OVERVIEW OF WORKERS' COMPENSATION LAW IN VIRGINIA

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INTRODUCTION

A. Jurisdiction

On-the-job injuries in Virginia are governed by the Virginia Workers' Compensation Act ("the Act").[1] All questions arising under the Act are to be determined by the Virginia Workers' Compensation Commission ("the Commission") unless otherwise provided.[2] Injuries occurring outside of Virginia may be subject to the Act if the contract for employment was made in Virginia, the employer has a place of business in Virginia, and the contract of employment was not expressly for service exclusively outside Virginia.[3]

The Act provides the exclusive rights and remedies for injured workers covered by the Act.[4] Failure to maintain workers' compensation insurance when required, however, permits injured employees to file civil law suits against employers to recover damages for personal injury or death if the injured employee or the decedent's representative does not elect to pursue workers' compensation benefits.

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[1] Va. Code §§ 65.2-100 – 65.2-1310 (1950 as amended).

[2] Va. Code § 65.2-700.

[3] Va. Code § 65.2-508(A).

[4] Va. Code § 65.2-307.

B. Coverage

1. Employers

(a) Direct Employers

Coverage of the Act extends to employees of any person, firm or private corporation, including any public service corporation, that has regularly in service three or more employees in the same business within Virginia.[5] Part-time employees may count toward this total if they are regularly in service of the employer. Employers with fewer than three regular employees may elect to be covered under the Act.[6]

(b) Professional Employer Organizations

A professional employer organization ("PEO") may be recognized as the employer in appropriate situations.[7] Such organizations, however, are required to register with the Commission.[8] Each PEO must provide an annual accounting to the Commission of its clients.[9] A PEO must also notify the Commission and its client if it intends to terminate any relationship with the client.[10] In such cases, workers' compensation insurance coverage will continue for the covered employees until the date of termination or fifteen calendar days

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[5] Va. Code § 65.2-101 "Employee" (2) (h). This requirement does not apply to operators of underground coal mines or their employees. *Id*.
[6] Va. Code § 65.2-101 "Employee" (2) (h); *see also* Va. Code § 65.2-305.
[7] Va. Code § 65.2-101 "Professional employer organization" and "Professional employer services"; Va. Code § 65.2-803.1(D).
[8] Va. Code § 65.2-803.1(A).
[9] Va. Code § 65.2-803.1(B).
[10] Va. Code § 65.2-803.1(E).

after receipt of the notice of the termination by both the Commission and the client, whichever is later.[11]

(c) Statutory Employers

Employers that hire subcontractors to help them with work may be held liable for injuries suffered by employees of the subcontractors.[12] In such cases, the employer is referred to as the "statutory employer."[13]

When any person or entity performs any work that is a part of its trade, business or occupation and contracts with a subcontractor for performance by the subcontractor of all or part of the work, the hiring person or entity shall be liable to pay any worker employed in the work workers' compensation benefits as if the worker had been directly employed by the hiring person or entity.[14] The same is true for any person or entity that contracts to perform work for another person when such work is not a part of the trade, business or occupation of the other person.[15] Such a contractor is then liable to any worker employed in the work for workers' compensation benefits as if the injured worker had been a direct employee of the contractor.[16] This liability can extend to employees of sub-subcontractors.[17]

Such liability does not always extend to employers hiring individuals for the maintenance or repair of real property.[18] To avoid liability in property management situations, an employer must be engaged in the business of property management on behalf

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[11] *Id*. This section does not alter the notice obligations of an insurer seeking to cancel workers' compensation insurance coverage. *See*, *e.g.*, Va. Code § 65.2-804.
[12] Va. Code § 65.2-302.
[13] *Id*.
[14] Va. Code § 65.2-302(A).
[15] Va. Code § 65.2-302(B).
[16] *Id*.
[17] Va. Code § 65.2-302(C).
[18] Va. Code § 65.2-302(D).

of an owner and acting merely as an agent of the owner, not engaged in or have any employees engaged in the same trade, business or occupation of the injured worker, and not seek or obtain from the property owners any profit from the services performed by the individuals engaged in the same trade, business or occupation of the injured worker.[19] In such cases, the business of property management means the oversight, supervision and care of real property or improvements to real property on behalf of property owners.[20]

If an injured worker qualifies as a "statutory employee," then the injured employee may seek workers' compensation benefits from the statutory employer or his direct employer, but not both.[21] In such cases, the compensation benefits are based upon the earnings of the statutory employee for his direct or immediate employer.[22]

If a person or entity is found to be a statutory employer and is required to pay workers' compensation benefits to an injured worker, then the statutory employer is entitled to indemnity from any person who would have otherwise been liable to pay compensation to the injured worker.[23] Statutory employers also have the right to join the injured employee's direct employer or any intermediate employer as a party to a claim by the injured employee.[24]

2. <u>Employees</u>

Under the Act, an employee is defined as "every person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or

[19] *Id*.
[20] Va. Code § 65.2-302(D)(2).
[21] Va. Code § 65.2-303(A).
[22] Va. Code § 65.2-303(B).
[23] Va. Code § 65.2-304.
[24] *Id*.

implied, whether lawfully or unlawfully employed, except (i) one whose employment is not in the usual course of the trade, business, occupation or profession of the employer; or (ii) as otherwise provided" in the Act.[25] Apprentices and trainees may qualify as covered employees.[26] Unless otherwise excluded, every executive officer, including president, vice-president, secretary, treasurer or any other officer, elected or appointed in accordance with the charter and bylaws of a corporation, municipal or otherwise, and every manager of a limited liability company elected or appointed in accordance with the articles of organization or operating agreement of the limited liability company, are considered employees.[27] Public employees, officers and volunteers may be covered under the Act if specifically designated as an employee by the Act.[28] Sole proprietors and partners of a business electing to be included as employees are employees under the Act if the insurer is notified of the desire to be covered by the Act.[29]

Certain employees are excluded from coverage under the Act.[30] Under certain circumstances, the following may not be employees entitled to workers' compensation benefits:

- licensed real estate sales persons or brokers;
- taxi cab or executive sedan drivers;
- casual employees;

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[25] Va. Code § 65.2-101 "Employee" (1)(a).
[26] Va. Code § 65.2-101 "Employee" (1)(b) .
[27] Va. Code § 65.2-101 "Employee" (1)(h).
[28] Va. Code § 65.2-101 "Employee" (1).
[29] Va. Code § 65.2-101 "Employee" (1)(n). Such sole proprietors or partners must provide notice to the insurance carrier instead of the employer. *Id*.
[30] Va. Code § 65.2-101 "Employee" (2).

- domestic servants;
- farm or horticultural laborers unless the employer regularly has in service more than two full-time employees;
- an executive officer who is not paid salary or wages on a regular basis at an agreed-upon amount and who rejects coverage under the title;
- employees of any common carriers by railroad engaging in commerce between any of the several states or the District of Columbia;
- employees of common carriers by railroad who are engaged in intrastate trade or commerce;
- non-compensated employees and non-compensated directors of corporations exempt from taxation pursuant to § 501(c)(3) of Title 26 of the United States Code (Internal Revenue Code of 1954); and,
- certain sports officials.[31]

For additional examples of employees not covered under the Act, see Va. Code § 65.2-101 "Employee" (2).

3. <u>Compensable Injuries</u>

The Act provides benefits for:

(1) injuries by accident arising out of and in the course of employment;[32]

(2) occupational diseases;[33] and,

(3) certain ordinary diseases of life.[34]

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[31] Va. Code § 65.2-101 "Employee" (2).
[32] Va. Code § 65.2-101 "Injury."
[33] Va. Code § 65.2-400.

The Act does not extend coverage to any injury, disease or condition resulting from an employee's voluntary participation in an employer-sponsored off-duty recreational activity which is not part of the employee's duties.[35] The Act also excludes from coverage any injury resulting from the use of a motor vehicle that was provided to the employee by a motor vehicle dealer for commuting to or from work or any other non-work activity and which bears a dealer's license plate.[36] Certain injuries resulting from willful misconduct may also be excluded as discussed later.[37]

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[34] Va. Code § 65.2-401.
[35] Va. Code § 65.2-101 "Injury."
[36] *Id*.
[37] Va. Code § 65.2-306.

CHAPTER II

ACCIDENTAL INJURIES

Virginia is an "actual risk" state and not a "positional risk" state.[1] This means that for an injury on the job to be compensable under the Act, there must be a causal connection between the injury and the conditions of the work place. Accordingly, not every injury that occurs on the job is necessarily compensable under the Act.

To be compensable, injuries at work must satisfy three requirements.[2] First, the injury must be by accident. Second, it must arise out of employment. Third, it must occur in the course of employment. The phrases "arising out of" and "in the course of" are not synonymous and an employee must establish both conditions before compensation may be awarded.[3] These requirements, however, are to be liberally construed in favor of the employee.[4]

A. Injury by Accident

An injury by accident requires an identifiable incident that occurs at some reasonably definite time and that causes an obvious sudden, mechanical or structural change in the body.[5] Injuries of gradual growth or caused by cumulative effect are excluded from compensation.[6]

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[1] *Hill City Trucking v. Christian*, 238 Va. 735, 385 S.E.2d 377 (1989).
[2] Va. Code § 65.2-101 ("injury"); *Morris v. Morris*, 238 Va. 78, 584, 385 S.E.2d 858, 862 (1989).
[3] *R&T Invs., Ltd. v. Johns*, 228 Va. 249, 321 S.E.2d 287 (1984).
[4] *Bradshaw v. Aronovitch*, 170 Va. 329, 196 S.E. 684 (1938).
[5] *Kraft Dairy Group, Inc. v. Bernardine*, 229 Va. 253, 255-56, 329 S.E.2d 46, 47 (1985).
[6] *Morris v. Morris*, 238 Va. 578, 586, 385 S.E.2d 858, 863 (1989) (quoting *Airstrop v. Blue Diamond Coal Co.*, 181 Va. 287, 293, 24 S.E.2d 546, 548 (1943)).

The occurrence of an identifiable incident is, in most cases, easily satisfied. Examples are cuts, burns, slip and falls, and motor vehicle accidents.

Certain activities performed over discreet periods of time, however, may satisfy the requirement of an identifiable incident.[7] The Commission has not adopted a specific test for the amount of time required to satisfy the requirement of an identifiable incident so long as the injury appears suddenly at a particular time and place and upon a particular occasion and is caused by an identifiable incident or sudden participating event, and is the result of an obvious mechanical or structural change in the body.[8]

Though the term "injury by accident" is to be liberally construed in favor of employees,[9] injuries resulting from repetitive trauma, continuing mental or physical stress, or other cumulative events, as well as injuries sustained at an unknown time are not "injuries by accident" within the meaning of the Act.[10] Also, psychological injuries allegedly resulting from conflicts with supervisors or disagreements over management decisions do not constitute an injury by accident.[11]

B. Arising Out of Employment

The term "arising out of" refers to the origin or cause of an injury.[12] An accident arises out of employment when the origin or cause of the injury relates to the employment;

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[7] *See, e.g., Southern Express v. Green*, 257 Va. 181, 509 S.E.2d 836 (1999) (worker suffered chilblains after being exposed to cold temperatures in a cooler for four hours found to have suffered a compensable injury).
[8] *Id*.
[9] *Aistrop v. Blue Diamond Coal Co.*, 181 Va. 287, 24 S.E.2d 546 (1943).
[10] *Morris v. Morris*, 238 Va. 578, 385 S.E.2d 858 (1989).
[11] *Teasley v. Montgomery Ward & Co.*, 14 Va. App. 45, 415 S.E.2d 596 (1992).
[12] *Bradshaw v. Aronovitch*, 170 Va. 329, 196 S.E. 684 (1938).

in other words, there must be a causal connection between the employee's injury and the conditions under which the work is required to be performed.[13]

An employer is therefore not an insurer against all accidental injuries that may occur to employees at work.[14] Instead, an employer is liable under the Act for injuries growing out of or from risks peculiar to the nature of the work performed and accidents to which the employees are exposed in a special degree by reason of their employment.[15] Risks to which all persons similarly situated or equally exposed and not due in some special degree to the particular employment are excluded.[16]

The "arising out of" requirement is often summarized as follows:

> An injury arises out of the employment when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and resulting injury. Under this test, if 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 it 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 workman would have been equally exposed apart from the employment. The causative danger 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 rationale consequence.[17]

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[13] *Metcalf v. A. M. Express Moving Sys.*, 230 Va. 464, 339 S.E.2d 171 (1986).
[14] *Dreyfuss & Co. v. Meade*, 142 Va. 567, 129 S.E. 336 (1925).
[15] *Id*.
[16] *Id*. This exclusion is sometimes referred to as a risk that is "common to the neighborhood." *See, e.g.*, *Bradshaw v. Avonovitch*, 170 Va. 329, 196 S.E.2d 684 (1938).
[17] *Baggett Transp. Co. v. Dillon*, 219 Va. 633, 248 S.E.2d 819 (1978) (quoting *In re McNicol*, 215 Mass. 497, 499, 102 N.E. 697, 697 (1913).

An injury at work caused by an idiopathic condition is not compensable if no other employment factors intervene or operate to cause or contribute to the injuries sustained as a result of the idiopathic condition.[18] The effects of an accident due to an idiopathic condition, however, are compensable if the employment places the employee in a position that increases the dangerous effects of the accident such as on a ladder, near equipment, or in a moving vehicle.[19]

In cases of unexplained accidental injuries, the employee must show sufficient evidence that the injuries arose out of and occurred in the course of employment.[20] However, a presumption arises that an injury arises out of employment when an unexplained injury by accident occurs in the course of employment and results in the death of an employee.[21] Furthermore, if an employee is physically or mentally unable to testify and the facts support an inference that the accident arose out of an in the course of employment, then it is presumed that the accident arose out of and in the course of employment.[22]

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[18] *Virginia Dep't of Transp. v. Mosebrook*, 13 Va. App. 536, 538, 413 S.E.2d 350, 351-52 (1992).
[19] *Southland Corp. v. Parson*, 1 Va. App. 281, 284-85, 338 S.E.2d 162, 164 (1985).
[20] The employee must show by a preponderance of the evidence that the injuries arose out of and occured in the course of employment. *Liberty Mut. Ins. Corp. v. Herndon*, 59 Va. App. 544, 556 (Va. Ct. App. 2012)(citing to *Marketing Profiles v. Hill*, 17 Va. App. 431, 433, 437 S.E.2d 727, 729, 10 Va. Law Rep. 613 (1993)
[21] *Southern Motor Lines v. Alvis*, 200 Va. 168, 104 S.E.2d 735 (1958).
[22] Va. Code §65.2-105.

C. In the Course of Employment

The phrase "in the course of employment" refers to the time, place and circumstances under which an injury occurs.[23] An accident occurs in the course of employment when it takes place during the period of employment, at a place where the employee may reasonably be and while the employee is reasonably fulfilling duties of his or her employment or otherwise engaged in doing something incidental to his or her employment.[24]

Virginia does not recognize an instantaneous beginning or end of a work shift.[25] An employee has a reasonable time before beginning work or after concluding work to enter or leave an employer's premises.[26] Therefore, an employee injured prior to or after work while on the employer's premises or an extension thereof (for example, a company parking lot) may be able to satisfy the "in the course of" requirement.[27]

Likewise, Virginia recognizes the personal comfort doctrine.[28] Therefore, employees on breaks, including lunch breaks, or going to and from the restroom may be in the course of their employment.

Virginia, however, does not consider going to or coming from work to be in the course of employment except in three general situations.[29] The three exceptions are:

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[23] *Conner v. Bragg*, 203 Va. 204, 123 S.E.2d 393 (1962).
[24] *Bradshaw v. Aronovitch*, 170 Va. 329, 196 S.E. 684 (1938).
[25] *Brown v. Reed*, 209 Va. 562, 165 S.E.2d 394 (1969).
[26] *Briley v. Farm Fresh, Inc.*, 240 Va. 194, 396 S.E.2d 835 (1990).
[27] *Brown*, 209 Va. at 562, 165 S.E.2d at 394.
[28] *Southern Motor Lines Co. v. Alvis*, 200 Va. 168, 104 S.E.2d 735 (1958).
[29] *Kent v. Virginia-Carolina Chem. Co.*, 143 Va. 62, 129 S.E.2d 330 (1925).

(1) where in going to and from work the means of transportation is provided by the employer or the time consumed is paid for or included in the wages;

(2) where the way used is the sole and exclusive way of entrance and exit, with no other way, or where the way of entrance and exit is constructed by the employer; and,

(3) where the employee on his or her way to or from work is still charged with some duty or task in connection with his or her employment.[30]

The first exception has recently been statutorily modified with regard to vehicles provided to employees by motor vehicle dealers.[31] Injuries which result from the use of a motor vehicle that is provided to an employee by a dealer for the employee's use commuting to or from work or for any other non-work activity and which bears a dealer's license plate are not compensable.[32]

D. Willful Misconduct

No lost wage or medical benefits may be awarded to an employee or his or her dependents for an injury or death caused by the employee's "willful misconduct" as defined by the Act.[33] The categories of willful misconduct recognized under the Act are:

(1) an employee's willful misconduct or intentional self-inflicted injury;[34]

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[30] *Id*.
[31] Va. Code § 65.2-101 "Injury" (2).
[32] *Id*.
[33] Va. Code § 65.2-306.
[34] Va. Code § 65.2-306(A)(1).

(2) an employee's attempt to injure another;[35]

(3) an employee's intoxication;[36]

(4) an employee's willful failure or refusal to use a safety appliance or to perform a duty required by statute;[37]

(5) an 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;[38] and,

(6) an employee's use of certain non-prescribed controlled substances.[39]

The employer has the burden of proof on any willful misconduct defense. In non-death cases, however, a rebuttal presumption that an employee was intoxicated at the time of his or her injury due to the consumption of alcohol or use of a non-prescribed controlled substance is created if there was at the time of the injury an amount of alcohol in an employee which is equal to or greater than 0.08 blood alcohol content or if drug testing yields a positive test result from a Substance Abuse and Mental Health Services Administration certified laboratory.[40] The employee may overcome such a presumption by clear and convincing evidence.[41]

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[35] Va. Code § 65.2-306(A)(2).
[36] Va. Code § 65.2-306(A)(3).
[37] Va. Code § 65.2-306(A)(4).
[38] Va. Code § 65.2-306(A)(5).
[39] Va. Code § 65.2-306(A)(6); *see also* Va. Code § 54.1-3400 for list non-prescribed controlled substances to which this section applies.
[40] Va. Code § 65.2-306(B).
[41] *Id*.

Willful misconduct alone is not sufficient to bar compensation benefits. An employer must also establish that the willful misconduct caused or played a role in causing the employee's injury.[42]

Simple or gross negligence of an employee will not support a willful misconduct defense.[43] Instead, willful misconduct requires an intention to do something that the employee knows, or ought to know, is wrongful or forbidden by law.[44] Therefore, an employee's mere contributory negligence does not support a defense of willful misconduct.[45]

To establish that an employee willfully violated a safety rule, an employer must prove that:

(1) the rule was reasonable;

(2) the employee knew of the rule before the accident;

(3) the rule was for the benefit of the employee; and,

(4) the employee intentionally undertook the prohibited act.[46]

An employer must also establish that it consistently enforced the safety rule.[47]

If an employer intends to rely upon a defense of willful misconduct, it must give notice of the defense to the injured worker or his dependents and the Commission at least

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[42] *Wyle v. Professional Serv. Indus., Inc.*, 12 Va. App. 684, 406 S.E.2d 410 (1991).
[43] *Uninsured Employer's Fund v. Keppel*, 1 Va. App. 162, 335 S.E.2d 851 (1985).
[44] *King v. Empire Collieries Co.*, 148 Va. 585, 139 S.E. 478 (1927).
[45] *Keppel*, 1 Va. App. at 162, 335 S.E.2d at 851.
[46] *Dan River, Inc. v. Giggetts*, 34 Va. App. 297, 302, 541 S.E.2d 294, 297 (2001).
[47] *VEPCO v. Kremposky*, 227 Va. 265, 315 S.E.2d 231 (1984).

fifteen days prior to any hearing.[48] This notice must contain a statement of the employee's specific act or acts which the employer believes establishes willful misconduct.[49]

[48] Rule 1.10 of the Rules of the Virginia Workers' Compensation Commission.
[49] *Id*.

CHAPTER III

OCCUPATIONAL DISEASES

A. Occupational Diseases

Occupational diseases are compensable in Virginia.[1] To be compensable, an occupational disease must be a disease arising out of and in the course of employment.[2] Coverage, however, is excluded for some ordinary diseases of life to which the general public is exposed outside of employment.[3]

A disease shall be deemed to arise out of employment only if there is apparent to the rational mind, upon consideration of all the circumstances:

(1) a direct causal connection between the conditions under which the 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 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 relationship between the employer and employee; and,

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[1] Va. Code § 65.2-403(A).
[2] Va. Code § 65.2-400(A).
[3] *Id*.

(6) it had its origin in a risk connected with the employment and flowed from that source as a natural consequence even though it need not have been foreseen or expected.[4]

Cases of hearing loss and carpal tunnel syndrome may also be compensable, but not as occupational diseases.[5] Instead, they are treated as ordinary diseases of life which may be compensable if an employee can satisfy the burden of proof required for such conditions.[6]

Certain employees, namely in the public safety arena, are entitled to a presumption that designated occupational diseases were suffered in the line of duty and are therefore compensable unless the presumption is overcome by a preponderance of competent evidence to the contrary.[7] Conditions for which this presumption may apply for such workers include:

(1) respiratory diseases;

(2) hypertension or heart disease; and,

(3) leukemia or pancreatic, prostate, rectal, throat, ovarian or breast cancer.[8]

These presumptions, however, do not apply to voluntary life-saving and rescue squad members, volunteer law-enforcement chaplains, auxiliary and reserve deputy sheriffs, and auxiliary and reserve police.[9]

Certain employees, again mainly public safety employees, may also be entitled to a presumption for infectious diseases.[10] These diseases include:

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[4] Va. Code § 65.2-400(B).
[5] Va. Code § 65.2-400(C).
[6] *Id.*; *see also* Va. Code § 65.2-401.
[7] Va. Code §§ 65.2-402 and 402.1.
[8] Va. Code § 65.2-402.
[9] Va. Code § 65.2-402(G).

(1) hepatitis;

(2) meningococcal meningitis;

(3) tuberculosis; and,

(4) HIV.[11]

Covered individuals who test positive for exposure to the above diseases, but have not yet become partially or totally disabled, are nevertheless entitled to medical benefits.[12] This entitlement includes annual medical examinations to measure the progress of the condition.[13]

Employees or prospective employees who are not incapacitated for work, but who may suffer from an occupational disease or are susceptible to one may waive his or her right for any aggravation of his or her condition that may result from working or continuing to work in the same or similar occupation.[14] Such a waiver, however, requires approval of the Commission.[15]

Apportionment among employers of liability for occupational disease is not permitted.[16] Instead, an employer and its insurer at the time of an employee's last injurious exposure are solely liable for compensable occupational diseases without the right of contribution from any prior employer or insurer.[17] Injurious exposure is defined as "an exposure to the causative hazard of such disease which is reasonably calculated to bring on

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[10] Va. Code § 65.2-402.1.
[11] *Id*.
[12] Va. Code § 65.2-402.1(C).
[13] *Id*.
[14] Va. Code § 65.2-407(A).
[15] *Id*.
[16] Va. Code § 65.2-404.
[17] *Id*.

the disease in question."[18] In pneumoconiosis cases, exposure to the causative hazard of pneumoconiosis for ninety work shifts shall be conclusively presumed to constitute injurious exposure.[19]

An operator of a coal mining business that is subject to the Act and that acquires a coal mining business or substantially all of the assets of a coal mining business is liable for all benefits which would have been payable by the prior operator to persons previously employed by the prior operator if the acquisition had not occurred and the prior operator had continued to operate the business.[20] The subsequent operator must also secure the payment of any required benefits.[21] This obligation does not apply if the prior operator of the business is relieved of liability under the last injurious exposure section.[22]

B. Ordinary Diseases of Life

Employees suffering from ordinary diseases of life due to their employment may receive benefits in limited situations.[23] The two most notable examples are hearing loss and carpel tunnel syndrome.[24] Any claims for ordinary diseases of life, however, must be established by clear and convincing evidence rather than a mere probability.[25]

An ordinary disease of life to which the general public is exposed outside of employment may be treated as an occupational disease if an employee establishes that:

(1) the employee has the disease;

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[18] Va. Code § 65.2-404(B).
[19] *Id*.
[20] Va. Code § 65.2-404(C).
[21] *Id*.
[22] *Id*.
[23] Va. Code § 65.2-401.
[24] Va. Code § 65.2-400(C).
[25] Va. Code § 65.2-401.

(2) the disease arose out of and in the course of employment under the circumstances required for occupational diseases;

(3) the disease did not result from causes outside of employment; and,

(4) one of the following exists:

(a) the disease follows as an incident of an occupational disease;

(b) the disease is an infectious or contagious disease contracted in the course of one's employment in a hospital, sanitarium, laboratory, nursing home or while otherwise engaged in the direct delivery of health care or in the course of employment as emergency rescue personnel; or,

(c) the disease is characteristic of the employment and was caused by conditions peculiar to such employment.[26]

Ordinary diseases of life that are aggravated by a worker's environment are not compensable in Virginia.[27] This exclusion, however, applies only in non-accident settings.

In keeping with the foregoing, claims for mental stress due to employment are generally not compensable.[28] Therefore, mental stress due to the use of offensive words or decisions by managers is not compensable.[29]

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[26] Va. Code § 65.2-401.

[27] *Head v. Newport News City Police Department*, 65 O.I.C. 166 (1986); *Ashland Oil Company v. Bean*, 225 Va. 1, 300 S.E.2d 739 (1983).

[28] Reid and Evers, *Stress In The Workplace: Is It Compensable Under The Virginia Workers' Compensation Act?* Vol. IV J. Civ. Litigation, No. 1, 15 (1992).

[29] *Welch v. Berglund Chevrolet, Inc.*, 66 O.I.C. 74 (1987); *Crow v. Alleghany Airlines, Inc.*, 57 O.I.C. 88 (1976).

The foregoing exclusion does not always preclude claims for post-traumatic stress disorder in non-accident settings. Though a claim for post-traumatic stress disorder due to a one-time stressful situation will likely be denied,[30] such a claim may be compensable if an employee can establish by credible evidence that the disorder resulted from repeated exposure to traumatic stressors and a lack of causes outside of work for the disorder.[31]

[30] *Chesterfield County v. Dunn*, 9 Va. App. 475, 389 S.E.2d 180 (1990).
[31] *Fairfax County Fire & Rescue Dep't v. Mottram*, 263 Va. 365, 559 S.E.2d 698 (2002).

CHAPTER IV

REPORTING REQUIREMENTS

A. Employer

Within ten days of an employee's injury or death, an employer, or its insurer, is required to file a report of the injury or death with the Commission.[1] The Commission provides a form for this reporting.[2] Such reporting, however, may now be done electronically.[3] The accident report must contain the name, nature and location of the employer, and the name, age, sex, wages and occupation of the injured employee; and must state the date and hour of the alleged accident, along with the nature and cause of the injury, as well as any other information required by the Commission.[4]

Minor injuries are reported on a different form.[5] If a minor injury becomes more serious or if the compensability of the injury is disputed, an employer will be required to file an accident report with the Commission.

Failure to file required reports with the Commission may subject an employer to a civil penalty of not more than $500.00 for each violation.[6] If the Commission determines that any such failure is willful, it may assess a civil penalty of not less than $500.00 and not more than $5,000.00.[7] If an employer has transmitted the accident report to its insurance

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[1] Va. Code § 65.2- 900.
[2] *See* Form 3.
[3] *See* http://www.vwc.state.va.us/ "electronic filing services."
[4] Va. Code § 65.2- 900(B).
[5] *See* Form 45-A.
[6] Va. Code § 65.2- 902(A).
[7] *Id*.

carrier or third-party administrator, then the insurance carrier or third-party administrator will be liable for the penalty if it fails to timely file the required report.[8]

B. Employee

1. Notice of Accident

a. To Employer

Every injured employee or his or her representative is required to give immediate notice of an accident.[9] In cases where an injured employee is not able to give immediate notice, the employee or his or her representative is required to give notice as soon as practical.[10]

The notice is required to state:

(1) the name and address of the employee;

(2) the time and place of the accident; and,

(3) the nature and cause of the accident and the injury.[11]

No defect or inaccuracy in the notice, however, shall bar compensation unless the employer can prove that its interests were prejudiced by the defect or inaccuracy and then only to the extent of the prejudice.[12]

The failure of an employee to give his or her employer notice of an accidental injury may, in certain situations, bar the employee's right to lost wage or medical benefits prior to

[8] *Id*.
[9] Va. Code § 65.2-600(A) (though statute requires written notice, actual notice is sufficient).
[10] *Id*.
[11] Va. Code § 65.2-600(B).
[12] Va. Code § 65.2-600(E).

the date of giving notice in.[13] The employee may avoid this penalty by showing that the employer, its agent or representative had knowledge of the accident or that the employee had been prevented from giving notice by reason of physical or mental incapacity or the fraud or deceit of some third person.[14] Giving notice to a co-worker who is not a foreman, supervisor or someone in management is generally not sufficient if the co-worker does not timely relay the notice to a supervisor, foreman or manager.

Failure of an employee to provide notice to an employer within thirty days of an accident may bar all workers' compensation benefits.[15] To avoid this result, an injured employee must establish a reasonable excuse for not giving timely notice.[16] Even if an employee can establish a reasonable excuse for the failure to give notice within thirty days, the employee may still be denied benefits if the employer can establish that it has been prejudiced by the lack of notice.[17] Examples of prejudice to an employer include the inability to provide immediate medical treatment to an injured employee to reduce the extent of an injury, the employer's inability to adequately and timely investigate a claim, and an employer's inability to offer an injured employee light duty work to reduce its exposure.[18]

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[13] Va. Code § 65.2-600(C).
[14] *Id*.
[15] Va. Code § 65.2-600(D).
[16] *Id*.
[17] *Id*.
[18] *Kosma v. Bellamy*, 79 O.W.C. 10 (2000).

b. To Statutory Employer

Failure by an employee to give notice to a statutory employer within thirty days of an accident may not bar a claim for benefits against the statutory employer.[19] If an injured employee fails to give notice to any statutory employer after an accident on the job, a statutory employer may still be held liable for workers' compensation benefits if:

(1) the statutory employer has received at least 60 days' notice of the hearing; and,

(2) the statutory employer is not prejudiced by the notice of the accident.[20]

2. <u>Notice of Occupational Disease</u>

In cases of occupational disease, an employee is required to give notice to an employer of the illness within 60 days after a work-related diagnosis is first communicated to the employee.[21] Unlike cases involving injuries by accident, a failure to give the required notice will not bar an employee's right to benefits for an occupational disease unless the employer can establish that the employee's failure to give timely notice resulted in clear prejudice to the employer.[22] Further, an employee is not required to provide a reasonable excuse for his or her failure to provide timely notice before the employer is required to establish prejudice.

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[19] Va. Code § 65.2-600(A).
[20] *Id*.
[21] Va. Code § 65.2-405(A).
[22] *Id*.

3. Employee Change in Conditions

As long as an employee or dependent receives workers' compensation benefits, the employee or defendant has a duty to immediately report:

(1) any incarcerations;

(2) any return to employment;

(3) any increase in earnings;

(4) any remarriage; or,

(5) any change in his or her status as a full-time student.[23]

When the employer is self-insured, this notice must go to the employer.[24] In all other cases, the notice must go to the insurer.[25] If the Commission determines that the payment of benefits has occurred due to an employee or dependant's failure to provide notice of the above events, then payments may be recovered from the employee or dependent either by way of credit against future compensation benefits or by an action at law against the employee or dependent.[26]

4. Employee Change of Address

As long as an employee is entitled to workers' compensation benefits, the employee has a duty to provide the Commission with a current residential address and to report any changes of that address as they occur.[27] An employee's failure to provide a residential address or a change of residential address, without reasonable justification, may result in

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[23] Va. Code § 65.2-712.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] Va. Code § 65.2-711.

the suspension of compensation payments to the employee until the employee satisfies this duty.[28]

[28] *Id*.

CHAPTER V

AVERAGE WEEKLY WAGE

Compensation benefits are based upon an employee's "average weekly wage." In general, an employee's "average weekly wage" is based upon an average of the employee's gross weekly wages for fifty-two weeks before the date of injury.[1] When an employee has not worked for an employer for fifty-two weeks before an injury, the Commission may use other methods to calculate an average weekly wage provided that the method used produces a result that is fair and just to both the employee and employer.[2] To calculate the average weekly wage, the employer may be required to file a wage chart with the Commission.[3]

In cases where an employee has worked for an employer for only a brief period of time prior to his or her injury, the parties may use the wages of a co-employee to calculate the average weekly wage.[4] The co-employee must be a person of the same grade and character as the injured employee and employed in the same class of employment in the same locality or community as the injured employee.[5] This is often referred to as a "like employee." As with the wages of an injured employee, the statute requires an averaging of the wages of the "like employee" for fifty-two weeks before the date of injury.[6]

If an employee is still employed in the employment in which he or she was injuriously exposed at the time of a diagnosis of an advanced stage of asbestosis or

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[1] Va. Code § 65.2-101 "Average weekly wage" (1)(a).
[2] *Id*.
[3] *See* Form 7A.
[4] *Id*.
[5] *Id*.
[6] *Id*.

mesothelioma, then the employee's weekly compensation rate shall be based upon the employee's average weekly wage as of the date of the diagnosis of the advanced stage of the disease.[7] If the employee is unemployed or employed in other employment, the weekly compensation rate shall be based upon the average weekly wage of a person of the same or similar grade and character in the same class of employment in which the employee was injuriously exposed on the date of diagnosis of the advanced stage.[8] These compensation rates are subject to the maximum and minimum rates of the Commission, which, as of July 1, 2013, are $955.00 and $238.75 respectively.[9]

Payments made to employees by employers in addition to wages may be included when calculating an average weekly wage. Such additional payments must be specifically provided for in the contract of employment and also must be of such a character as to indicate that they are being paid in lieu of wages.[10] Examples of such allowances or perquisites include payments for meals, lodging, travel, rent, electricity, water, telephone, uniforms and laundry.[11] The Commission has recently abandoned its established value for perquisites in favor of a case by case determination of the actual value of such benefits.

Tips may be also included in average weekly wage calculations.[12] The Commission, however, may require proof that tips have been reported for tax purposes before permitting their inclusion in the average weekly wage.

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[7] Va. Code § 65.2-406(c).
[8] *Id*.
[9] *Id*.
[10] *Bosworth v. 7-Up Distrib. Co.*, 4 Va. App. 161, 355 S.E.2d 399 (1987).
[11] *See* VWC Form No. 7A.
[12] *Chesapeake Bay Seafood House v. Clements*, 14 Va. App. 143, 415 S.E.2d 864 (1992).

Wages from an employee's second job may be included in his or her average weekly wage in appropriate situations. For wages from a second job to be included, the second job must be substantially similar to the job the employee was performing at the time of his or her injury.[13] Thus, wages from a second job may be combined with an employee's wages earned in the job in which they were injured if the nature, character or primary mission of the two jobs is substantially similar.[14]

An employee may also be permitted to combine the wages of two jobs if they are performed for the same employer.[15] This is so even if the two jobs for the same employer are dissimilar.[16]

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[13] *Creedle Sales Co. v. Edmonds*, 24 Va. App. 24, 480 S.E.2d 123 (1997).
[14] *Frederick Fire & Rescue v. Dodson*, 20 Va. App. 440, 457 S.E.2d 783 (1995).
[15] *Dinwiddie County Sch. Bd. v. Cole*, 28 Va. App. 462, 506 S.E.2d 36 (1998), *aff'd*, 258 Va. 430, 520 S.E.2d 650 (1999).
[16] *Id*.

CHAPTER VI

BENEFITS

A. Temporary Total Disability

When an employee is totally disabled from work due to a work place injury, the employer is required to pay the employee weekly compensation equal to 66⅔ percent of the employee's average weekly wage during the period of total disability.[1] In most cases, lost wage benefits in Virginia are limited to 500 weeks.[2] Total compensation should also not exceed an amount obtained by multiplying the maximum compensation rate applicable on the date of injury by 500 except in certain cases; most notably, permanent total disability.[3]

An injured worker, however, may not receive a weekly compensation rate greater than the maximum compensation rate established by the Commission on July 1 of each year.[4] As of July 1, 2013, the maximum compensation rate was $955.00.

The Commission also sets a minimum compensation rate as of July 1 of each year.[5] As of July 1, 2013, the minimum compensation rate was $238.75. The minimum compensation rate applies only in temporary total disability cases.[6]

An employee, however, may not receive weekly compensation benefits greater than his or her average weekly wage. Therefore, an employee may only receive weekly

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[1] Va. Code § 65.2-500(A).
[2] Va. Code § 65.2-518.
[3] *Id.*; *see also* Va. Code § 65.2-500(D).
[4] Va. Code § 65.2-500(A).
[5] Va. Code § 65.2-500.
[6] Va. Code § 65.2-502(A).

compensation benefits equal to his or her average weekly wage if his or her average weekly wage is below the minimum compensation rate.[7]

An injured worker that is only partially disabled may receive temporary total disability benefits in certain situations. If an injured employee has been released to light duty work and conducts an adequate search for work within his or her limitations, then the employee may receive temporary total disability benefits during the job search if the search is unsuccessful. Injured employees that are not eligible for lawful employment and who are only partially disabled may not receive temporary total disability benefits even if they attempt to market their residual work capacity.[8]

Certain "employees" are not entitled to temporary total disability benefits.[9] By statute, AmeriCorps members, food stamp recipients participating in work programs, and recipients of Temporary Assistance for Needy Families participating in work programs are not eligible to receive temporary total disability benefits even if the injury results in death.[10]

B. Temporary Partial Disability

When an injured worker is only partially disabled and returns to work, an employer is obligated to pay the injured worker weekly compensation benefits equally to 66⅔ percent of the difference between the injured worker's average weekly wage before his or her injury and the average weekly wage that the injured worker is able to earn after the injury.[11] An employer is not required to pay an injured worker temporary partial disability benefits

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[7] Va. Code § 65.2-500(A).
[8] *Id*.
[9] Va. Code § 65.2-500(E), (F) and (G).
[10] *Id*.
[11] Va. Code § 65.2-502(A).

greater than the maximum compensation rate even if 66⅔ percent of the difference between the pre-injury average weekly wage and the post-injury average weekly wage is greater than the maximum compensation rate.[12]

Temporary partial disability benefits are also subject to the 500 week maximum.[13] The 500 week limit also applies to any combination of temporary total disability and temporary partial disability paid to an injured worker.[14]

Certain employees are not entitled to temporary partial disability benefits. Injured employees not eligible for lawful employment are not entitled to temporary partial disability benefits.[15] As with temporary total disability benefits, AmeriCorps members and certain recipients of food stamps and Temporary Assistance for Needy Families are not eligible for temporary partial disability benefits.[16]

If a partially disabled employee refuses work offered to or procured for him or her and the work is suitable for the injured employee in light of his or her limitations, the employee is not entitled to lost wage or vocational benefits unless the Commission finds that the employee's refusal was justified.[17] A partially disabled employee's unjustified refusal of suitable light duty work that lasts for more than six months after compensation was last paid before being suspended for refusal of light duty work bars further temporary partial disability benefits.[18] The six-month period may be extended by any total disability

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[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] Va. Code § 65.2-502(B), (C) and (D).
[17] Va. Code § 65.2-510(A).
[18] Va. Code § 65.2-510(C).

that occurs during the six-month period.[19] When a partially disabled employee is precluded from accepting light duty work as a result of pregnancy, the six-month period may also be tolled for as long as a physician certifies medical disability due to the pregnancy.[20] If a partially disabled employee cures his or her unjustified refusal of light duty work within the six-month period, but at a wage less than that originally offered or procured, the employer is only required to pay temporary partial disability benefits equal to 66⅔ percent of the difference between the injured worker's pre-injury average weekly wage and the average weekly wage that the injured employee would have earned by accepting the originally proffered or procured light duty employment.[21]

A partially disabled employee who is discharged from a light duty position for cause forfeits his or her rights to additional temporary partial disability benefits.[22] A partially disabled employee who is terminated for "just cause" may be permanently barred from future temporary partial disability benefits.[23] These forfeitures do not apply in situations where an employee has procured his or her own light duty work.[24]

C. Permanent Partial Disability

The loss or loss of use of certain parts of the body is compensable in Virginia.[25] This compensation, however, is limited to specific parts of the body.[26] If an injured worker receives a permanent partial disability rating for a body part or injury not specifically listed,

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[19] *Id*.
[20] *Id*.
[21] Va. Code § 65.2-510(B).
[22] *Timbrook v. O'Sullivan Corp.*, 17 Va. App. 594, 439 S.E.2d 837 (1994).
[23] *C & P Telephone Co. v. Murphy*, 12 Va. App. 633, 406 S.E.2d 190 (1991).
[24] *Id*.
[25] Va. Code § 65.2-503.
[26] *Id*.

the injured employee is not entitled to any permanent partial disability benefits. For example, Virginia does not recognize permanent partial disability benefits for ratings to the whole person or to the back.

If an injured worker receives a permanency rating for less than one hundred percent loss of use of a scheduled part of the body or injury, then the injured worker will receive an award for an amount equal to the same proportion as the permanency rating.[27] This includes partial loss of use of hearing and vision.[28]

Benefits for permanent partial disability are subject to the five hundred week limit on compensation benefits.[29] Permanent partial disability benefits are paid at the rate of 66⅔ percent of the injured worker's average weekly wage at the time of his or her injury.[30] Permanent partial disability benefits are paid after temporary total disability benefits are paid and not at the same time.[31] Permanent partial disability benefits, however, may be paid simultaneously with temporary partial disability benefits.[32] When this occurs, each combined payment shall count as two weeks against the total five hundred week limit.[33]

The scheduled losses in Virginia are as follows:

(1)	Thumb	60 weeks
(2)	First Finger (index finger)	35 weeks
(3)	Second Finger	30 weeks

[27] Va. Code § 65.2-503(D).
[28] *Id*.
[29] Va. Code § 65.2-503(E)(2).
[30] Va. Code § 65.2-503(B).
[31] Va. Code § 65.2-503(E)(1).
[32] Va. Code § 65.2-503(E)(2).
[33] *Id*.

(4)	Third Finger	20 weeks
(5)	Fourth Finger (little finger)	15 weeks
(6)	First Phalanx of the thumb or any finger	One-half compensation for loss of entire thumb or finger[34]
(7)	Great Toe	30 weeks
(8)	A toe other than a great toe	10 weeks
(9)	First Phalanx of any toe	One-half compensation for loss of entire toe[35]
(10)	Hand	150 weeks
(11)	Arm	200 weeks
(12)	Foot	125 weeks
(13)	Leg	175 weeks
(14)	Permanent total loss of the vision of an eye	100 weeks[36]
(15)	Permanent total loss of hearing of an ear	50 weeks[37]
(16)	Severely marked disfigurement of the body resulting from an injury not otherwise compensated by this section	Not exceeding 60 weeks
(17)	Pneumoconiosis, including but not limited to silicosis and asbestosis, medically determined to be in the	A. First Stage – 50 weeks B. Second Stage – 100 weeks C. Third Stage – 300 weeks[38]

[34] The loss of more than one phalanx of a thumb or finger is deemed the loss of the entire thumb or finger. Any amounts received for loss of more than one finger shall not exceed compensation provided for the loss of a hand.

[35] The loss of more than one phalanx of a toe is deemed the loss of the entire toe.

[36] Can be either loss of use or loss of vision acuity. *See also* Rule 13 – Table of Percentage of Loss of Visual Acuity.

[37] *See also* Rule 12 – Hearing Loss Table.

[38] These benefits are cumulative and not in addition to each other. *See also* Rule 11 – Pneumoconiosis Table.

(18) Byssinosis 50 weeks[39]

In order to obtain permanent partial disability benefits, an injured worker must establish that:

(1) he or she has reached maximum medical improvement; and,

(2) his or her functional loss of use has been quantified or rated.[40]

D. Permanent Total Disability

Certain injured employees may qualify for permanent total disability benefits.[41] If so, weekly compensation benefits shall continue for the lifetime of the injured employee without limit as to the number of weeks or the total amount of benefits paid.[42]

Injured employees may be awarded lifetime compensation benefits for permanent and total incapacity when there is:

(1) loss of both hands, both arms, both feet, both legs, both eyes, or any two thereof in the same accident;

(2) injury for all practical purposes resulting in total paralysis, as determined by the Commission based on medical evidence; or,

(3) injury to the brain which is so severe as to render the employee permanently unemployable in gainful employment.[43]

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[39] Va. Code § 65.2-503(B).
[40] *Hungerford Mechanical Corp. v. Hobson*, 11 Va. App. 675, 401 S.E.2d 213 (1991).
[41] Va. Code § 65.2-503(C).
[42] Va. Code § 65.2-500(D).
[43] Va. Code § 65.2-503(C).

E. Death Benefits

If an employee is killed on the job or dies as a result of injuries suffered in a work-related accident within nine years of the accident, an employer is liable for compensation benefits to the decedent's dependants.[44] These benefits are subject to the maximum and minimum limitations for other compensation benefits.[45]

The amount of dependent benefits is based upon the type of dependency. Persons qualifying as wholly dependent upon the decedent are entitled to 500 weeks of benefits from the date of injury.[46] Individuals entitled to a presumption of total dependency are:

(1) a wife upon a husband that she has not voluntarily deserted or abandoned at the time of the accident or with whom she lived at the time of the accident if she is actually dependent upon him;[47]

(2) a husband who is actually dependent upon a wife that he had not voluntarily deserted at the time of the accident or with whom he lived at the time of the accident if he is actually dependent upon her;[48]

(3) a child under the age of 18;[49]

(4) a child 18 or over if physically or mentally unable to earn a living; and,[50]

(5) a child under the age of 23 if enrolled as a full-time student in an accredited educational institution.[51]

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[44] Va. Code § 65.2-512(A).
[45] *Id*.
[46] Va. Code § 65.2-512(A)(1).
[47] Va. Code § 65.2-515(A)(1).
[48] Va. Code § 65.2-515(A)(2).
[49] Va. Code § 65.2-512(A)(3).
[50] *Id*.

For dependency purposes, the term "child" includes a stepchild, a legally adopted child, a posthumous child, and an acknowledged illegitimate child, but it does not include a married child.[52]

Parents in destitute circumstances may be presumed to be wholly dependent upon a deceased child provided that there are no other total dependents within the above categories.[53] Such parents, however, are entitled to only 400 weeks of benefits from the date of injury.[54]

If there are no dependents entitled to the statutory presumption of total dependency, then those that the Commission finds to be wholly dependent based on the facts may also receive up to 400 weeks of compensation benefits from the date of injury.[55] If there are no total dependents at all, then individuals that may be partially dependent upon decedents may be awarded 400 weeks of compensation benefits from the date of injury.[56]

If there is more than one total dependent, benefits are to be divided equally among the total dependents to the exclusion of partial dependents.[57] In cases where there are no total dependents, the benefits shall be divided among the partial dependents according to the portion of their dependency upon the decedent at the time of his or her injury.[58] If benefits are terminated as to any dependent, that dependent's share is to be divided

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[51] *Id*.
[52] Va. Code § 65.2-515(B)
[53] Va. Code § 65.2-515(A)(4).
[54] Va. Code § 65.2-512(A)(2).
[55] *Id*.
[56] Va. Code § 65.2-512(A)(3).
[57] Va. Code § 65.2-512(C).
[58] *Id*.

proportionately among the remaining dependents according to their dependency.[59] If an injured worker receives workers' compensation benefits prior to his or her death, the number of weeks paid to the decedent is to be subtracted from the maximum number of weeks payable to the dependents.[60]

Certain dependents are expressly excluded from receiving death benefits. These are dependents of AmeriCorp members, dependants of food stamp recipients participating in work programs, or dependents of recipients of Temporary Assistance for Needy Families participating in a work program.[61]

An employer is also required to pay burial expenses not exceeding $10,000.00.[62] An employer is further required to pay reasonable transportation expenses not to exceed $1,000.00.[63]

Certain decedents may be entitled to a presumption that their accidental death arose out of and in the course of his or her employment. This presumption is applied when an employee is found dead as a result of an accident at his or her place of employment, or nearby, where his or her duties may have called him or her to be during the hours of work, and there is no evidence offered to show what caused the death or to show that the decedent was not performing his job at the time.[64]

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[59] Va. Code § 65.2-512(D).
[60] Va. Code § 65.2-512(E).
[61] Va. Code § 65.2-512(F), (G) and (H).
[62] Va. Code § 65.2-512(B).
[63] *Id*.
[64] *Pinkerton's Inc., v. Helmes*, 242 Va. 378, 410 S.E.2d 646 (1991); *Southern Motor Lines v. Alvis*, 200 Va. 168, 104 S.E.2d 735 (1958).

F. Medical Benefits

1. Lifetime Duration

Every injured employee is entitled to medical benefits as long as necessary after an accident.[65] This means that employees are entitled to lifetime medical benefits for work-related injuries.

2. Few Limitations

Such benefits have few limitations as employers and insurers in Virginia may not direct or manage medical care received by injured workers.[66] The medical benefits must be reasonable, necessary and causally related to the original compensable injury.[67] Medical attention, service and care also include chiropractic treatment and care.[68]

An employer is not required to pay for any medical treatment provided to a worker injured in an accident prior to the date the injured worker gives notice to his or her employer.[69] An employer, however, is required to pay for medical treatment provided to an employee suffering from an occupational disease for a period of fifteen days prior to the date of first communication of the disease to the employee.[70] In cases of asbestosis, an employee is entitled to medical benefits even if the asbestosis has not reached a ratable stage for permanency benefits.[71]

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[65] Va. Code § 65.2-603(A)(1).
[66] *Eames v. Williamsburg Soup & Candle Co.*, 76 O.W.C. 7 (1997).
[67] Va. Code § 65.2-603(A)(1).
[68] Va. Code § 65.2-603(D).
[69] Va. Code § 65.2-600(C). This exception does not apply if the employer had notice of the accident or that the employee was prevented from giving notice due to incapacity or the fraud or deceit of some third party.
[70] Va. Code § 65.2-403(B).
[71] *Jones v. Dupont*, 24 Va. App. 36, 480 S.E.2d 129 (1997).

Certain medical equipment and modification to an employee's principal home may be subject to a spending cap. If the injured worker's treating physician and the Commission determine that certain medical equipment is necessary, the Commission may require the employer to provide such equipment and/or home modification provided that the aggregate cost of such items or modifications does not exceed $42,000.00.[72] Items listed in the statute include:

- bed-side lifts, adjustable beds, ramps, handrails, doorway alterations; and,
- appliances.[73]

Otherwise, the only other limitation on medical expenses is that the charges for medical services not exceed the charges that prevail in the same community for similar treatment.[74] This is sometimes referred to as the prevailing community rate or the usual and customary rate. Thus, Virginia is not a fee-scheduled state for medical services.

3. <u>Panel of Physicians</u>

After an accident or a report of an injury on the job, the employer must furnish the injured worker a panel or list of at least three physicians selected by the employer from which the injured worker is to select a treating physician.[75] The list of physicians is to be given to the injured worker within a reasonable time after the employer learns of the injury.[76] If an employer does not provide an injured worker with a panel from which to select a treating physician within a reasonable period of time, the injured worker is free to

[72] Va. Code § 65.2-603(A)(1).
[73] *Id*.
[74] Va. Code § 65.2-605. The "community" includes one or more planning districts as set forth in Rule 14 of the Virginia Workers' Compensation Commission. Rule 14 – Definition of Community.
[75] Va. Code § 65.2-603(A)(1).
[76] *Peninsula Transp. v. Gibbs*, 228 Va. 614, 324 S.E.2d 662 (1984).

select any treating physician that he or she may desire.[77] Mere posting of a list of physicians has been held to be insufficient.[78] The panel may include chiropractors if the injured worker's injury may be treated with chiropractic care.[79]

For employers that provide health insurance to their employees, the employer is required to inform an employee, if the employee asks, whether any physician listed on the panel is eligible to receive payment under the employer-sponsored health insurance plan.[80]

4. <u>Independent Medical Examinations</u>

As long as an employee seeks compensation under the Act for a work-related injury, an employer may compel the employee to submit to an independent medical examination ("IME").[81] Facts communicated to an examiner or otherwise learned by an examiner during such examinations are not privileged.[82]

There are certain limitations on independent medical examinations. The examinations must be at reasonable times and reasonable places.[83] This means, among other things, that an employer must give an employee reasonable notice of the IME and, in appropriate cases, provide transportation for the employee to the IME. An employer is also limited to one examination ***per medical specialty*** without prior approval from the

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[77] *Gibbs v. Peninsula Trans. Dist. Comm'n*, 62 O.I.C. 194 (1983).
[78] *Smith v. Food Lion, Inc.*, 75 O.W.C. 136 (1996); *Lambert v. Clinchfield Coal Co.*, 68 O.I.C. 194 (1989).
[79] Va. Code § 65.2-603(F).
[80] Va. Code § 65.2-603(E).
[81] Va. Code § 65.2-607(A).
[82] *Id*.
[83] Va. Code § 65.2-607(A).

Commission.[84] Approval for more than one IME in the same specialty requires a showing of good cause or necessity.[85]

If an employee refuses to submit or in any way obstructs an IME, the employee's right to compensation and the employee's right to apply for or pursue any hearing shall be suspended until such refusal or objection ends.[86] Unless the Commission finds that the employee was justified in refusing to submit to or in obstructing the examination, the employee shall not receive lost wage compensation during the period of suspension.[87] An employer may not unilaterally suspend lost wage benefits due to an alleged refusal or obstruction of an IME. Such suspension requires an employer to file an application for hearing.

An employee's unjustified refusal of medical care prescribed by a treating physician may also bar an employee from lost wage benefits during the period of refusal.[88] As with an IME, the Commission will not deny lost wage benefits to an injured worker if it finds that the circumstances justify the employee's refusal.[89]

5. <u>Change in Treating Physicians</u>

Once an employee selects a treating physician, the employee is generally required to treat with that physician unless otherwise ordered by the Commission or a change is approved by the employer or insurer.[90] An employee or employer may petition the

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[84] *Id.*
[85] *Id.*
[86] Va. Code § 65.2-607(B).
[87] *Id.*
[88] Va. Code § 65.2-603(B).
[89] *Id.*
[90] Va. Code § 65.2-603(A)(1).

Commission for a change in treating physicians.[91] A change may be ordered if the Commission finds:

(1) that inadequate treatment is being rendered;

(2) that a specialist in a particular field is required and not being provided;

(3) the absence of improvement in an employee's health condition is without adequate explanation;

(4) conventional modalities of treatment are not being used;

(5) that there is no plan for long-term disability care; or,

(6) that a physician fails to cooperate with discovery proceedings.[92]

6. <u>Peer Review</u>

An alternative to requesting a hearing before the Commission on the reasonableness or necessity of medical care is the peer review program. Questions concerning the appropriateness, quality, duration and cost of medical care may be addressed to a regional peer review committee.[93] Requests for such a review may be made by the Commission, a treating physician, insurer or self-insured employer.[94] The peer review committee may order a physician to accept less than the amount billed or repay fees already received if it determines that the physician improperly over utilized or otherwise rendered inappropriate medical treatment or services.[95] Such decisions are reviewable by the full Commission.[96]

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[91] *Breckenridge v. Marvel Poultry*, 228 Va. 191, 319 S.E.2d 769 (1984); *Powers v. J. D. Construction*, 68 O.I.C. 208 (1989).
[92] *Id*.
[93] Va. Code §§ 65.2-1305 and 1306.
[94] Va. Code § 65.2-1305.
[95] Va. Code § 65.2-1306.
[96] Va. Code § 65.2-1306(B).

G. Vocational Benefits

Injured employees are also entitled to vocational rehabilitation benefits.[97] Such benefits, however, must be reasonable and necessary.[98] Further, an employer is not required to furnish such benefits to any injured employee who is not eligible for lawful employment.[99]

Vocational rehabilitation services may include vocational evaluation, counseling, job coaching, job development, job placement, on-the-job training, education and retraining.[100] Vocational rehabilitation services involving the exercise of professional judgment must be provided by a certified rehabilitation provider, a licensed professional, a certified rehabilitation counselor, or a certified vocational evaluation specialist.[101]

When disputes arise regarding vocational rehabilitation services, any party may request a hearing in the Commission regarding the disputed services.[102] The Commission, when determining the reasonableness and necessity of vocational benefits, is required to take into account the employee's pre-injury job and wage classification; his or her age, aptitude and level of education; the likelihood of success in the new vocation; and, the relative cost and benefits to be derived from the requested rehabilitation.[103]

As with the unjustified refusal of medical care, an employee's unjustified refusal of vocational rehabilitation services may bar the employee from further compensation unless

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[97] Va. Code § 65.2-603(A)(3).
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] Va. Code § 65.2-603(A)(3).

the Commission finds that the refusal was justified.[104] The suspension of benefits shall continue until the employee's refusal ceases.[105] In appropriate cases, the Commission may order a change in vocational rehabilitation services.[106]

H. Pneumoconiosis Benefits

Benefits to coal workers for pneumoconiosis are based upon a schedule within the Act.[107] To obtain such benefits, a coal worker must have medical evidence of pneumoconiosis based upon x-rays that have been read and classified pursuant to standards set out by the International Labor Office.[108]

If the employee has the requisite evidence of the illness, the employee shall receive the following benefits even if the employee is not prevented from working:

(1) for first stage pneumoconiosis, 50 weeks;[109]

(2) for second stage pneumoconiosis, 100 weeks;[110]

(3) for third stage pneumoconiosis, 300 weeks;[111] and,

(4) for A, B or C pneumoconiosis or pneumoconiosis which involves progressive massive fibrosis or is accompanied by sufficient pulmonary function loss

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[104] Va. Code § 65.2-603(B); *Ilg v. UPS, Inc.*, 2012 Va. LEXIS 128 (Va., June 7, 2012) (holding that an employee is not precluded from asserting that his refusal of vocational rehabilitation was justified because he was disabled by an injury which was related to the accident which caused a second injury for which he was receiving compensation, despite the fact that the first injury was not itself the subject of the award).
[105] Va. Code § 65.2-603(B).
[106] *Id*.
[107] Va. Code § 65.2-504.
[108] *Id*.
[109] Va. Code § 65.2-504(A)(1).
[110] Va. Code § 65.2-504(A)(2).
[111] Va. Code § 65.2-504(A)(3).

which totally precludes an employee from performing manual labor in a dusty environment and the employee is not working, lifetime benefits.[112]

These benefits are limited to pneumoconiosis suffered by coal workers.[113] When differentiating between coal worker's pneumoconiosis and other types of pneumoconiosis, it is conclusively presumed that an employee is suffering from coal worker's pneumoconiosis if he or she has had exposure to coal dust.[114]

In cases for first, second or third stage coal worker's pneumoconiosis, the employer and employee may submit up to three medical interpretations (readings) of x-rays for the Commission's consideration.[115] For good cause shown, additional readings may be received as evidence if deemed necessary by the Commission.[116] Parties may submit x-rays to the Commission's pulmonary committee for interpretation.[117] If a party agrees to accept the reading of the pulmonary committee as binding, the cost of the evaluation will be paid by the Commission.[118]

The Commission has also established a table for conversion of x-ray interpretations into first, second and third stages for the purpose of awarding benefits.[119] This table is to be used for both coal worker's pneumoconiosis and other pneumoconises.[120]

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[112] Va. Code § 65.2-504(A)(4).
[113] Va. Code § 65.2-504(C).
[114] *Id*.
[115] Rule 10.1.
[116] *Id*.
[117] Rule 10.2.
[118] *Id*.
[119] Rule 11.
[120] *Id*.

In cases involving pneumoconiosis other than coal worker's pneumoconiosis, such as silicosis or asbestosis, benefits are set out in Va. Code § 65.2-503(B) (1950 as amended). If the employee has the requisite evidence of the illness, the employee shall receive the following benefits even if the employee is not prevented from working:

(1) for first stage pneumoconiosis, 50 weeks;

(2) for second stage pneumoconiosis, 100 weeks; and

(3) for third stage pneumoconiosis, 300 weeks.[121] Benefits for byssinosis are limited to 50 weeks.[122]

If death results from coal worker's pneumoconiosis or if the employee was totally disabled by coal worker's pneumoconiosis at the time of his death, the employee's dependents are entitled to benefits.[123] Such claims must be filed within three years of the date of death.[124] Such benefits may be paid to a surviving spouse, minor dependents or other legal dependents during such dependency.[125] Benefits to a surviving spouse shall continue until the spouse's death or remarriage.[126] Benefits to minor dependents shall continue until the minor dependents reach the age of 18 or 23 if the dependents remain full-time students.[127] Any claim for compensation of an employee who is totally disabled by coal

[121] Va. Code § 65.2-503(B)(17).
[122] Va. Code § 65.2-503(B)(18).
[123] Va. Code § 65.2-513.
[124] Va. Code § 65.2-513(A).
[125] *Id*.
[126] *Id*.
[127] *Id*.

worker's pneumoconiosis at the time of his death, however, shall be paid only to the extent required by federal law.[128]

The Act sets out certain presumptions for determining whether a death or total disability of an employee was due to pneumoconiosis or any chronic occupational lung disease.[129] If an employee who died from a respiratory disease was employed for ten years or more in an environment where he or she was injuriously exposed to such a disease, then there is a rebuttable presumption that his or her disease arose out of such employment.[130] Likewise, there is a rebuttable presumption that an employee's death or total disability was due to coal worker's pneumoconiosis if the employee became totally disabled from coal worker's pneumoconiosis or if such disease significantly contributed to his or her death or disability.[131] Where there is clear evidence of exposure to an occupational lung disease, the Commission may make its determination whether compensation is payable to the dependents based upon the description of the employee's symptoms, x-rays, and other competent medical evidence and the opinion of experts as whether those symptoms reasonably describe the symptoms of such an occupational disease.[132] The statement as to the cause of death on a death certificate may be considered as evidence in any such cases, but shall not be controlling on the Commission's findings.[133] The Commission may also establish standards, not inconsistent with those prescribed by the Secretary of Labor under the 1969 Federal Coal Mine Health and Safety Act, for apportioning liability for benefits

[128] *Id*.
[129] Va. Code § 65.2-513(B) and (C).
[130] Va. Code § 65.2-513(C)(1).
[131] *Id*.
[132] Va. Code § 65.2-513(C)(2).
[133] Va. Code § 65.2-513(C)(3).

under Va. Code § 65.2-513(C)(3) and under Va. Code § 65.2-504(A)(4) among more than one operator, where such apportionment is appropriate, provided that no apportionment shall operate to deprive an employee of the full benefits due him or her.[134]

In cases of claims for death or total disability under Va. Code §§ 65.2-504(A)(4) and 513, the following matters shall be required or effective only to the extent that they are allowed by the 1969 Federal Coal Mine Health and Safety Act and the regulation issued there under:

(1) notice to the employer under § 65.2-405;

(2) any limitation for the filing of a claim for benefits for death or total disability under §§ 65.2-406 and 601;

(3) waivers as provided under § 65.2-407;

(4) settlements agreed to, allowed, or granted under § 65.2-701; and,

(5) the right of an employer to refuse employment to an applicant or to discharge a claimant because he or she has or is susceptible to coal worker's pneumoconiosis.[135]

Benefits for injuries arising out of pneumoconiosis are not subject to the maximum limitations applicable to other benefits.[136] Therefore, lost wage benefits to injured workers or their dependants may exceed 500 weeks.[137]

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[134] *Id*.
[135] Va. Code § 65.2-514.
[136] Va. Code § 65.2-519.
[137] *Id*.

I. Cost of Living Adjustments

Injured workers receiving temporary total disability or permanent total disability benefits or dependents receiving lost wage benefits may be entitled to periodic cost-of-living adjustments in their compensation rate.[138] Temporary partial disability and permanent partial disability benefits are not subject to cost-of-living adjustments.

An injured worker or a decedent's dependents may receive cost-of-living adjustments if the total disability benefits paid under the Act and any benefits paid under the Federal Old-Age Survivors and Disability Insurance Act (social security) is less than eighty percent of the average monthly earnings of the claimant before disability or death.[139] Injured workers may deduct any monthly amounts paid for Medicare when determining the monthly amount of combined disability benefits.[140]

The Commission requires proof from an employee of the amount, if any, of social security disability benefits before ordering a cost-of-living adjustment.[141]

Cost of living adjustments become effective as of October 1 of each year.[142] The Commission typically determines the cost of living adjustment for each year by July 1.

Cost of living adjustments are compounded annually.[143] Though compounding will increase an employee's compensation rate, the compensation rate can never exceed the

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[138] Va. Code § 65.2-709.
[139] Va. Code § 65.2-709(A).
[140] *Id*.
[141] Va. Code § 65.2-709(B).
[142] Va. Code § 65.2-709(D).
[143] Va. Code § 65.2-709(C).

current maximum compensation rate as established by the Commission for the current year.[144]

There is no statute of limitations on cost-of-living adjustments. Further, Rule 1.2(B), which precludes the awarding of benefits more than ninety days before the filing date of a change in condition application by a claimant, does not apply to request for cost-of-living adjustments.[145]

[144] Va. Code § 65.2-709(D).
[145] Rule 1.2(B).

CHAPTER VII

PERIODS OF LIMITATIONS

A. Injuries

An injured worker has two years from the date of an accident to file a claim for workers' compensation benefits.[1] This filing period is jurisdictional, which means that the Commission may not award benefits if the claim is not timely filed.[2]

Death benefits payable under the Act shall be payable only if:

(1) the death results from the accident;

(2) a Claim for Benefits has been filed within two years of the accident; and,

(3) the claim for death benefits is filed within two years from the date of the death.[3]

The statute of limitations may be tolled in certain situations.[4] Such tolling may occur when the conduct of the employer or insurer operates to prejudice the employee with respect to filing a claim prior to the expiration of the statute of limitations.[5] To establish tolling, an injured worker must prove that:

(1) the employer received notice of an accidental injury;

(2) the employer paid compensation or wages to the employee during incapacity or the employer failed to file the required accident report with the Commission; and,

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[1] Va. Code § 65.2-601.
[2] *Id.*; *see also Barksdale v. H.O. Engen, Inc.*, 218 Va. 496, 237 S.E.2d 794 (1977).
[3] Va. Code § 65.2-601.
[4] Va. Code § 65.2-602.
[5] *Id*.

(3) the employer's conduct prejudiced the employee's rights to file a claim prior to the expiration of the statute of limitations.[6]

If an employee can establish these facts, then the statute of limitations will be tolled for the duration of the period of benefit payment or until the employer files the required accident report.[7]

The Act provides that the rights of an employee are not prejudiced if:

(1) an employer has filed the required accident report with the Commission;

(2) the employee has received after the accident a workers' compensation guide from the Commission; or,

(3) the employee has received a notice of the need to file a claim with the Commission.[8]

If an employer relies upon the notice argument, the notice given to the employee must be in substantially the following form:

NOTICE TO EMPLOYEE

> BECAUSE OF THE ACCIDENT OR INJURY YOU HAVE REPORTED, YOU MAY HAVE A WORKERS' COMPENSATION CLAIM. HOWEVER, SUCH CLAIM MAY BE LOST IF YOU DO NOT FILE IT WITH THE VIRGINIA WORKERS' COMPENSATION COMMISSION WITHIN THE TIME LIMIT PROVIDED BY LAW. YOU MAY FIND OUT WHAT TIME LIMITS APPLY TO YOUR INJURY BY CONTACTING THE COMMISSION. THE FACT THAT YOUR EMPLOYER MAY BE COVERING YOUR MEDICAL EXPENSES OR CONTINUING TO PAY YOUR SALARY OR WAGES DOES NOT STOP THE TIME FROM RUNNING.[9]

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[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*.

Such notices must also include the address and telephone number that the employee can use to contact the Commission.[10]

B. Changes in Condition

Claims by injured workers for additional benefits based upon changes in condition are also subject to periods of limitations.[11] If an injured worker is seeking temporary total disability or temporary partial disability benefits pursuant to a change in condition, then the injured worker has two years from the date compensation was last paid pursuant to an award to file his or her claim for additional benefits.[12] If an employee, however, is seeking permanent partial disability or permanent total disability benefits under a change in condition application, then the employee must file within three years from the date compensation was last paid pursuant to an award.[13] An injured worker may also bring a change in condition application within two years of the date of any surgery the employee undergoes to repair or replace a prosthesis or orthosis due to a compensable injury.[14]

In cases where no lost wage compensation has been paid, the Commission may make an award for permanent partial disability or permanent total disability benefits within thirty-six months from the date of the accident.[15] Arguably, an employee must have filed a

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[10] Va. Code § 65.2-602.
[11] Va. Code § 65.2-708.
[12] Va. Code § 65.2-708(A). Entry of an award only for medical benefits triggers the twenty-four month period of limitations. *Prince William County Sch. Bd. v. Rahim*, 58 Va. App. 493, 508 (Va. Ct. App. 2011)
[13] Va. Code § 65.2-708(A).
[14] *Id.*

[15] Va. Code § 65.2-708(B).

claim for medical benefits within two years for this exception to apply as it is set out in the section dealing with the period of limitations for change in condition applications.

The periods of limitations on change in conditions applications may be extended by twenty-four months in certain cases.[16] Wages paid to an employee for a period not exceeding twenty-four consecutive months are considered the payment of "compensation" for purposes of calculating the periods of limitations in change in conditions situations if:

(1) an employee is physically unable to return to his or her pre-injury work due to the compensable injuries; and,

(2) the employee is provided work within his or her capacity at a wage equal to or greater than his or her pre-injury wage.[17]

This extension, however, only applies in cases where the claimant returns to work for the pre-injury employer.[18] The exception applies to each period of light duty work provided to an employee.[19]

An additional limitation on change in condition applications by employees is found in Rule 1.2 of the Rules of the Virginia Workers' Compensation Commission. This rule provides that the Commission may not award an employee lost wage benefits with a starting date more than ninety days before the date the employee filed his or her change in condition claim with the Commission.[20]

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[16] Va. Code § 65.2-708(C).
[17] *Id*.
[18] *Scott v. Scott*, 16 Va. App. 815, 433 S.E.2d 259 (1993).
[19] *Ford Motor Co. v. Gordon*, 281 Va. 543, S.E.2d 4.03 (2011).
[20] Rule 1.2(B).

C. Incapacity After Permanent Partial Disability

After an employee has received compensation for permanent partial disability, the employee has one year from the date compensation was last paid for permanent partial disability to file an application for compensation for incapacity to work.[21] This limitation period does not apply to change in condition applications filed by injured workers.[22] This limitation period therefore only applies when an injured worker's condition is the same at the beginning and ending period of permanent partial disability.[23] As with change in condition applications, however, the Commission may not award an injured worker benefits beginning more than ninety days before the date of his or her application.[24]

D. Occupational Diseases

For most occupational diseases, an injured worker has two years from the date that the diagnosis of the disease is first communicated to the employee or five years from the date of last injurious exposure during employment, whichever first occurs to file a claim.[25] Communication of the diagnosis of the disease must also include information that the disease is work-related to trigger the start of the limitation period.[26]

The Act, however, provides different limitation periods for specific diseases. These are:

(1) for coal miner's pneumoconiosis, three years from the date of diagnosis as category I/O or greater to the employee or legal representative of the

[21] Va. Code § 65.2-501.
[22] *Armstrong Furniture v. Elder*, 4 Va. App. 238, 356 S.E.2d 614 (1987).
[23] *Id*.
[24] Va. Code § 65.2-501.
[25] Va. Code § 65.2-406(A)(6).
[26] *Garrison v. Prince William County Bd. of Supervisors*, 220 Va. 913, 265 S.E.2d 687 (1980).

employee's estate or five years from the date of last injurious exposure in employment, whichever first occurs;

(2) for byssinosis, two years from the date of diagnosis or seven years from the date of last injurious exposure in employment, which ever first occurs;

(3) for asbestosis, two years from the date of diagnosis;

(4) for symptomatic or asymptomatic infection with human immuno deficiency virus (HIV) including acquired immuno deficiency syndrome (AIDS), two years after a positive test for infection with HIV; and,

(5) for disease directly attributable to the rescue and relief efforts at the Pentagon following the terrorist attack on September 11, 2001, two years from the date of diagnosis.[27]

Certain occupational diseases do not have statutes of limitations. These are:

(1) cataracts of the eyes due to exposure to the heat and glare of molten glass or to radiant rays such as infrared;

(2) epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to pitch, tar, soot, bitumen, anthracene, paraffin, mineral oil or their compounds, products or residues;

(3) radium disability or disability due to exposure due to radioactive substances and x-rays;

[27] Va. Code § 65.2-406(A).

(4) ulceration due to chrome compound or to caustic chemical acids or alkalis and undulant fever caused by the industrial slaughtering and processing of livestock and handling of hides;

(5) mesothelioma due to exposure to asbestos; and,

(6) angiosarcoma of the liver due to vinyl chloride exposure.[28]

If death results from an occupational disease within any of the foregoing periods, a claim must be filed within three years of the date of death.[29] This period is therefore one year longer than the period for deaths due to accidental injures as set in Va. Code § 65.2-601 and pneumoconiosis is expressly excluded from the requirements of § 65.2-601.[30]

In most cases, claims for a change in condition in occupational disease situations, such as an advancement from one stage or category to another, must be filed within three years from the date compensation was last paid for an earlier stage of the disease.[31] Change in condition claims regarding asbestos, however, must be filed within two years from the date of diagnosis of the advanced stage.[32] No change in condition application for an advanced stage of asbestosis may be denied on the grounds that there has been no subsequent accident or exposure.[33]

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[28] Va. Code § 65.2-406(B).
[29] *Id*.
[30] *Id*.
[31] Va. Code § 65.2-406(C).
[32] *Id*.
[33] *Id*.

The foregoing statutes of limitations for occupational disease will be tolled until the employer gives the employee notice in substantially the following form:

NOTICE TO EMPLOYEE

> IN THE EVENT A DIAGNOSIS OF COAL MINERS' PNEUMOCONIOSIS (INCLUDING BLACK LUNG, SILICOSIS, PNEUMOCONIOSIS, COAL WORKERS' PNEUMOCONIOSIS, ROCK DUST, DUST ON YOUR LUNGS OR TERMS OF SIMILAR MEANING) IS COMMUNICATED TO YOU, YOU MAY HAVE A WORKERS' COMPENSATION CLAIM. HOWEVER, SUCH CLAIM MAY BE LOST IF YOU DO NOT FILE IT WITH THE VIRGINIA WORKERS' COMPENSATION COMMISSION WITHIN THE TIME LIMIT PROVIDED BY LAW. YOU MAY FIND OUT WHAT TIME LIMIT APPLIES TO YOUR CLAIM BY CONTACTING THE WORKERS' COMMISSION. THE FACT THAT YOU ARE TOLD THAT YOU HAVE COAL MINERS' PNEUMOCONIOSIS WHICH HAS NOT REACHED THE COMPENSABLE LEVEL UNDER THE GUIDELINES OF THE WORKERS' COMPENSATION COMMISSION OR THAT YOU ARE STILL ABLE TO WORK OR ARE WORKING DOES NOT STOP THE TIME FROM RUNNING OR OTHERWISE RELIEVE YOU OF YOUR DUTY TO FILE YOUR CLAIM WITH THE WORKERS' COMPENSATION COMMISSION.[34]

The notice is also required to include the address and telephone number that the employee may use to contact the Commission.[35] Employers are also required to post and keep posted, in a conspicuous manner, the notice in, on or about the mine operations and in places usually frequented by employees.[36]

[34] Va. Code § 65.2-405(B).
[35] *Id*.
[36] *Id*.

CHAPTER VIII

TERMINATING/MODIFYING LOST WAGE BENEFITS

A. By Agreement

An employee's right to lost wage benefits may be terminated or modified by agreement. This is most often accomplished by the submission of an agreement form signed by both the employee and the employer's representative (generally, the insurer).[1] The agreement form sets out the basis for the termination of lost wage benefits.[2] If an employee returns to work at a wage lower than his or her pre-injury average weekly wage, then the employee may be entitled to temporary partial disability benefits and the parties will be required to also file an additional form starting such benefits.[3] In situations not covered by the agreement forms, the parties may submit stipulations and request the entry of an award based upon the stipulations.

In cases where the employee refuses to sign the agreement form or the employee cannot be located, then the employer or insurer must file an application with the Commission to terminate benefits. Employers and insurers run significant risks if they terminate benefits to an injured worker without the benefit of an agreement form or the filing of an application with the Commission.

B. By Application

In Virginia, an employer or insurer must obtain an employee's consent to termination or modification of lost wage benefits or file an application with the Commission

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[1] *See*, *e.g.*, V.W.C. Form No. 46 (Termination of Wage Loss Award).
[2] *Id*.
[3] *See* V.W.C. Form No. 4A (Supplemental Agreement to Pay Benefits).

for appropriate relief before ceasing payment of lost wage benefits to an injured worker. An employer or insurer may not unilaterally cease payment of lost wage benefits to an injured worker.

If an injured worker refuses to give his or her consent to the termination or modification of lost wage benefits, an employer or insurer must file an application with the Commission seeking the suspension or modification of such benefits.[4] Such applications are strictly reviewed and must satisfy all requirements before the Commission will refer them to the hearing docket.[5] Such applications must:

(1) be filed under oath (requires notary statement);

(2) state that the injured worker has been paid the correct compensation rate as established by prior award (including any cost-of-living adjustments that have been awarded);

(3) state the date through which compensation was last paid (which must be in accordance with Rule 1.4(C));

(4) be filed within two years of the claimant last receiving benefits if filed pursuant to Va. Code § 65.2-708;

(5) be filed with supporting documentation/evidence; and,

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[4] Va. Code § 65.2-708. Under § 65.2-708(A), the statute of limitations is triggered on the last date for which compensation was paid and runs for twenty-four consecutive months. *Gordon v. Ford Motor Co.*, 53 Va. App. 616, 674 S.E.2d 545, *reheaing en banc*, 55 Va. App. 363, 685 S.E.2d 880, *aff'd, Ford Motor Co. v. Gordon*, 281 Va. 543, 708 S.E.2d 846 (2011); *see also Marshalls, Inc. v. Huffman*, 59 Va. App. 117 (Va. Ct. App. 2011). § 65.2-708(C), which operates in conjunction with and extends the limitation of § 65.2-708(A), also functions on an award-by-award basis. *Id*.

[5] *See* V.W.C. Form 5A (Employer's Application for Hearing); *see also* Rule 1.4.

(6) be mailed to the employee and the employee's attorney (if represented).[6]

Appropriate grounds for seeking termination or modification of lost wage benefits include:

(1) the employee's return to pre-injury work;

(2) the employee's release to return to pre-injury work;

(3) the employee's return to light duty work;

(4) the employee's current disability is unrelated to his or her work-related accident;

(5) the employee failed to report to an employer-requested independent medical examination;

(6) the employee refused selective employment within his or her physical capabilities;

(7) the employee failed to cooperate with vocational rehabilitation efforts; and

(8) the employee refused to cooperate with medical treatment.[7]

The Commission may summarily deny an application if the employer or insurer has not paid the injured worker compensation through the date required for filing the application.[8] In most cases, compensation must be paid to an injured worker through the date of filing of the application with the Commission.[9] The exceptions are:

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[6] *Id*.
[7] *Id*.
[8] Rule 1.4(C).
[9] *Id*.

(1) the application alleges that the employee returned to work; in which case, payment shall be made to the date of the return; and,

(2) the application alleges a refusal of selective employment or medical attention; in which case, payment shall be made to the date of the refusal or fourteen days before filing, whichever is later.[10]

Other grounds exist for an employer or insurer to file an application with the Commission seeking the suspension or modification of lost wage benefits to an employee. An employer and insurer may file an application seeking a credit for and/or a change in lost wage benefits due to an employee's failure to report:

(1) any incarceration;

(2) return to employment;

(3) increase in earnings;

(4) remarriage;

(5) change in full-time student status;

(6) fraud; or,

(7) misrepresentation.[11]

In lieu of a credit against future compensation payments, the employer or insurer may bring an action at law against the claimant or the statutory dependents for recovery of the benefits paid.[12]

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[10] Rule 1.4(C)(1) and (2).
[11] Va. Code § 65.2-712.
[12] *Id*.

The failure of an injured worker or statutory dependent to provide the Commission with a current residential address while receiving benefits may also provide a basis for an application seeking the suspension of benefits.[13] A post office box address does not comply with this requirement.[14] Benefits may be suspended until the injured worker or statutory dependent complies with this requirement.[15]

[13] Va. Code § 65.2-711.
[14] *Craft v. Commercial Courier Express, Inc.*, 78 O.W.C 270 (1999).
[15] Va. Code § 65.2-711.

CHAPTER IX

SETTLEMENT

A. Overview

The parties may settle all or any part of a workers' compensation claim.[16] Any settlement, however, requires approval of the Commission.[17] Approval requires a determination by the Commission that settlement is in the best interest of the injured worker or the statutory dependents.[18] The Commission discourages settlements that include general or blanket releases of any and all claims.[19]

Settlements in workers' compensation cases do not become final and binding until approved by the Commission.[20] Even after approval, either side may withdraw their consent to settlement within twenty days of the Order approving the settlement.[21]

B. Settlement Document Requirements

The Commission has established guidelines for submission of settlement documents.[22] The required documents are:

(1) a notarized Affidavit from the claimant;

(2) a Joint Petition signed by the parties;

(3) a proposed Order;

(4) an informational letter from the claimant or the claimant's counsel; and,

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[16] Va. Code § 65.2-701.
[17] *Id*.
[18] *Id*.; *Jocham v. Retired Persons Services, Inc.*, 76 O.W.C. 433 (1997).
[19] *Jocham v. Retired Persons Services, Inc.*, 76 O.W.C. 433 (1997).
[20] *Damewood v. Lanford Brothers Co.*, 29 Va. App. 43, 509 S.E.2d 530 (1999).
[21] *Shields v. Napit Construction Corp.*, 70 O.I.C. 258 (1991).
[22] Rule 1.7

(5) a fee statement, if necessary, endorsed by the claimant and the claimant's attorney.[23]

In addition to the foregoing, the parties need to submit current medical evidence that supports the basis for settlement.[24] If the proposed settlement contemplates an annuity, the Joint Petition must state that the company issuing the annuity is authorized by the State Corporation Commission of Virginia to transact the business of insurance in Virginia and that, in the case of default, the employer or insurer shall remain responsible for payment of the annuity benefits.[25]

The impact of federal benefit programs may need to be addressed in the settlement documents. For example, injured workers receiving or contemplating applying for social security disability benefits may require language in the settlement documents to lessen the impact of any lump sum settlement on future social security disability benefits. Likewise, the settlement documents may need to address Medicare benefits and liens. The necessity of obtaining approval from the federal government of settlements that impact Medicare recipients can delay the Commission's approval of a settlement as the Commission will require that the parties deal with the Medicare issue, if any, before seeking the Commission's approval of the settlement.

C. Settlements Involving Minors or Incapacitated Individuals

Certain lump sum settlements involving minors or incapacitated individuals may require additional steps to ensure the discharge of the minor or incapacitated individual's

[23] *Id*.
[24] Rule 1.7(C)(1).
[25] Rule 1.7(D).

claims.[26] If a minor receives a lump sum payment up to and including $15,000.00, then payment to the parent or natural guardian of the minor, based on the parent or guardian's approval of the settlement, operates as a full and complete discharge of all claims of the minor.[27] Whenever any lump sum payment greater than $15,000.00 is made to a minor or an incapacitated person, however, the payment must be made to the guardian of the property of the minor or the conservator of the incapacitated person, or, if there is none, to some suitable person or corporation appointed by a circuit court as trustee to properly discharge the employer and insurer.[28]

[26] Va. Code § 65.2-525.
[27] Va. Code § 65.2-525(B).
[28] Va. Code § 65.2-525(C).

CHAPTER X

THE STRUCTURE OF THE VIRGINIA WORKERS' COMPENSATION COMMISSION

The Virginia Workers' Compensation Commission oversees and handles workers' compensation claims in Virginia.[1] The Commission is made up of three commissioners appointed by the General Assembly.[2] One of the commissioners is classified as a representative of the employers.[3] One of the commissioners is classified as a representative of the employees.[4] The third commissioner is generally viewed as a neutral or independent commissioner.

The Commission's central office is located in Richmond. There are, however, regional offices located throughout the state. These are located in:

(1) Fairfax;

(2) Manassas;

(3) Virginia Beach;

(4) Roanoke;

(5) Harrisonburg; and,

(6) Lebanon.

As the central office, Richmond is home to:

(1) the Clerk's office;

(2) the Claims Services Department;

(3) the Dispute Resolution Department;

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[1] Va. Code §§ 65.2-200 and 700.
[2] Va. Code § 65.2-200(B).
[3] Va. Code § 65.2-200(D).
[4] *Id*.

(4) the Chief Deputy Commissioner; and,

(5) the Commissioners.

The Commission has appointed deputy commissioners to assist the commissioners in hearing claims.[5] Deputy commissioners are located in Richmond and in the regional offices.

[5] Va. Code § 65.2-201(B).

CHAPTER XI

HEARINGS

If the parties to a workers' compensation claim cannot reach an agreement, contested issues or disputed claims will be referred to the Commission's hearing docket for resolution. The Commission conducts two types of hearings:

(1) on-the-record hearings; and,

(2) evidentiary hearings.

The Commission also offers free mediation services that may be requested prior to a hearing. In 2013, the Commission also launched an Alternative Dispute Resolution pilot program for change in condition applications, which yielded successful results. The program is expected to continue and expand to cover initial claim for benefit applications and other contested issues.

A. On-The-Record Hearings

Cases that involve facts that are not in dispute or where one or both parties request it may be referred for an on-the-record determination.[1] Examples of issues that may be referred for an on-the-record hearing are:

(1) average weekly wage;

(2) closed periods of disability;

(3) change in treating physicians;

(4) contested medical issues including bills;

(5) permanent disability ratings;

[1] Rule 1.9.

(6) return to work;

(7) failure to report incarceration, change in address or return to work; and,

(8) attorney fee disputes.[2]

If the Commission determines that material issues of fact are in dispute or that oral testimony will be required to resolve the dispute, then the claim or issue will be referred to the evidentiary hearing docket.[3]

On-the-record hearings are generally conducted by a review of the file and any submissions by the parties. If a claim or issue is referred for an on-the-record hearing, the Commission will send written notice to the parties of the Commission's selection of the claim or issue for such a determination. The notice will set out a schedule for submission of any additional evidence or argument that the parties wish to submit to the Commission. No testimony is taken as witnesses are not called. In some cases, the Commission may request a personal appearance or telephone conference call with the parties in an effort to bring about an agreed resolution of the claim or issue.[4] The Commission will render a written decision on the issue or claim once the record has closed. As with any "hearing" decision, either party may request a review within thirty days of receipt of the decision.[5]

B. Evidentiary Hearings

If an issue or claim is not suitable for an on-the-record hearing, then the issue or claim is referred to the Commission's evidentiary hearing docket. A commissioner or

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[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] Va. Code § 65.2-705.

deputy commissioner may preside at the hearing.[6] The commissioners and deputy commissioners have the power to administer oaths to witnesses, to compel the attendance of witnesses at hearings, to compel the production of documents and to punish for contempt.[7]

Evidentiary hearings, as the name implies, involve the taking of evidence. Witnesses are therefore generally called to testify and a record is made of their testimony.[8] Though health care providers can be called to testify at evidentiary hearings, the general practice is that their testimony is presented by way of their medical records, by deposition testimony prior to the hearing or by answers to interrogatories prior to the hearing. Evidentiary hearings are public proceedings.[9]

Hearings are generally set for a total of thirty minutes though additional hearing time may be requested. The Commission is not bound by statutory or common law rules of pleading or evidence nor by technical rules of practice.[10]

If desired, a party may conduct discovery prior to a hearing.[11] Specific forms of discovery provided for in the Commission's rules include:

(1) subpoena *duces tecum*;

(2) depositions;

(3) interrogatories;

(4) requests for admissions; and,

(5) production of wage information.[12]

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[6] Va. Code §§ 65.2-201(A) and 704(A).
[7] Va. Code § 65.2-201(A) and (C).
[8] Rule 2.2.
[9] Va. Code § 65.2-704(C).
[10] Rule 2.2.
[11] Rule 1.8.

The Commission may approve other forms of discovery and may limit discovery if the Commission finds that a party's discovery requests are unreasonably cumulative, duplicative, expensive or if the requests were not timely made.[13]

Failure to respond to discovery requests may lead to sanctions.[14] Sanctions may include:

(1) rejection of a pleading including, but not limited to, all or part of a claim or defense;

(2) exclusion of evidence; and,

(3) dismissal of a claim or application.[15]

Once the record has closed following an evidentiary hearing, the commissioner or deputy commissioner will issue a written opinion setting out his or her decision.[16] A party dissatisfied with the opinion may request a review of the opinion within thirty days of the date of the opinion.[17]

C. Costs

An employer or insurer may be assessed costs by the Commission if the Commission determines that any proceedings in the Commission have been brought, prosecuted or defended without reasonable grounds.[18] The costs may include the entire cost of the

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[12] *Id*.
[13] Rule 1.8(B).
[14] Rule 1.8(K) and Rule 1.12.
[15] Rule 1.12.
[16] Va. Code § 65.2-704(A).
[17] Va. Code § 65.2-705(B).
[18] Va. Code § 65.2-713(A).

proceeding and a reasonable attorney's fee to the opposing counsel.[19] If the Commission finds that an employer or insurer has filed an application in bad faith, it may assess against the employer or insurer an amount up to ten percent of the total amount of benefits due the claimant between the period that benefits should have been paid and the date of any award.[20] This penalty is in addition to any cost fees or other awards approved by the Commission.[21]

[19] *Id*.
[20] Va. Code § 65.2-713(C).
[21] *Id*.

CHAPTER XII

APPEALS

A. Review by Commission

Once a commissioner or deputy commissioner renders his or her opinion, any party may request a review by the Commission.[1] If one party files an application or request for review with the Commission, then the opposing party has fourteen days in which to make its own independent application or request for review.[2]

A request for review must be filed with the Commission within thirty days of the date of issuance of the hearing decision.[3] Such requests, if timely made, are as a matter of right.

Reviews are conducted by the three commissioners.[4] This is often referred to as a review by the "full Commission."[5] A deputy commissioner may participate in the review if a commissioner presided at the hearing or is absent.[6]

Requests for review must be in writing.[7] A request for review should assign specific findings of fact and conclusions of law by the hearing commissioner as errors.[8] Failure of a party to assign a specific error in its request may be deemed by the Commission to be a waiver of the party's right to further argue that error.[9] The Commission, however, may on

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[1] Va. Code § 65.2-705.
[2] Va. Code § 65.2-705(C).
[3] Va. Code § 65.2-705(A).
[4] *Id*.
[5] *Id*.
[6] Va. Code § 65.2-704(B).
[7] Rule 3.1.
[8] *Id*.
[9] *Id*.

its own motion address any error and correct any decision on review if such action is considered to be necessary for a just determination of the issues.[10] The requesting party must furnish a copy of the request for review to the opposing party.[11]

The request for review should also include, if desired, a request for oral argument before the Commission.[12] If the request for review does not include such a request, the review will proceed on the record only.[13] Even if a party requests oral argument, the Commission may not schedule oral argument if it does not consider oral argument necessary or of probable benefit to the Commission in adjudicating the issues.[14] As a practical matter, most reviews are conducted on the record without oral argument.

Following receipt of a request for a review and preparation of a transcript of the hearing testimony, if requested, the Commission will issue a schedule for submission of written statements from each party.[15] No new evidence may be introduced by a party at the time of review except upon agreement of the parties or by permission of the Commission in response to a petition to reopen or receive after-discovered evidence from a party during the request for review period.[16] Such petitions will only receive favorable consideration from the Commission when it appears to the Commission that reopening the hearing or receiving after-discovered evidence is absolutely necessary and advisable and also only when the party making the request is able to establish that:

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[10] *Id*.
[11] *Id*.
[12] Rule 3.4.
[13] *Id*.
[14] *Id*.
[15] Rule 3.2.
[16] Rule 3.3.

(1) the evidence was obtained after the hearing;

(2) that the evidence could not have been obtained prior to the hearing through the exercise of reasonable diligence;

(3) that the evidence is not merely cumulative, corroborative or collateral; and,

(4) the evidence is material and should produce an opposite result before the Commission.[17]

Once the parties have filed their review statements and any oral argument has been held, the Commission will review the evidence and subsequently issue a written opinion, which will be filed with the record of the proceedings.[18] Any party dissatisfied with the Commission's ruling may appeal the decision to the Court of Appeals of Virginia.[19]

B. Appeals to the Court of Appeals of Virginia

Any party may appeal a decision of the full Commission to the Court of Appeals of Virginia.[20] As with requests for review by the full Commission, an appeal to the Court of Appeals of Virginia is as a matter of right. Appeals to the Court of Appeals of Virginia may only be taken from final decisions by the full Commission and not from decision of a deputy commissioner or single commissioner.[21] Appeals in cases in which the full Commission has remanded certain issues to a deputy commissioner for further determination generally will not be permitted.

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[17] *Id.*; *see also Pollard v. First General Services*, 77 O.W.C. 259 (1998).
[18] Va. Code § 65.2-705(A).
[19] Va. Code § 65.2-706.
[20] Va. Code § 65.2-706(A).
[21] *Id*.

If a party intends to appeal a decision of the full Commission to the Court of Appeals of Virginia, the party must file its notice of appeal with the clerk of the Commission within thirty days of the date of the Commission's decision.[22] A copy of the notice of appeal must also be filed with the clerk of the Court of Appeals.[23] In addition to containing the names, addresses and telephone numbers of the parties and their counsel, the notice of appeal must state whether the appealing party challenges the sufficiency of the evidence to support the findings of the Commission if it wishes the Commission to prepare a transcript of any hearing.[24] A party must also pay a filing fee at the time it files a copy of the notice of appeal with the clerk of the Court of Appeals.[25] This filing fee, however, may be waived for indigent claimants.[26]

A party filing a notice of appeal must simultaneously file with the Commission an appropriate appeal bond.[27] Like the filing fee, however, the appeal bond requirement may be waived for indigent claimants.[28]

Once a party files a notice of appeal with the Commission, the Commission prepares the record for transmission to the Court of Appeals.[29] The Commission is to transmit the record within thirty days of the filing of the notice of appeal.[30]

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[22] Va. Code § 65.2-706.
[23] *Id*.
[24] Rule 5A:11(b) and (c) of the Rules of the Supreme Court of Virginia.
[25] Rule 5A:11(b).
[26] Va. Code § 17.1-606.
[27] Rule 5A:16(a).
[28] Va. Code §§ 8.01-676.1(N) and (O).
[29] Rule 5A:11(c) and (d).
[30] Rule 5A:11(d).

Appeals in the Court of Appeals are more formal than reviews before the Commission. If a party fails to meet certain deadlines and filing requirements, the appeal may be dismissed.

The standard of review on appeal is often difficult for an appealing party to overcome. Findings of fact by the Commission, if supported by credible evidence, are binding on appeal.[31] The appellate court will further view the evidence in the light most favorable to the party prevailing before the Commission.[32] The appellate court will also not retry the facts, reweigh the preponderance of the evidence or make its own determinations of the credibility of the witnesses.[33]

C. Appeals to the Supreme Court of Virginia

If a party is still dissatisfied with an award after a determination or rehearing by the Court of Appeals of Virginia, a party may petition for appeal to the Supreme Court of Virginia. Any party wishing to appeal from a determination by the Court of Appeals of Virginia must file a Notice of Appeal with the clerk of the Court of Appeals within thirty days after entry of the final judgment or order denying a rehearing.[34] Such appeals are not as a matter of right and are reserved for cases involving:

(1) substantial constitutional questions as a determinative issue; or,

(2) matters of significant precedential value.[35]

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[31] *Connor v. Bragg*, 203 Va. 204, 123 S.E.2d 393 (1962).
[32] *Barnes v. Wise Fashions*, 16 Va. App. 108, 428 S.E.2d 301 (1993).
[33] *Westmoreland Coal Co. v. Russell*, 31 Va. App. 16, 520 S.E.2d 839 (1999).
[34] Rule 5:14(a) of the Rules of Supreme Court of Virginia.
[35] Va. Code § 17.1-410(b); *see also* Rule 5:17(c).

Consequently, the Supreme Court of Virginia does not hear many workers' compensation appeals.

Appeals to the Supreme Court of Virginia involve additional petition and briefing requirements, but the same standards of review apply (*i.e.*, factual findings of Commission binding on appeal).

D. Interest on Review or Appeal

An appeal by an employer creates a suspension of the Commission's award such that an employer is not required to make a payment pursuant to an award during an appeal.[36] If an award is affirmed on appeal, however, then the employer must pay interest on the benefits delayed.[37] The applicable interest rate as of 2013 was six percent.[38]

[36] Va. Code § 65.2-706(C).
[37] Va. Code § 65.2-707.
[38] Va. Code § 6.2-302

CHAPTER XIII

REQUIRED FILINGS

A. Insurance Information

Every employer required to have workers' compensation insurance must file annually or as often as requested evidence of its workers' compensation insurance or status as an authorized self-insurer.[1] Insurers may file this required notice on behalf of insureds.[2] Employers and insurers must also notify the Commission of the cancellation of any workers' compensation insurance.[3] An insurer may not cancel a policy without giving the Commission and the employer thirty days notice unless the employer has already obtained other insurance and the Commission is notified by the new insurer of coverage.[4] If cancellation of a policy is for the nonpayment of premiums, however, then an insurer need only give ten days notice to the employer and Commission.[5]

B. Reports of Accidents

Within ten days of notification of an accidental injury or death, an employer or insurer must file with the Commission a report of the injury or death. [6]

C. Agreement Forms

If an agreement is reached regarding an injured worker's entitlement to workers' compensation benefits, an award must be filed with the Commission.[7] Additional Award Agreement must also be filed with the Commission.[8]

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[1] Va. Code § 65.2-801(A)(1); *see also* Rule 7.1 and Form 45F.
[2] Va. Code § 65.2-804(A)(1).
[3] *Id*.
[4] Va. Code § 65.2-804(B).
[5] *Id*.
[6] Va. Code § 65.2-900(A).

D. Medical Records

Parties must promptly provide copies of the records to the opposing party.[9] Unless otherwise directed, parties are also required to file medical records relating to a claim with the Commission once a hearing request is filed.[10]

E. Penalties for Failure to Make Required Filings

Employers and insurers are subject to numerous penalties if they fail to make required filings with the Commission. These penalties include:

(1) for failure to obtain workers' compensation insurance or file notice of such insurance with the Commission – a fine of not less than $500.00 and not more than $5,000.00;[11]

(2) for failure to file reports of injuries or accidents with the Commission – a fine up to $500.00 for each failure or a fine between $500.00 and $5,000.00 if the Commission finds that any such failure is willful;[12]

(3) for failure to file agreement forms with the Commission within fourteen days of being signed by the parties – a fine up to $1,000.00;[13] and,

(4) for failure to file required medical records – a fine up to $500.00 for each failure or a fine between $500.00 and $5,000.00 if the Commission finds that any such failure is willful.[14]

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[7] Va. Code § 65.2-701(A); *see also* Rule 4.1.
[8] Va. Code § 65.2-701(A).
[9] *Id*.
[10] Rule 4.2 of the Rules of the Virginia Workers' Compensation Commission.
[11] Va. Code § 65.2-805(A). Such failure may also waive certain defenses of an employer to a civil action brought by an injured employee for his or her injury.
[12] Va. Code § 65.2-902(A).
[13] Va. Code § 65.2-701(B). Other sanctions are also permitted.

[14] Va. Code § 65.2-902.

CHAPTER XIV

RESOURCES

A. Virginia Workers' Compensation Commission

Address: 1000 DMV Drive
Richmond, Virginia 23220

Telephone: 1-877-664-2566
Facsimile: (804) 367-9740

B. The Virginia Workers' Compensation Act Annotated

This is a publication of the Commission. The Commission publishes an updated version each Fall. Copies may be obtained directly from the Commission.

C. Website for Virginia Workers' Compensation Commission

http://www.vwc.state.va.us/

This is a useful website. In addition to containing updates and a searchable database of opinions, it provides for electronic filing of accident reports and claims for benefits.