.

#### **IV. CONCLUSION**

Many defenses can be available to workers' compensation claims, and often at least some of them are overlooked. The author and his law firm welcome the opportunity to assist employers and carriers in preventing and responding to workers' compensation claims, and provide this paper as an aid to Virginia businesses and workers' compensation insurance carriers. For information about our firm please visit our website [www.HoggeLaw.com](http://www.HoggeLaw.com), and for additional resources for Virginia employers please visit our website [www.VirginiaLaborLaw.com](http://www.VirginiaLaborLaw.com).