VAN BUREN AND ITS PROGENY
What is One Piece of Work and
What is an Injury by Accident?

TIMELINE

Aistrop v. Blue Diamond Coal Co., 181 Va. 287 (1943)

Claimant's estate filed a wrongful death action alleging the claimant was exposed to fumes. The employer alleged that a negligence action was barred by the workers' compensation statute. The trial court agreed and dismissed the case. The Supreme Court of Virginia reversed the trial court and remanded the case because there was no determination as to whether the death, "…was due to the sudden inhalation of gas on a particular occasion and at a particular time which can be fixed with reasonable certainty so as to exclude the common-law remedy…." Id. at 295.

This is one of many cases that cite to a 1912 Harvard Law Review Article that followed the decisions of English Courts to deduce that the injury must be received at a particular time, in a particular place, by a particular accident. Bohler, A Problem in the Drafting of Workmen's Compensation Acts, 24 Harvard Law Review 328 (1912).

The article indicated that the two reasons for the injury by accident definition were:

1. To give notice to the employer so they can investigate the injury and protect themselves from fraud; and
2. So the last employer does not incur the burden of pensioning worn out workers.

Id. at 293.

Bradley v. Phillip Morris, 1 Va. App. 141 (1985)

The claimant was moving heavy barrels and scrap metal for several hours in the morning. During his lunch break he felt pain in his back. The Court of Appeals stated, 'We do not understand the term "identifiable incident" to mean an event or activity bounded with rigid temporal precision. It is rather, a particular work activity which takes place within a reasonably discrete time frame. In the claimant's case the work activity consumed approximately three hours; his effort in moving the barrels was performed separate and apart from his other regular duties. His activity was an "identifiable incident that occurs at some reasonable definite time."' Id. At 145 (citation omitted).

This and following Court of Appeals cases applied what became known as the "three hour test".

Morris v. Morris, 238 Va. 578 (1989)

Three cases were consolidated; one claimant was lifting cartons for 45 minutes and suffered a heart attack; one claimant was installing panels for 2 ½ hours and suffered a heart attack; and one claimant was unloading steel doors for 1 ½ hours and suffered a cervical disc injury.

The Supreme Court was addressing the Bradley "three hour test". The Supreme Court rejected the "three hour test" and held that '...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….'" Id. at 589.

The Supreme Court cited to the 1912 Harvard Law Review Article from Aistrop.

Was causation the real concern of the Court as opposed to repetitive injury? The Court stated, 'In each of the three cases now before us, the injury made its appearance suddenly "at a particular time and upon a particular occasion" But, as we said in Aistrop, that is not enough. In order to carry his burden of proving an "injury by accident," a claimant must prove that the CAUSE of his injury was an identifiable incident….' Id. (emphasis added).

Merillat Industries, Inc.v. Parks, 246 Va. 429 (1993)

The Court of Appeals had upheld a Commission Compensation Order based on a finding of occupational disease for a torn rotator cuff caused by repetitive movement of the arm. The Supreme Court reversed noting that an occupational disease, "…requires that the condition for which compensation is sought as an occupational disease must first qualify as a disease." Id. at 432.

The Stenrich Group v. Jemmont, 251 Va. (1996)

Claimant alleged that his carpal tunnel syndrome, which resulted from repetitive activity, was a disease rather than an occupational injury and therefore compensable. This stemmed from a string of Court of Appeals cases following the Court of Appeals decision in Merillat in which the claimant's submitted medical opinions that their various conditions were diseases.

The Supreme Court, clearly frustrated with the holdings of the Virginia Court of Appeals stated, "But if there lingers any doubt about this Court's holding in Merillat, we now remove the doubt by saying that job-related impairments resulting from cumulative trauma caused by repetitive motion, however labeled or however defined, are, as a matter of law, not compensable under the present provisions of the Act." Id. at 199.

R & R Constr. Corp. v. Hill, 25 Va. App. 376 (1997)

Claimant began to feel a sore place in his back while moving five to seven five-gallon paint buckets from one place to another in a storage shed.

The Virginia Court of Appeals stated that, "The fact that the claimant did not or could not identify precisely which bucket or buckets he was lifting when the disc or discs herniated does not constitute a failure to prove that an immediate or sudden event or events caused the discs to herniate." Id. at 380. An injury can be caused by one or several sudden events. Id. at 379.

Southern Express v. Green, 257 Va. 181 (1999)

Claimant worked in a beer cooler for approximately four hours during her shift and suffered from chillbains. Justice Kinser wrote the opinion for the Supreme Court. She notes that "injury by accident" was not defined by the General Assembly and therefore subject to judicial interpretation. Id. at 185.

Justice Kinser distinguishes Morris saying the problem for each of the claimant's in Morris was that they, "asserted that the cause of their respective injuries was the particular piece of work that they were performing on the days when the injuries first manifested themselves, BUT EVIDENCE OF CAUSATION, ESPECIALLY MEDICAL EVIDENCE, WAS NOTICEABLY ABSENT." Id. at 187 (emphasis added).

The Supreme Court cited to the 1912 Harvard Law Review article. Id.

Hoffman v. Carter, 50 Va. App. 199 (2007)

Claimant was performing demolition work on plaster walls. After working for three to four hours he noticed a lot of dust in his nostrils and began coughing stuff up. He was diagnosed with chemical pneumonitis.

Following the Green analysis, the Virginia Court of Appeals found that the claimant's exposure to plaster dust was "bounded by rigid temporal precision" and therefore, was an injury by accident. Id. at 214.

Again, the decision appears to revolve around causation, not the repetitive activities. 'In our view, Gale's statement that it "certainly seems" that Carter's condition was related to his exposure to dust is sufficient to prove causation by a preponderance of the evidence.' Id. at 216.

Additionally, is this a return to the Bradley "three hour test"?

Kohn v. Marquis, 288 Va. 142 (2014)

The estate of a police officer filed a negligence action when the police office was killed during training when struck in the head multiple times. The Circuit Court found that the negligence action was barred since the injury was covered by the workers compensation statute.

The Virginia Court of Appeals agreed again relying on the Green analysis.

Van Buren v. Augusta County, 66 Va. App. 441 (2016)

Claimant was working with other emergency personnel moving a 400 pound man from a bathtub. He was involved in a variety of different activities. The Virginia Court of Appeals determined that forty-five minutes provides the necessary rigidity of temporal precision to constitute one event.

The Court indicated that they did not agree with the Commission that Morris controlled the outcome of the case.

The Court noted that although Morris was still valid law, subsequent cases have refined Morris. Namely, R & R Constr. Corp., Green, and Hoffman. Pointing out that the "legislature is presumed to know the decisions of the appellate courts of the Commonwealth and to acquiesce therein unless if countermands them explicitly", the Court determined that the entire rescue undertaken was "one piece of work". Id. at 455.

Kim v. Roto Rooter Services Co., Record No. 1053-16-4 (Va. Ct. App. March 7, 2017)

Claimant was working on a backed up sewer line underneath a movie theater. He was pushing and pulling a hose for about two and a half hours and his knee began to feel sore. The Virginia Court of Appeals distinguished this case from Van Buren, because Van Buren was an "adrenaline-fueled rescue attempt" and that the Court in Van Buren had carved out a "first responder exception." Id. at p. 6.

Again is the real concern causation? Claimant had already finished one shift before receiving the emergency call and was already stiff and tired. He had experienced knee pain the day before. There was a discrepancy as to when he said the pain began. Court noted "As such it is unclear from the record when he actually sustained the injury to his left knee." Id. at p. 8.

Riverside Regional Jail Authority v. Dugger, 68 Va. App. 32 (2017)

Claimant was performing defensive training maneuvers and suffered a torn medial meniscus. The Virginia Court of Appeals says Van Buren was not a first responder exception and that the statement in Kim saying so was dicta and based on an "incorrect assumption". Id. at 43. Would this change the Kim decision?

The Court went on to find that the claimant's four-hour defensive training was sufficiently bound with rigid temporal precision. The Court also found that training maneuvers involved a variety of training exercises and, therefore, were not repetitive. Id.

Daggett v. Old Dominion University/Commonwealth of Virginia, Record No. 0517-18-1 (Va. Ct. App. Sept. 25, 2018)

The claimant was moving smart boards to record tags from the equipment. There was a total of 14 boards, each weighing different amounts. The process took approximately 90 minutes. Near the end of the process he began experiencing burning in his shoulders.

The Virginia Court of Appeals determined that the claimant's activities were repetitive and denied benefits. The Court distinguished the case from Van Buren and Dugger stating that the activities in those two cases were widely varied and not repetitive.

Bandy v. Motor Vehicles/Commonwealth of Virginia, VA00001370700 (Full Commission, November 2, 2018)

Claimant was participating in a defensive tactics course over an eight hour time period. This involved twisting hands and wrists backward and throwing punches at mannequins and another trainee.

The Full Commission determined that the eight hour time period provided the necessary rigidity of temporal precision to constitute one event. Id. at p. 8.

Sclafani v. City of Charlottesville, VA00001340217 (Full Commission, November 29, 2018)

Claimant was the bad guy in a role-playing exercise with a SWAT team. He was taken down in handcuffs throughout the day. During a break for lunch he did not notice any pain. However, during the afternoon session he felt a tweak, and following the afternoon session he began feeling pain.

The Full Commission indicated that the training session provided the necessary rigidity of temporal precision relying on Bandy. Id. at p. 5. They did not differentiate between the morning and the afternoon training sessions.

Department of Motor Vehicles/Commonwealth of Virginia v. Bandy, Record No. 1878-18-2 (Va. Ct. App. April 30, 2019)

The employer appealed the decision, arguing that the injury actually took place during the afternoon session of the training. The Virginia Court of Appeals found that the eight-hour reference was dicta was not essential to the decision. Id. at p. 5.

"The Commission clearly found that the claimant's injury by accident occurred during the punching drills that took place during the afternoon training session, and the record supports that finding." Id. at p. 6.

Judge Russell wrote a concurring opinion indicating that he agreed the Commission's language was dicta, but he felt it was, "…dicta with the potential to cause GREAT MISCHIEF going forward." Id. at p. 7 (emphasis added).

He felt that central to the Courts decision's in Van Buren, Green, and more recently Dugger, was the fact that they suffered non-cumulative injuries "that unquestionably arose from her employment as a result of her participating in a four-hour defensive tactics class that was continuous and uninterrupted." Id. at p. 10.

"In conclusion, the Commission's assertion amounts to a rule allowing a claimant to occurred at some identified point in a full workday that included both risks of the employment and risks of the neighborhood. SUCH AN ASSERTION IS AN INCORRECT STATEMENT OF LAW." Id. at p. 12 (emphasis added).

Alexandria City Public Schools and Alexandria City School Board v. Handel, Va. App (2019), 70 Va. App. 349 (May 14, 2019)

The employer stipulated to injuries to the claimant's right hip, neck, back, right ankle and right knee, but disputed an injury to the head and right shoulder, because, unlike the other injuries, the claimant had failed to prove a sudden mechanical or structural change in her right shoulder.

The Virginia Court of Appeals determined that, "Once an accident is established, any injuries resulting from the accident, even if not connected directly to the sudden mechanical or structural change, are compensable." Id. at 355.

In a section of the decision labeled "Gradually Occurring Injury" the Court reviewed the Morris decision and came to the conclusion that Morris, "…focused on defining what constitutes an, accident, and not on restricting the definition of, injury," Id. at 359.

The employer argued to the Court of Appeals that the injury occurred over an eight-hour time period and, therefore, contrary to the Court of Appeals decision in Bandy.

The Court of Appeals believed that, "…from the record that the Commission assumed but failed to find that Sclafani's testimony established an identifiable incident with sufficient temporal precision." Id. at p. 8. Therefore, they remanded the case for the, "…Commission to make a factual finding consistent with this opinion as to whether Sclafani's injury occurred during the four post-lunch hours of the training." Id.