

# Strategies for Defense of Workers' Compensation Claims

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# Strategies for Defense of Workers' Compensation Claims

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## Introduction

This presentation provides an introduction to some important strategies for defense of claims under the Virginia Workers' Compensation Act and associated legal issues. A white paper by Raymond L. Hogge, Jr., *Strategies for Defense of Workers' Compensation Claims* (July 14, 2015) (available upon request from Ray Hogge), provides a more detailed discussion of these strategies and issues. Neither this presentation nor the white paper are intended as comprehensive examinations of the topic, or as legal advice.

# Strategies for Defense of Workers' Compensation Claims

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## No Coverage

- Fewer than 3 employees
  - Fewer than 3 working in Virginia
  - Employer has burden of proof
  - Does not apply if employer's established mode of operating business regular requires at least 3 employees

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## No Coverage

- Casual Labor
  - Workers who perform work not normally performed by employer

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## No Coverage

- Domestic Servants
- Certain Farm Laborers
- Others

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## No Employment Relationship

- Employee v. Independent Contractor
- Considerations
  - Power to direct and control - most important
  - Right to hire
  - Power to discharge
  - Obligation to pay wages
- Written Independent Contractor Agreement
  - Useful but not controlling

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## No Employment Relationship

- Statutory Employers and Employees
  - Owner / contractor may be statutory employer of workers employed by subcontractor
  - Test: Is subcontracted work part of trade, business or occupation of owner / contractor?
  - Important because
    - Owner / contractor can be liable for comp if subcontractor not insured
    - Exclusivity shields owner / contractor from tort

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## Employee Borrowed by Special Master

- Borrowed Employee Doctrine
- Important between contractor and subcontractor; important in employee leasing
- Company that transfers worker is “general master” of worker; Company that “borrows” worker is “special master” of worker
- Only special master is liable for workers' compensation



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## Employee Borrowed by Special Master

- Factors Determining Whether Borrowed
    - Who has control over the employee and the work he is performing - most important factor
    - Whether the work is that of the borrowing employer
    - whether there was an agreement between the original employer and borrowing employer
    - whether employee acquiesced in new situation
- (continued...)

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## Employee Borrowed by Special Master

- Factors Determining Whether Borrowed (...continued)
  - Whether original employer terminated relationship with employee
  - Who is responsible for furnishing work place, work tools, and working conditions
  - Length of the new employment
  - Who had right to discharge employee
  - Who required to pay employee

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## Employee Borrowed by Special Master

- Case Study: *Liberty Mutual Ins. Corp. v. Herndon*, 59 Va. App. 544 (2012)

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## **Compensability Must Be Proven**

Claimant must prove an “injury by accident”  
“arising out of” and “in the course of” the  
employment

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## Accident

- For injury by accident, claimant must prove:
  - (1) an identifiable incident
  - (2) that occurs at some reasonably definite time;
  - (3) an obvious sudden mechanical or structural change in the body; and
  - (4) a causal connection between the incident and the body change

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## Accident

- Gradual Onset
  - Gradual onset of symptoms usually do not establish accident
    - Example: Gradual onset of low back pain while working does not establish accident
    - Example: Lumbar strain resulting from prolonged sitting and occasional bending does not establish accident

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## Accident

- Gradual Onset
  - Onset of symptoms over a short time period can establish accident depending on nature of injury
  - Example: Accident proven where employee suffered chilblains caused by working in cold walk-in freezer for 4 hours

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## Accident

- Psychological Injuries
  - To prove accident, must be causally related to
    - (a) physical injury, or
    - (b) obvious sudden shock or fright arising in the course of employment
  - Ordinary disagreements and conflicts with supervisory personnel not sufficient
  - Post Traumatic Stress Disorder - may be compensable depending on circumstances



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## Arising Out of the Employment

- “An injury arises out of the employment when there is a causal connection between the claimant’s injury and the conditions under which the employer requires the work to be performed.”

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## Arising Out of the Employment

- Virginia follows “**actual risk**” test.
  - Injury must be a “result of the exposure occasioned by the nature of the employment.”
- Virginia does not follow “positional risk” test.
  - Not sufficient that the job put the claimant in a position to be injured.
  - In effect, this only requires that the injury arise in the course of the employment.

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## Arising Out of the Employment

- Actual Risk Test - “Common to the Neighborhood”
  - Virginia Supreme Court stated that “the causative danger must be peculiar to the work and not common to the neighborhood.”
  - Many cases interpreted this as meaning a danger must not be one to which the public is exposed.
  - But...

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## Arising Out of the Employment

- Actual Risk Test - “Common to the Neighborhood”
  - In *Liberty Mutual v. Herndon* (2012) the Va. Ct. App. appeared to reject that interpretation.
  - Court stated: “It matters not that the risk is common to the neighborhood ..., as long as the injury can fairly be traced to the employment as a **contributing cause.**”
  - Caution: The “common to the neighborhood” language continues to appear in decisions.

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## Arising Out of the Employment

- Actual Risk Test - “Common to the Neighborhood”
  - Actual risk test now should be understood as requiring the risk to be one to which the employee would not have been equally exposed apart from the employment.
  - Example: Stairs
    - Tripping on stairs at work compensable only if the stairs present an “enhanced risk” compared to stairs walked by other people on and off the job

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## Arising Out of the Employment

- Actual Risk Test - “Street Risk Rule” Exception
  - Motor vehicle accidents caused by ordinary street risks are compensable

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## Arising Out of the Employment

- Actual Risk Test - Unexplained Falls
  - Claimant must prove the cause of a fall to prove it arose out of the employment.
  - Claimant who has no memory of accident often cannot prove cause of fall unless other witness observed it.

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## Arising Out of the Employment

- Actual Risk Test - Unexplained Falls
  - Circumstances can provide proof that cause of fall was risk of employment.
    - *Liberty Mutual v. Herndon* (Va. Ct. App. 2012): unexplained fall from 2d floor of building under construction: circumstances sufficient.
    - *Hersl v. United Airlines* (Va. Ct. App. 2014): unexplained fall from back of pickup truck: circumstances not sufficient.



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## Arising Out of the Employment

- Actual Risk Test - Ideopathic Falls
  - Fall caused by preexisting personal disease of employee.
  - Effects compensable if employment places employee in position of increasing dangerous effects of fall - fall from height; fall near machinery; fall from moving vehicle.

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## Arising in Course of the Employment

- “An accident occurs in the course of employment when it takes place within the period of employment, at a place where the employee may be reasonably expected to be, and while he is reasonably fulfilling the duties of his employment or is doing something which is reasonably incidental thereto.”

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## Arising in Course of the Employment

- “An employee is deemed to be within the course of employment for a reasonable period while he winds up his affairs.”
- “In the majority of cases, a reasonable period will be the time it takes to gather personal belongings or to pick up a pay check.”

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## Arising in Course of the Employment

- Deviation from Employment
  - If deviation is significant and for personal reasons: does not arise in course of employment
  - If deviation is insignificant or not for purely personal reasons: arises in course of employment

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## Arising in Course of the Employment

- Coming and Going
  - Usually not in course of employment if employee going to work or coming from work.
  - Can be in course of employment where
    - Employer provides means of transportation
    - Employer pays for time
    - Employer provides sole means of ingress and egress

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## Arising in Course of the Employment

- Personal Comfort Doctrine
  - If employee charged with any employment-related duty, then injury can arise in course of employment where it occurs while employee is resting, using restroom, or eating.

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## Arising in Course of the Employment

- Advanced Intoxication
  - “An employee may abandon his employment by reaching an advanced state of intoxication which renders the employee incapable of engaging in his duties.... Any injuries thereafter suffered are not in the course of the employment.”
  - Does not apply where “an intoxicated employee continues actively to perform his duties.”
  - Different than statutory intoxication defense.

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## Suicide

- *Food Distributors v. Estate of Ball* (Va. Ct. App. 1997): Suicide held compensable under doctrine of compensable consequences.
- *Amoco Foam v. Johnson* (Va. S. Ct. 1999): Consequence of a compensable consequence not compensable.
- *John Paul Plastering v. Johnson*: (Va. S. Ct. 2003): Suicide not compensable unless a direct result of a compensable injury - hard to prove.



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## **Willful Misconduct (Virginia Code 65.2-306)**

- Affirmative Defense
- Procedure Requirement - VWCC Rule 1.10:
  - “If the employer intends to rely upon a defense under § 65.2-306 of the Act, it shall give to the employee and file with the Commission no less than 15 days prior to the hearing, a notice of its intent to make such defense together with a statement of the particular act relied upon as showing willful misconduct.”

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## Willful Misconduct (Virginia Code 65.2-306)

- Intentional Self-Inflicted Injury
  - A form of willful misconduct

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## Willful Misconduct (Virginia Code 65.2-306)

- Intoxication
  - Fact of intoxication not enough
  - Employer must prove causal link between intoxication and injury
  - Employer need only prove intoxication was a contributing cause; not sole cause

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## Willful Misconduct (Virginia Code 65.2-306)

- Intoxication
  - Statutory Presumption of Intoxication
    - Applies where amount alcohol or drug exceeds specified limits
    - Post-accident drug and alcohol testing crucial
    - Can be rebutted by clear and convincing evidence

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## Willful Misconduct (Virginia Code 65.2-306)

- Safety Appliances
  - “No compensation shall be awarded to the employee or his dependents for an injury or death caused by the employee’s willful failure or refusal to use a safety appliance.”

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## Willful Misconduct (Virginia Code 65.2-306)

- Safety Rules
  - “No compensation shall be awarded to the employee or his dependents for an injury or death caused by the employee’s willful breach of any reasonable rule or regulation adopted by the employer and brought, prior to the accident, to the knowledge of the employee.”

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## Willful Misconduct (Virginia Code 65.2-306)

- Safety Rules
  - Employer must prove
    - (1) the safety rule was reasonable
    - (2) the rule was known to the employee
    - (3) the rule was for the employee's benefit, and
    - (4) the employee intentionally undertook the forbidden act.

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## Willful Misconduct (Virginia Code 65.2-306)

- Safety Rules
  - Not necessary for employer to prove the employee purposefully decided to violate the rule, only that, knowing the safety rule, the employee intentionally performed the forbidden act.
  - Proof of negligence or even gross negligence by the employee, is not sufficient.



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## Willful Misconduct (Virginia Code 65.2-306)

- Safety Rules
  - Employee may rebut defense by showing the rule was not kept alive by bona fide enforcement or that there was a valid reason for his inability to obey the rule.
    - “Proof of a pattern or practice of failing to discipline employees guilty of willful violations of a safety rule defeats the defense afforded an employer by Code § 65.2-306] when such violations occur under circumstances charging the employer with knowledge and acquiescence.”

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## Willful Misconduct (Virginia Code 65.2-306)

- Refusal of Vocational Rehabilitation
  - “The unjustified refusal of the employee to accept medical service or vocational rehabilitation services when provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless, in the opinion of the Commission, the circumstances justified the refusal.”

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## **Exclusive Remedy Doctrine**

- An employee is precluded from bringing a common law tort action against an employer for injuries or illnesses covered by workers' compensation.

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## Exclusive Remedy Doctrine

- Compensability Does Not Determine Exclusivity - *Giordano v. McBar Industries, Inc.*, 284 Va. 259 (2012).

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## Exclusive Remedy Doctrine

- Strangers to the Business
  - Exclusivity does not apply to a common law action for an employee's injury against a party who is a "stranger to the business."

We hope you found this presentation useful.  
Please contact us if we can be of assistance to you  
in any workers' compensation matter.

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