How to Advise Plaintiffs/Claimants About Occupational Disease Claims After The Stenrich Group Case

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I. Occupational Diseases:

A. General background:

Occupational Diseases have been recognized as part of the Workers' Compensation Act since 1944. Prior to that time, only "injury by accident" cases were considered compensable. The initial inclusion of occupational diseases was by way of a specific schedule. In 1969, a General Assembly advisory report recommended the elimination of the schedule because the schedule was likely to have the effect of eliminating diseases not listed. The schedule was repealed by virtue of Legislative amendments in 1970. Thereafter, the Industrial Commission construed the Act to cover occupational diseases and included cumulative trauma disorders in that category. Then, in 1985, the Virginia Supreme Court decided the case of Western Electric Co.,v. Gilliam, 229 Va. 245,329 S.E. 2d 13 (1985), which eliminated coverage for virtually all occupational diseases including those caused by cumulative trauma. In response thereto, in 1986 the General Assembly enacted the modern version of the definition of covered

occupational diseases. The current definition of occupational disease is as follows[1]:

> § 65.2-400, "Occupational disease" defined. - A. As used in this title, unless the context clearly indicates otherwise, the term "occupational disease" means a disease arising out of and in the course of employment, but not an ordinary disease of life to which the general public is exposed outside of the employment.
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> B. A disease shall be deemed to arise out of the employment only if this is apparent to the rational mind, upon consideration of all the circumstances:
>
> 1. A direct causal connection between the conditions under which 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 the employment, nor any condition of the neck, back or spinal column;
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> 5. It is incidental to the character of the business and not independent of the relation of employer and employee; and
>
> 6. It had its origin in a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction. (Code 1950, § 65-42; 1952, c. 603; 1968, c. 660, § 65.1-46; 1970, c. 470; 1986, c. 378; 1991, c. 355.)

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[1] excluding changes effective July 1, 1997 (see Exhibit A hereto).

B. **From Merillat to Stenrich:**

Subsequent to the time of the above 1986 enactment and up until November of 1993, the Workers' Compensation Commission and the Virginia Court of Appeals construed the Act as amended to cover occupational diseases including many cumulative trauma disorders[2]. Then, in November of 1993, the Virginia Supreme court decided the case of Merillat Industries v. Parks, 246 Va. 429, 436 S.E. 2d 600 (1993). Merillat involved a torn rotator cuff sustained by a worker as a result of cumulative trauma. The Virginia Supreme Court indicated in that case that the job related impairments arising from repetitive motion or cumulative trauma were not covered and since there was no evidence that claimant's condition was a "disease", it was not found compensable.

Following Merillat, claimant's attorneys regularly filed cumulative trauma claims as covered occupational diseases, but made sure to have a medical opinion from a physician that the ailment was a "disease". Also, thereafter, the Workers' Compensation Commission found those cases to be compensable. See for example Johnson v. VDO Yazaki Corporation, VWC File No. 162-83-95 (Full

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[2] except those involving the back, neck and spinal column. § 65.2-400 B (4), Virginia Code.

Commission, July 22, 1994) where the Full Commission discusses in detail the impact of Merillat. The Court of Appeals regularly affirmed the Commission's decision in these regards. See for example Perdue Farms, Inc. v. McCutchan, 21 Va. App. 65, 461 S.E. 2d 431 (1995). In fact, the Court of Appeals sometimes found cumulative trauma cases to be compensable occupational diseases even when no medical evidence was presented that the ailment was a disease. See for example Wampler-Longacre, Inc. v. Young, Record No. 1506-95-3, (Va. Ct. of Appeals, November 21, 1995).

Then, in 1996 the Virginia Supreme Court put an abrupt halt to any attempt to pursue claims arising from cumulative or repetitive motion injuries, despite medical evidence that such ailments were diseases. In The Stenrich Group, et al v. Jemmott, Perdue Farms,Inc. v. Martin, and Wampler-Longacre Chicken, Inc., et al v. Biller, 251 Va. 186, 467 S.E. 2d 795 (1996), the Virginia Supreme Court held that physical impairments resulting from cumulative trauma caused by repetitive motion were not compensable under the Act, regardless of the medical evidence.

Partly in response to The Stenrich Group, as well as perhaps due to a recognition of the great injustice being

done to many of Virginia's workers, the Virginia Legislature enacted revisions to the occupational disease statute making carpal tunnel and hearing loss cases compensable, but only upon a showing of clear and convincing evidence. These revisions will be effective July 1, 1997 (see copy of amendment at Exhibit A hereto).

C. **Cases following Stenrich:**

i. **Cases denying coverage.**

As a result of the Virginia Supreme Court opinion in The Stenrich Group case, all occupational disease claims are looked at with greater scrutiny. It is recognized that if an award was previously entered in favor of a claimant and not appealed, even cumulative trauma injuries will remain compensable. See Fieldcrest Cannon, Inc. v. Marshall, Record No. 2567-96-2 (Va. Ct. of Appeals, April 1, 1997) (copy at Exhibit B hereto). But other cumulative trauma injuries, even if not the result of repetitive motion and normally thought to be diseases, may not be compensable. See for instance J.H. Miles v. Guyton, Record No. 2391-96-1 (Va. Ct. of Appeals, April 8, 1997) (copy at Exhibit C hereto) denying a claim for bilateral plantar fascitis;

see Safeway Stores, Inc., v. Brown, Record No. 0635-96-4 (Va. Ct. of Appeals, August 20, 1996) (copy at Exhibit D hereto) denying coverage for digital neuroma; see Allied Fibers v. Rhodes, 23 Va. App.101, 474 S.E. 2d 829 (1996) denying compensability of gradually incurred hearing loss; see Love v. Love Chiropractic Center, VWC File No. 168-10-67 (Full Commission, January 31, 1997) (copy enclosed at Exhibit E hereto) denying compensability for degenerative joint disease in hands; and see United Airlines, Inc., v. Walter, Va. 24 App. 394, 482 S.E. 2d 849 (1997) denying compensability of photosensitivity claim.

ii. **Cases awarding coverage.**

On the other hand, numerous opinions rendered after The Stenrich Group case have found occupational disease claims to be compensable. See Bradshaw v. Olsten,Corporation, VWC File No. 175-12-48 (Full Commission, February 24, 1997) (copy at Exhibit F hereto) finding claimant's ailment of allergic pneumonitis to be compensable; see Webb v. A New Leaf, Inc., VWC File No. 178-92-96 (Full Commission January 31, 1997) (copy enclosed at Exhibit G hereto) awarding benefits for contact dermatitis.

II. Ordinary Diseases of Life:

A. General background:

Certain types of ailments that do not fall directly under the category of occupational diseases, may fall under the category of "ordinary diseases of life" to which the general public is exposed outside of the employment. The definition of a compensable "ordinary disease of life" is as follows[3]:

> § 65.2-401. "Ordinary disease of life" coverage.- An ordinary disease of life to which the general public is exposed outside of the employment may be treated as an occupational disease for purposes of this title if it is established by clear and convincing evidence, to a reasonable medical certainty, that it arose out of and in the course of employment as provided in § 65.2-400 with respect to occupational diseases and did not result from causes outside of the employment, and that:
>
> > 1. If follows as an incident of occupational disease as defined in this title; or
> > 2. It is an infectious or contagious disease contracted in the course of one's employment in a hospital or sanitarium or laboratory or nursing home as defined in § 32.1-123, or while otherwise engaged in the direct delivery of health care, or in the course of employment as emergency rescue personnel and those volunteer emergency rescue personnel referred to in § 65.2-101; or
> > 3. It is characteristic of the employment and was caused by conditions peculiar to such employment. (1986, c.

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[3] also subject to changes effective July 1, 1997 (see Exhibit A hereto).

378, § 65.1-461; 1989, c. 502; 1991, c. 355)

B. **Impact of Stenrich:**

The Virginia Supreme Court reasoning in The Stenrich Group case will have equal application to claims made for benefits for an "ordinary disease of life". However, a number of recent cases also continue to show the viability of ordinary disease of life claims assuming the medical evidence is sufficient. See Marley Mouldings, Inc., v. Rotenberry, Record No. 0755-95-3 (Va. Ct. of Appeals, August 23, 1996) (copy at Exhibit H hereto) finding that the claimant's asthma is a compensable ordinary disease of life; See Mitre Corporation and Home Indemnity Co. v. Gourzis, Record No. 1183-96-2 (Va. Ct. of Appeals, February 25, 1997) (copy at Exhibit I hereto) finding claimant's chemically induced bronchitis to be an ordinary disease of life; See Trostle v. City of Suffolk, VWC File No. 171-94-57 (Full Commission, May 1, 1997) (copy at Exhibit J hereto) finding that claimant's pneumonia was a compensable ordinary disease of life.

III. **Respiratory Disease, Hypertension or Heart Disease:**

A. **General background:**

In 1976, the General Assembly enacted

legislation which created a rebuttable presumption that respiratory disease, hypertension or heart disease suffered by certain public employees were presumed to be covered occupational diseases. The current version of the Act provides coverage for hypertension, respiratory or heart disease to members of a county, city or town police department, salaried or volunteer fire fighters, members of the State Police Officers Retirement System, as well as sheriffs and sergeants and their deputies[4]. § 65.2-402, Virginia Code. In adopting these provisions, the legislature recognized that the cause of cardiopulmonary disease is difficult to establish and that the medical community is somewhat divided on the impact of stress in the work place.

Once the claimant activates the presumption by showing the existence of the ailments in question, the burden of proof shifts from the employee to his employer to rebut the claimant's evidence. City of Waynesboro Sheriff's Department v. Harter, 1 Va. App. 265, 337 S.E. 2d 901 (1985). To rebut the presumption, the employer

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[4] Other coverage is also provided for volunteer or salaried fire fighters. § 65.2-402 C, Virginia Code.

must present competent medical evidence of a non-work-related cause of the disabling disease. County of Amherst Bd. of Supervrs v. Brockman, 224 Va. 391, 297 S.E. 2d 805 (1982).

Recently, in the case of Duffy v. Com./Dept. of State Police, 22 Va. App. 245, 268 S.E. 2d, 702, (1996), one or more of the following Police officers filed claims for wage and medical benefits related to their heart disease. Evidence was presented that their heart disease was caused by one or more of the following: 1) high cholesterol; 2)hypertension; 3) family history of heart disease; 4) diabetes; 5) obesity; and 6) smoking. The Deputy Commissioner concluded that the employer failed to rebut the presumption provided the employees by Code § 65.2-402 and awarded benefits. The Full Commission reversed, holding that the employer was not required to exclude work-related stress to rebut the presumption. The Court of Appeals again reversed, holding that in a case where the evidence demonstrated that multiple factors, including job stress, contributed to the development of heart disease, the employer must exclude work-related stress as a contributing factor to rebut the presumption of causation. If the employer is unsuccessful, the "two causes" rule applies and causation

is established when it is shown that work contributed to the disability.

B. **Impact of Stenrich:**

Also, recently, in the case of Tirpack v. City of Hopewell, VWC File No. 174-25-40 (Full Commission May 1, 1997) it was held that The Stenrich Group case does not apply to § 65.2-402. That statute, while contained in the occupational disease section of the Code, was enacted separately and stands alone.

IV. **Procedure:**

Pursuant to § 65.2-403, Virginia Code, as amended, the occupational disease claims arise as of the time of the communication by a health care provider that claimant has such an ailment and that it is related to his work place. C&P Telephone co. v. Williams, 10 Va. App. 516, 392 S.E. 2d 846 (1990). Furthermore, the claimant or his representative must notify the employer within 60 days after the medical diagnosis is received. § 65.2-405, Virginia Code. With certain exceptions, claimant must then file a claim with the Commission within two years after diagnosis or within five years from the date of last injurious exposure. § 65.2-406, Virginia Code; See also § 65.2-406 B in regards to the exceptions.

V. Lawsuits Against Employers For Injuries Arising Out Of The Work Place:

It is accepted law that when injuries arising out of the work place are covered by workers' compensation, that the injured workers cannot sue the employer for those injuries. Since many injuries normally covered under workers' compensation, including but not limited to repetitive motion or cumulative trauma injuries incurred in the work place are no longer compensable under the Act, claimant's lawyers are looking for creative ways to find remedies for their clients, often against the employer. Recent cases have held such lawsuits permissible. See Middlekauff v. Allstate, Ins., Co., 247 Va. 150, 439 S.E. 2d 394 (1994) (suit for injury from harassment and verbal abuse not barred since gradually incurred injuries are not covered by workers' compensation); Lichtman v. Knouf, 248 Va. 138, 445 S.E. 2d 114 (1994) (suit for intentional infliction of emotion distress not barred since not covered by workers' compensation); Richmond Newspapers v. Hazelwood, 249 Va. 369, 457 S.E. 2d 56 (1995) (suit against employer for goosing not barred since it was personal, not related to his employment and not compensable under workers' compensation.)

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INDEX OF EXHIBITS

I. Mitre Corporation and Home Indemnity Company v. Gourzis, Record No. 1183-96-2 (Va. Ct. of Appeals, February 25, 1997)

J. Trostle v. City of Suffolk, VWC File No. 171-94-57 (Full Commission, May 1, 1997)

K. Tirpak v. City of Hopewell, VWC File No. 174-25-40 (Full Commission, May 1, 1997)