OVERCOMING THE WILLFUL MISCONDUCT DEFENSE

I. Background

A. Purpose: Provides employers a defense to workers' compensation claims where the injured employee's injuries were caused by:

1. willful misconduct or self-inflicted injury;
2. attempt to injure another;
3. intoxication;
4. willful failure or refusal to use a safety appliance;
5. willful breach of any reasonable rule or regulation adopted by the employer and brought to the knowledge of the employee prior to the accident;
6. use of a nonprescribed controlled substance identified as such in Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1.

Va. Code § 65.2-306 (attached as Exhibit 1)

B. Burden of Proof

1. Generally: the party asserting the willful misconduct defense has the burden of proof. Va. Code § 65.2-306 (B)

   a. Thus, employer and insurer must prove that the claimant was guilty of willful misconduct in order to prevail.

2. What is it that must be proved: Virginia Court of Appeals set forth the elements the defendants must prove in a violation of a safety rule case in Spruill v. C.W. Wright Constr. Co., 8 Va. App. 330, 381 S.E.2d 359 (1989):

   1. the safety rule was reasonable,
   2. the rule was known to the claimant
   3. the rule was for the claimant's benefit
   4. the employee intentionally undertook the forbidden act.

3. Intoxication/Drug Burden of Proof: if defense can show that at time of injury the claimant had an amount of alcohol or drugs in his bodily fluids (i) equal to or greater than standard in Va. Code § 18.2-266, or (ii) a positive drug test result from a SAMHSA certified lab, then there is a REBUTTABLE PRESUMPTION that claimant was intoxicated or using drugs at time of injury. Va. Code § 65.2-306(B).

a. If defendants show claimant has a BAC above 0.08 or tested positive for drugs by a SAMHSA certified lab, then rebuttable presumption claimant was intoxicated or using drugs at time of accident.

b. Presumption can be overcome with evidence presented by claimant. See Intoxication/Drug sections, *infra*.

c. Defendants still must prove causation

4. ***Recent Amendment to Code*** General Assembly passed amendments to Va. Code § 65.306(B) that took effect 7/1/02 in an attempt to make it more difficult for claimants to overcome willful misconduct defenses based on positive intoxication/drug tests but end the presumption in death cases. New language:

The 2002 amendments *added* or ~~deleted~~ language in subsection B as follows:

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

Virginia Code § 65.2-306 (attached as Exhibit 2)

a. There is no rebuttable presumption if the claimant dies from his injuries.

b. In all other cases where the rebuttable presumption is created it must be overcome by <u>clear and convincing evidence</u>.

c. Effect: make it more difficult for a claimant to overcome a positive drug test or BAC result.

5. "Clear and convincing": no cases interpreting or applying or defining "clear and convincing" standard to willful misconduct cases. Thus, look to cases addressing "clear and convincing" in carpal tunnel cases under Va. Code § 65.2-401.

a. Clear and convincing defined as:

> Evidence is clear and convincing when it produces in the fact finder 'a firm belief or conviction as to the allegations sought to be established. It is . . . more than a mere preponderance, but not to the extent of such certainty required beyond a reasonable doubt as in criminal cases. It does not mean clear and *unequivocal*.'
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> Lee Co. School Bd. v. Miller, 38 Va. App. 253, 563 S.E.2d 374 (2002)(quoting Fred C. Walker Agency v. Lucas, 215 Va. 535, 211 S.E.2d 88 (1975)).

b. If relying on expert testimony, need more that "reasonable degree of medical probability." Instead need the expert to use words suggesting the higher standard. Words accepted by the Commission and Court of Appeals as meeting this standard include:

i. "the deciding factor" Lee Co. v. Miller, supra. In a footnote, the Court referenced a dictionary to define the term as the "definitive" or "conclusive" factor.

ii. "most probably" Id. The Court relied upon and cited a dictionary for the definition of "most" as "in or to the highest degree"

iii. "most likely" Buckley v. Kern Motor Inc., VWC File No. 204-61-30 (June 10, 2002).

iv. "high probability" *Staton v. National Fruit Product Co.*, VWC No. 187-30-46 (July 6, 1998), *aff'd sub nom.* National Fruit Product Co., Inc. v. Staton, 28 Va. App. 650, 507 S.E.2d 667 (1998) (*per curiam*), *aff'd mem.*, 259 Va. 271 (2000).

v. "likely" Manley v. Dept. for the Blind & Vision Impaired, VWC File No. 205-75-72 (June 3,2002).

C. Notice: Rule 1.10 of the Rules of the Commission states:

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

1. Old thought: this was simply a technicality with no real "bite." If the employer failed to provide the notice, the Commission would more often than not simply grant a continuance or allow the defendants to proceed regardless.

2. New: A valuable tool for claimants. If the rule is not strictly complied with, the defendants waive the defense.

   a. Lowes of Short Pump Virginia v. Campbell, 38 Va. App. 55, 561 S.E.2d 757 (2002) changed the landscape.