REPORT OF THE

JOINT SUBCOMMITTEE STUDYING THE FEASIBILITY

OF COMPENSATING GRADUALLY-INCURRED, WORK-RELATED INJURIES

UNDER THE VIRGINIA WORKMEN'S COMPENSATION ACT

TO

THE GOVERNOR

AND

THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 20

COMMONWEALTH OF VIRGINIA
RICHMOND
1983

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Report of the
Joint Subcommittee Studying The Feasibility
Of Compensating Gradually-Incurred, Work-Related Injuries
Under the Virginia Workmen's Compensation Act
TO: The Honorable Charles S. Robb, Governor of Virginia
AND

The General Assembly of Virginia
December, 1982

INTRODUCTION

The Joint Subcommittee studying the feasibility of compensating gradually-incurred, work-related injuries under the Workmen's Compensation Act was established pursuant to House Joint Resolution No. 37 of the 1982 General Assemblly. Senate Bill No. 286 introduced by Senator Peter K. Babalas was passed by indefinitely in the Senate Committee on Commerce and Labor as a compromise to the introduction and passage of HJR No. 37 during the 1982 Session.

HOUSE JOINT RESOLUTION No. 37

Establishing a joint committee of the House of Delegates and the Senate to study whether the Virginia Workmen's Compensation Act should be amended so as to include gradually-incurred, work-related injuries as compensable.

WHEREAS, § 65.1-7 of the Code of Virginia defines "injury" and "personal injury" as meaning only injury by accident arising out of and in the course of employment; and

WHEREAS, the Supreme Court of this Commonwealth has interpreted that provision to mean that the injury must occur at a specific time and place; and

WHEREAS, many states include as compensable in their workmen's compensation laws all work-related injuries, whether sudden or gradual; and

WHEREAS, the National Commission on State Workmen's Compensation Laws has stated that workmen's compensation laws should provide broad coverage to employees for work-related injuries; and

WHEREAS, employees in the Commonwelth who have experienced gradually-incurred, work-related injuries have been denied compensation due to the present law; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee is created to study whether the Virginia Workmen's Compensation Act should be amended so as to include gradually-incurred, work-related injuries as compensable.

The joint subcommittee shall consist of seven members, four of whom shall be appointed by the Chairman of the House Committee on Labor and Commerce and three of whom shall be appointed by the Chairman of the Senate Committee on Commere and Labor.

The joint subcommittee shall complete its study and present its findings, conclusions and recommendations to the Governor and the General Assembly not later than December 1, 1982.

The cost of conducting this study shall not exceed $2,000.

Delegate Warren G. Stambaugh of Arlington was elected chairman of the subcommittee. Other members of the House of Delegates appointed to serve were: William T. Wilson of Covington, Frederick H. Creekmore of Chesapeake, and Kenneth E. Calvert of Danville.

Senator Edward M. Holland of Arlington was elected vice-chairman of the subcommittee. Other Senate members appointed to serve were: Frederick C. Boucher of Abingdon and Elliot S. Schewel of Lynchburg.

C. William Cramme', III, Senior Attorney and Hugh P. Fisher, III, Researh Associate of the Virginia Division of Legislative Services served as legal and research staff for the subcommittee. J. Lester Fitzgerald Deputy Clerk of the House Clerk's Office provided administrative and clerical Staff assistance for the study group.

WORK OF THE SUBCOMMITTEE

In an effort to hear as much testimony as possible regarding the feasiblilty of compensating gradually-incurred, work-related injuries under the Workmen's Compensation Act, the joint subcommittee held four meetings during 1982. The meetings were held on September 17, October 18, and November 16.

The subcommittee heard a large amount of oral testimony during their meetings and also received position papers and other written materials from a number of organizations. The following organizations presented oral testimony or written materials to the study subcommittee: the Virginia State AFL-CIO, the Industrial Commission of Virginia, the American Insurance Association, the Virginia Manufacturer's Association, the Virginia Retail Merchants Association, the Virginia Compensation Rating Bureau, the Virginia Trial Lawyers Association, the Virginia Division of Industrial Development, the Virginia Nurseryman's Association, Inc., the Assocaited General Contractors of Virginia, and Old Republic Insurance Company.

Representatives of those organizations discussed at length the over-all issue of whether gradually-incurred, work-related injuries should be compensated through the workmen's compensation system. During the course of the discussion of that issue many questions such as the following surfaced: Is the compensating of such injuries within the scope of the workmen's compensation system? Will the institution of this concept of compensation initiate more litigation? Presently, what is the exact status of the Virginia law? Did Badische and Cogbill change the definition of "injury by accident" and increase the burden that the claimant must carry? How will a change in the statutory law, affording compensation to employees who have developed gradually-incurred, work-related injuries, affect workmen's compensation insurance premium rates?

The proponents for legislating that gradually-incurred, work-related injuries be compensated under the workmen's compensation system pointed out to the study committee that this category of injuries may be as debilitating as those caused by compensable accidental injuries or occupational diseases. In many cases, the connection between performance by the employee of the usual job duties and the disabling condition is equally apparent. They stated to the study committee that to allow work-related injuries to go uncompensated is to defeat the fundamental purpose of worker's compensation. Their representatives argued that all worker's conpensation statutes have been liberally construed in favor of injured employees. They concluded that the purposes behind and objectives of workmen's compensation laws would support the extension of coverage to these injury situations. The opponents to such legislation disputed the proponents' position by stating that the purpose of the workmen's compensation system is to provide compensation for the legitimatley injured worker and his dependents for actual injuries arriving out of and in the course of employment. Unfortunately, the adoption of the gradually-incurred or so called "cumulative injury" concept by a few states have extended workmen's compensation coverage to disibilities resulting from the aging process and the wear-and-tear of the every day life without regard to workplace causation. It was the opponents' observation that this type of legislation has effectively changed workmen's compensation insurance into a supplementary retirement plan. The opponents question whether the employer community should be forced to pay for the normal wear-and-tear of the employees in the community. See Appendices 1 and 2 of this report.

In discussing the status of the Virginia law and whether the Badishe case and the Cogbill case changed Virginia law, the proponents told the joint subcommittee that it was their opinion that these two decisions rendered by the Virginia Supreme Court represent a change in the Virginia Law. See Appendices 3 and 4 for copies of those decisions. The proponents observed that up until two years ago, the Industrial Commission of Virginia, as a general rule, called upon claimants to prove their injuries were caused by their work, and to be reasonably specific about how and when the accident occured. In 1981, the proponents continued, the Virginia Supreme Court imposed much stricter rules in the Badische case. They told the joint subcommittee that this rule was repeated in the Cogbill case decided by the Virginia Supreme Court in March of 1982. The proponents stated that the Industrial Commission, prior to these two decisions would award compensation to an individual who

suffered an injury at work even though the individual could not pinpoint the particular moment at which the "accident" occurred. All that was required was that the worker prove that the injury was caused by work activity during a reasonably specific period. The proponents submitted to the joint subcommittee that the Supereme Court decisions in the Badische and the Cogbill cases, which reversed Industrial Commission awards, impose an unreasonably restrictive interpretation on the definition of the term "injury by accident". The proponents strongly urged the study committee to recommend that a provision be added to the workmen's compensation act which reestablishes the broader definition of "injury by accident" so that the law will be restored to the state it was in prior to the Supreme Court's decisions of 1981 and 1982. The proponents stated that in their opinion that Badische and Cogbill cases make the burden of proof for the claimant increasingly difficult to bear. They observed that a literal interpretation of Cogbill would require an employee to prove within a few hours the time of the accident causing the injury, even though the injury was due to the routine performance of duties. See Appendix 5 to this report.

The opponents told the joint subcommittee that neither they nor other lawyers and persons experienced in workmen's compensation matters believe that the Badische case or the Cogbill case has changed the state of the law in compensating injuries under the workmen's compensation system. They stated that presently there is nothing in those two cases that limit recovery in the manner suggested by the proponents. They stated that the concept of "injury by accident" has remained the same. They pointed out to the study committee that any change to the definition of "injury by accident" would legislate away 70 years of case law precedent. They submitted to the joint subcommittee that the Supreme Court of Virginia, since its decision in the case of Aistrop v. Blue Diamond Coal Company , 181 Va. 287 (1943), has been consistent in its application of the law to workmen's compensation injury cases. The proponents set forth in a memorandum, which is attached as Appendix 6 to this report, that the Supreme Court in its rulings from Aistrop to Badische and Cogbill has not departed from the well established legal standards that it requires in order to prove "accident by injury" under § 65.1-7 of the Code of Virginia.

The joint subcommittee learned from testimony of Commissioners of the Industrial Commission of Virginia that there are differences of opinion within the Commission regarding the issue of whether the Badische and Cogbill cases have changed the state of law. The members of the joint subcommittee expressed their concern regarding this difference of opinion and asked members appearing on behalf of the Commission why they thought the law had or had not been changed. Testimony revealed that since the Cogbill case was decided the Industrial Commission has kept a file on those types of cases in which there are similar injuries, and information in that file indicates that the Industrial Commission has not awarded compensation in six cases a month, on an average over a six month perioid since Cogbill . One commissioner stated that there were no awards in those cases because of the ruling in the Cogbill case. Another Commissioner stated that the recent Supreme Court rulings are not affecting or preventing the Industrial Commission from awarding compensation in injury cases. Both are in agreement, however, that if the law should be changed the Commission would be able to administer the new changes to the system. The proponents for legislative change see this difference of opinion as unfortunate, and stated that it appears that the Supreme Court's decisions have triggered an attitude on the part of the Industrial Commisison that has produced numerous decisions which indicate that the Act will no longer be construed broadly for the benefit of the disabled workers. The opponents to any legislative change stated that it is their belief that the Industrial Commission and the Supreme Court have been consistent in their application of the law to the facts of the cases which appeared before them, and they see no change having been made in the law. The proponents pointed out to the subcommittee that there are presently five cases on their way up to the Supreme Court involving the definition of "injury by accident", and that this study committee may want to monitor those decisions.

In regards to the costs involved in making any statutory changes, the proponents told the subcommittee that it is the intent of the Workmen's Compensation Act to make the costs of industrial accidents an expense of doing business, so that workers do not become destitute when they are disabled at work. They submitted that the employers should bear the cost of industrial accidents in as much as they are best able to spread the risks or costs of such accidents. They acknowledged that a business should bear all the costs which are in the scope of that enterprise because to fail to do so results in improper resource allocation. They observed that benefits are strictly limited and worker's are deprived of their right to sue as a part of the legislative compromise that was made between employers and employees when the Workmen's Compensation Act was enacted. They concluded that the purpose of the workmens's compensation system was to provide compensation to employees who are injured because of their job. They submitted that it is

very costly to the injured employee who is arbituraily excluded from receiving compensation presently because of the Badishe and Cogbill cases.

The opponents stated to the study committee that awards for cumulative or gradually-incurred injuries are very expensive to a workmen's compensation system. The opponents observed that it was never the original intent of the Workmen's Compensation Act to provide compensation for those injuries for which the proponents are seeking compensation. The proponents pointed out to the subcommittee a study made on the California workmen's compensation system, which has accepted the concept of gradually-incurred injury. See Appendix 7 of this report. That report suggests, the proponents stated, that the acceptance of the gradually-incurred concept in that state has extended that state's workmen's compensation coverage to disabilities from the aging process and the wear-and-tear of daily life without regard to workplace causation. It has effectively changed workmen's compensation insurance into a supplementary retirement plan. That study points out that the incidence of cumulative injury claims has increased threefold since 1974, that cumulative injury losses of insured employers for the years 1977 and 1978 are expectd to increase 45%, that older workers are most affected, that 80% of cumulative injury loss dollars are paid for disabilities more common to the aging process than industrial causation and almost all cumulative injury claims are initiated by litigation. They stated that any change made to the Act as suggested by the proponents would most assuredly open up the flood gates for claims for injuries, the causes of which are difficult if not impossible to determine, and for claims for the normal wear-and-tear of the body. This increase in claims, they stated, would require premium rates for workmen's compensation insurance to increase which in turn would increase the cost of and the price of goods.

Testimony concerning costs from the Virginia Compensation Rating Bureau, which was neither in favor of nor against a revision in the Code of Virginia, suggested that costs associated with the workmen's compensation system could increase if the Legislature should liberalize the definition of "injury by accident". See Appendix 8 of this report.

The proponents for legislative change told the joint subcommittee that any change to the statute would not neccessarily cause the increase in litigation. They noted that if changes were made the claimant would still have to bear the burden of proof to show that the injury arose out of and was directly related to the work-place. They stated that the changes that they were suggesting to be made to the statute would merely put the law back to where it was before the Badische and Cogbill cases. They stated that the definition of "injury by accident" has been narrowed by the decisions in those two cases, and that all they are advocating is that changes be made in order to fulfill the original purpose of the Act.

The opponents told the joint subcommittee that in their opinion the proponent's suggestion of eliminating the word "only" and the phrase "by accident" from § 65.1-7 and any of the three draft proposals which are attached to this report as Appendices 9, 10 and 11, would cause a flood of litigation. They stated that the suggested changes would undue 65 years of case law, and would cause the decision maker to redefine the terms of § 65.1-7 and, in the instances of the three drafts, would cause the decision maker to define the meaning of the vague and indefinite words in the drafts. They noted that should such changes be made the out-of-pocket legal expenses of the adversary process would most likely deplete the claimants net benefits, and in some instances amount to more than the expense of medical treatment. See Appendices 7 and 12. The opponents testified that should any of these suggested changes be made, there would be no equitable way to determine which employer should be assigned the responsibility for a particular injury claim without incurring enourmous legal fees and lengthy law suits. They noted that the assignment of the responsiblity is very important to an employer's insurance experience rating. Because of the possible cost and litigation involved should any of these changes be enacted, the opponents noted that potential workers in their 40's and 50's may face major problems in being hired.

In regards, to the issue of whether any change to the statute would affect industrial development in Virginia, the proponents observed that if Virginia is going to try to attract new business then Virignia will also have to provide healthy work conditions for the work environment in order to attract the labor in order to run the new business. It was their opinion that the institution of any of the suggested changes, which would put the law back to where it was before Badische and Cogbill , would not defray a potential employer from moving into the State. On the other hand, the Virignia Division of Industrial Developement stated to the subcommittee that it's concern regarding any changes to the statute is over the ability of Virginia to attract new business. That concern, it was stated, is viewed by potential employers in this State in terms of cost of insurance premiums and

the government's attitudes towards business. It was noted that should a gradually-incurred statute be put on the books in Virginia,potential new employers may view the Commonwealth's attitude towards new business with apprehension. See Appendix 13 of this report.

RECOMMENDATIONS

Because the joint subcommittee finds that it is unable to make any recommendations regarding the feasibility of compensating gradually-incurred, work-related injuries under the Workmen's Compensation Act, it has decided to leave the matter with the General Assembly, and therefore, makes no recommendations.

CONCLUSION

The joint subcommittee expresses its appreciation to all those parties who participated in its study.

The study group would note that its decision to make no recommendation has been offered only after thoroughly reviewing the evidence presented during the meetings.

Respectfully submitted

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Warren G. Stambaugh, Chairman

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Edward M. Holland, Vice-Chairman

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William T. Wilson

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Frederick H. Creekmore

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Kenneth E. Calvert

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Elliot S. Schewel

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Frederick C. Boucher

Appendix 1

Statement by
Julian F. Carper, President
Virginia State AFL-CIO
Workers' Compensation Joint Subcommittee
H. J. R. 37
September 17, 1982

For over 70 years it has been an established principle that workers who are injured on the job cannot simply be discarded with no compensation for their loss. An old Virginia case states: "The damage resulting from an accident is treated as a part of the expense of business and . . . borne as such, as much as the expenses of repairing a piece of machinery which has broken down . . . The blood of the workman (is) a cost of production and the industry should bear the charge." Humphrees v. Bosley Bros., Co., 146 Va. 91.

Over the past year or two, we have been alarmed at the assault on this principle by the Supreme Court and the Industrial Commission, and we would call upon the legislature to affirm and clarify for the Industrial Commission and even for the Court the basic rights of the injured worker as intended under the Act.

We sent out a letter to the Committee outlining our concerns, and I would like to touch on some of these points at this time. Up until two years ago, the Commission, as a general rule, called upon claimants to prove their injuries were caused by their work, and to be reasonably specific about how and when the accident occurred. Then in 1981, the Virginia Supreme Court imposed a much stricter rule, in the Starkes case. Mrs. Starkes had a job which required a lot of heavy lifting and pushing, and over a couple of days she experienced severe back problems. Her condition was diagnosed as a back sprain caused by her work, and the Commission awarded her compensation. The Supreme Court reversed this, because she "could not attribute it to any identifiable movement, incident or event on either day." This of course put Mrs. Starkes out of work, with no money to live on and no way to pay her doctor bills -- in spite of the fact that she proved she hurt her back on the job.

This rule was repeated in another Supreme Court case earlier this year, where a woman named Mrs. Cogbill proved that her back strain resulted from prolonged sitting and writing in a bent-over position during one day at work. The Court reversed the Commission's award, stating that the claimant's exertions "fell within the scope of her normal activities; we do not consider her exertion unusual in any significant particular.

Her injury developed slowly, not suddenly." The Court reiterated its requirement that a claimant suffer a "sudden, obvious physical change."

We can see no justification for this requirement that an injury be sudden and instantaneous. In Professor Larsen's treatise, from which Committee members have received excerpts, Larsen points out that most jurisdictions have awarded compensation for conditions that have developed, not instantaneously, but gradually over periods ranging from a few hours to several decades. Paragraph 39.10. Larsen also notes that "as to suddenness of cause, the tendency has been to recognize episodes or exposures of several hours' or even several days' duration, since for all practical purposes, . . . identification of the time of accident within a matter of a few days is sufficiently precise." Paragraph 39.20.

This treatise also points out that, with the recognition and compensation of occupational diseases, it is unfair to deprive those workers who fall in the cracks between accidental injury and occupational disease of some compensation. He writes: "As occupational disease coverage broadens, the parallel concept of accident may be expected to broaden, for, if any occupational disease with a gradual onset and a gradual result is compensable, it seems incongruous to deny compensation for an unexpected industrial injury . . . which is also gradual in onset and consequences."

The rule laid down by the Supreme Court in 1981 separates Virginia from most other states. In Tennessee and Maryland, which have similar statutes, the courts have construed "accident" to refer to the unexpectedness rather than the instaneous quality of the injury. West Virginia Courts have taken the phrase "personal injury" to include gradual injuries. The legislatures of Kentucky and Delaware have gone to great lengths to include all work-related injuries as compensable, whether sudden or gradual. The Kentucky statute defines injury as "any work-related harmful change" in the body, and Delaware defines injury as "any violence to the structure of the body." Under the Federal workers' compensation act, and under the Longshoremen and Harborworkers Act, gradual injuries are compensable.

The point I wish to stress is the importance of whether the injury was caused by the job -- not whether the injury occurred over a minute, an hour, or a day's time.

Unfortunately, it appears that the Supreme Court's decisions have triggered an attitude on the part of the Industrial Commission that has produced numerous decisions which indicate that the Act will no longer be construed broadly for the benefit of the disabled workers. We have a witness here today who is a young man who hurt his back on the job, and was denied compensation because it appeared the injury happened over a four-hour period.

What we are asking this Committee to do is to recommend that the words "by accident" be stricken from the Compensation Act. This would signal the Commission and the courts that the purpose of workers' compensation is to compensate anyone with an injury or illness caused by their work.

I would also like to take this opportunity to mention a few other decisions which are alarming, and which show that the interests of the claimants are no longer being considered at the Industrial Commission. One case involved a young woman named Mary Alice Ackerman, who was run over and killed while working as a toll collector. The Commission denied compensation to her orphaned infant and raised the fact that she failed to exercise a proper lookout. This raises the spectre that the Commission will look at the issue of negligence, which has never been relevant to workers' compensation.

In another case the Commission barred a man named James Washington's claim for compensation on the grounds that the statute of limitations had lapsed. Yet, Mr. Washington had filed an application within the two-year limit; he simply had not filed his medical reports.

In a similar case, the Commission used a statute of limitations to bar a claim where the claim had been filed by the medical provider. The Commission did this because the claimant, Willie O. Brown, had not filed it himself. What is so injust is, how many workers even know of a requirement to file a claim? Here, where a claim was filed, this was not even considered sufficient.

Attached to my statement is a sample of just a few Commission decisions which show this a narrow interpretation of the law. We are leaving copies of these decisions with the Committee.

To sum up, the Workers' Compensation system was set up to protect workers. It is intended to be broadly interpreted, and to operate regardless of fault or pre-existing disability. It appears that the interests of the insurance industry are taking precedence over the needs of these workers, and we hope that the legislature will act to change this sad situation.

/csj
OPEIU 334, AFL-CIO

SAMPLE OF RECENT INDUSTRIAL COMMISSION DECISIONS

1. Washington v. Camp - Mr. Washington's application for change in condition did not toll the statute of limitations, because he did not file medical reports.

2. Baker v. City of Alexandria Sheriff's Department - Ms. Baker's compensation was stopped when she was fired from light work for refusing to take a lie detector test.

3. Bennett v. Southland Corp. - Mr. Bennett went to his own doctor, instead of the company panel, and therefore he not only had to pay his own bills for the doctor, but also had all of his wage-loss compensation terminated.

4. Ackerman v. Commonwealth of Virginia - Ms. Ackerman was killed when she crossed over to her toll booth station from a co-worker's station; Commissioners raised issue of failure to exercise a proper look-out.

5. Payne v. Hampton - Mr. Payne had to pay his own attorney's fees to prove that he should be compensated for chiropractic treatment -- although this treatment had previously been authorized by the employer prior to the treatment.

6. Brown v. Cellin - Mr. Brown's claim for workers' compensation was filed by the medical care provider. Nevertheless, the Commission held the claim was barred by the statute of limitations because the claimant did not himself file a claim. (Only medical bills were considered compensable.)

7. Sisk v. Giant Food -Mr. Sisk sustained a psychiatric illness as a result of his job. The Commission held that because there was no physical trauma, this was not compensable.

8. Cumber v. City of Richmond Police Department - The Commission refused to recognize a psychiatric illness as resulting from the job, despite ample medical evidence, and compensation was cut off.

PROPOSAL TO AMEND THE WORKMEN'S COMPENSATION ACT TO INCLUDE GRADUAL INJURIES

The basic policy behind Workers' Compensation laws is simple: "(W)ear and tear of human beings in modern industry should be charged to the industry, just as the wear and tear of machinery has always been charged." Brown v. Reed, 165 S.E. 2d 394 (Va. 1969). To allow work-related injuries to go uncompensated is to defeat the fundamental purpose of Workers' Compensation. To this end, Workers' Compensation statutes have generally been liberally construed in favor of injured employees.

The objectives of Workers' Compensation were defined by the National Commission on State Workmen's Compensation Laws as follows:

1. Broad coverage of employees and of work-related injuries and diseases.
2. Substantial protection against interruption of income.
3. Provision of sufficient medical care and rehabilitation services.
4. Encouragement of safety.
5. An effective system for delivery of these benefits and services.

Virginia's Workmen's Compensation statute has been construed to exclude work-related injuries that were gradually incurred. We recommend the statute be changed so that it clearly reflects the broad intentions of Workmen's Compensation.

Section 65.1-7 of the Virginia Code defines "injury" and "personal injury" to "mean only injury by accident, or occupational disease as hereinafter defined, arising out of and in the course of employment..." The key words in this definition are "by accident." The Virginia Supreme Court has interpreted

this to mean that the injury must occur at a specific time and place, arise from unusual circumstances, and have an external cause.

In Badische Corp. v. Starks, 275 S.E. 2d 605 (Va. 1981), the Virginia Supreme Court held that, since Ms. Starks could not point to any sudden change in her body, she could not recover Workmen'sCompensation Her work required her to lift, push and pull heavy objects all day, and she had experienced back pain on and off for some time and had reported it to the doctor on many occasions. She had surgery for a herniated disc less than a month after reporting that the pain had increased significantly. The court said, however, that she failed to meet her burden of proof of injury by accident since she could not point to any sudden change in her body, or attribute her accident to any unusual movement or incident. Id. at 606-607.

In Tomko v. Michael's Plastering Co., 173 S.E. 2d 833 (Va. 1970), a carpenter was denied relief for a herniated disc after working with pieces of sheetrock weighing approximately 150 pounds each; he said after a hard week's work he had some soreness, but this particular week he was more sore than usual. Even though he saw a doctor a day or two after he realized his back was injured, he was denied Workmen's Compensation because he could not pinpoint with reasonable certainty when his injury occurred. Id. at 834-35. The Industrial Commission ruled, "that his herniated disc was of gradual growth and not compensable." Id. at 835.

The Workmen's Compensation statutes of Tennessee and Maryland are similar to Virginia's , but the courts of these states have construed accident to refer to the unexpectedness rather than the instantaneousness of the injury. St. Paul Insurance Co. v. Waller, 524 S.W. 2d 478 (Tenn. 1975); Holbrook v, G.M. Assembly, 291 A. 2d 171 (Md. 1972). The Workmen's Compensation statute

in West Virginia refers only to "personal injury," and the West Virginia courts have taken this to mean that gradual injuries are compensable. Lilly v. State Workmen's Compensation Commissioner, 225 S.E. 2d 214 (W. Va. 1976). The legislatures of Kentucky and Delaware went to great lengths to include all work-related injuries as compensable, whether sudden or gradual. The Kentucky statute defines injury as "any work-related harmful change in the body" and Delaware defines injury as any "violence to the structure" of the body.

The Longshoremen's and Harbor Worker's Compensation Act, 33 USC 902, has been construed to permit gradual injuries to be compensated. Shoemaker v. Sun Shipbilding, 12 B.R.B.S. 141 (1980). A large number of Virginia workers are already compensated under this standard.

The Virginia Workmen's Compensation Act should be amended so that workers with gradually developing back injuries are not arbitrarily excluded from compensation. This could be accomplished by following the model of any of the above-named statutes, or simply by striking the words "by accident" from the definition of injury.

Virginia State A.F.L.-C.I.O.

Chartered by the American Federation of Labor and Congress of Industrial Organizations

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Phone: (804) 355-7444

September 3, 1982

Re: House Joint Resolution 37

Dear Delegate Wilson:

The purpose of this letter is to give you some background information, prior to the Subcommittee meeting of Friday, September 17, which was called pursuant to House Resolution 37, to explain some of our deep concerns regarding recent developments in the Virginia Workers' Compensation law.

It is our belief that recent decisions by the Virginia Supreme Court, and by the Industrial Commission, have the potential to decimate the Act, at the cost of great suffering to disabled workers.

One of our major concerns, and the one which prompted our call for this study, stems from a decision in 1981 of the Virginia Supreme Court, which sharply cut back coverage of workers injured on the job. In Badische v. Starks, 275 S.E. 2d 605, the claimant's job involved lifting, pushing and pulling heavy weights all day. On May 24 her back began to bother her, and it got worse during the day. She continued to work the following day, but on May 26 she could barely walk, and had to be treated at the Emergency Room. Her condition was diagnosed as back sprain. The claimant was awarded benefits both at her original hearing, and on review by the Full Commission. The Supreme Court reversed this award, finding that "she suffered such pain in increasing intensity on Mary 24 and 25, but she could not attribute it to any identifiable movement, incident or event on either day."

In another Supreme Court decision in March of this year, the Court reversed another Commission award to a woman who hurt her back while working at an auction, bent over in a chair writing on a clipboard, for approximately four hours. An orthopedic surgeon diagnosed her condition as lumbar strain resulting from her prolonged sitting in that position that day. In reversing the award, the Court state that the claimant's exertions "fell within the scope of her normal activities; we do not consider her exertion unusual in any significant particular. He injury developed slowly, not suddenly." The Court also reiterated its requirement that a claimant suffer a "sudden, obvious physical change." Vepco v. Coubill.

With the exception of five years following the Aistrop decision in 1943, 181 Va. 287, 24 S.E. 2d 546, the Court and the Commission had generally followed a broader definition of injury by accident. The leading case, Derby v. Swift, 188 Va. 336, 49 S.E. 2d 417 (1948), held that "To constitute an injury by accident, it is not necessary that there must be a fall, slip or other fortuitous circumstance. If this were true, an employee who is injured and who slipped and fell would be allowed compensation while one who did not slip or fall would not be allowed compensation though he may have broken an arm or leg while performing his work in the usual way. This result would be illogical and against the purpose and spirit of The Workmen's Compensation law. . . . To constitute injury by accident it is not necessary that there should be an extraordinary occurrence in or about the work engaged in..."

This broader definition of accident was reaffirmed in 1968 in Reserve Life Insurance v. Hosey, 208 Va. 568, where the Court affirmed the Commission's award of compensation to Hosey, who had strained her knee while walking up a flight of stairs, noting " . . . whether an injury is the result of an accident does not depend on whether the same injury might happen to others. . . . 'The definition of accident . . . is . . . an event which, under the circumstances, is unusual and not expected by the person to whom it happens." "

Thus, for at least the past 30 years the standard applied for accidental injuries has been broader than that enunciated by the Supreme Court last year and this year. The claimant had only to be reasonably specific about the accident

The broader standard is more in line with the law under the Federal Employees' Compensation Act, the Longshore and Harborworkers Act, and the laws in most states including Tennessee, Maryland, Kentucky, and Delaware.

Surely it is unjust to deny benefits to a worker who is disabled due to heavy lifting or bending, simply because the injury is not instantaneous. As long as the claimant can show with reasonable specificity when the injury took place, within a period of several hours or even a few days, compensation should be awarded. And in the past it was awarded.

It is up to the Legislature to correct the present situation, and restore the law to the way it was interpreted prior to the Badische decision. This can be done very simply, by striking the words "by accident" from the Workers' Compensation Act. This would leave the Code section 65.1-7 reading: "'injury' and 'personal injury' mean only injury by accident, or occupational disease as hereinafter defined, arising out of and in the course of employment.. . ."

This would signal the courts and the Commission that the Act is to be construed liberally, to compensate all injuries and diseases which the claimant shows to have arisen "out of and in the course of the employment."

To turn to some other issues of concern, we would like to at this point signal some other decisions which have been coming from the Commission recently which seem to lack concern for the rights of claimants. The Commission has recently held: (a) That the employer's authorization of medical treatment is not binding on the carrier; (b) That an employee's treatment at his own expense by a physician of his choice forfeited his right to compensation for lost wages during disability, on the grounds that the employee had refused medical treatment selected by the

carrier; (c) that emotional disability caused by the job is not compensable unless there is a physical trauma; (d) that an employee who was fired from a light duty job for refusing to take a polygraph test forfeited compensation; (e) that an employee's application for a hearing, unaccompanied by medical reports, does not toll the statute of limitations; (f) that a claim filed by an employee's medical care provider did not toll the statute of limitations except regarding medical expenses; (g) that an employee who is negligent and disobeys a safety rule is barred from receiving compensation.

Anyone familiar with the history and fundamental principles of Workers' Compensation should be alarmed at these encroachments into Virginia law. The Compensation system was established early in the century to compensate workers who suffer from occupational injuries and diseases, without regard to fault or preexisting disability. It is the intent of the Act to make the cost of industrial accidents and diseases an expense of doing business, so that workers are not thrown out onto the garbage heap when they become disabled at work. Benefits are strictly limited, and workers are deprived of their right to sue for extensive damages when their employer's negligence cripples or kills.

While the influence of the insurance industry at the Commission has always been extensive -- most Deputies and Commissioners are former insurance industry claims adjusters or attorneys -- recent developments indicate the threat of even further control by the insurance companies. Insurers and manufacturers evidently feel that the easiest way to deal with the rising cost of occupational injuries and diseases is to cut benefits to the disabled. This is an injustice. The AFL-CIO has long supported the notion of exclusive state funds -- similar to the system used for unemployment compensation -- as a way of saving money, rather than cutting back benefits. The system was set up to protect workers, not insurance carriers and employers.

We hope that you will give serious consideration to these concerns.

Respectfully,

David H. Laws
Secretary-Treasurer

Appendix # 2

POSITION PAPER OF VIRGINIA STATE AFL-CIO ON HOUSE JOINT RESOLUTION 37 -

DEFINITION OF "ACCIDENT" UNDER WORKERS' COMPENSATION

Although in our view the Virginia Workers' Compensation law contains several gaps which exclude individuals deserving of compensation, for the purposes of this study our primary concern is that the law be restored to the state it was in prior to the Supreme Court decisions of 1981 and 1982.

The Industrial Commission, prior to these decisions, would award compensation to an individual who suffered an injury to the back at work during a day of heavy lifting, even though the individual could not pinpoint one particular moment at which the "accident" occurred. All that was required was that the worker prove that the injury was caused by work activity during a reasonably specific period.

The Supreme Court decisions in the Badische and Cogbill cases, which reversed Industrial Commission awards, impose an unreasonably restrictive interpretation on the requirement of an "accident." Why should a person who hurts his or her back at work over a several hour period be denied compensation, while someone who suffers a "sudden", instantaneous strain does receive workers' compensation?

We strongly urge this Committee to recommend that a provision be added to the Workers Compensation Act which re-establishes the broader definition of "injury by accident." Language should be drafted to define "accident" as an event occuring during a reasonably specific period of time. The legislature could even impose a maximum duration if it so chose; for example, an accident must occur during a reasonably specific period of time not exceeding five days.

This would in our view be more in line with the original intent of the legislature, as well as more consistent with the interpretation of the Industrial Commission.

September 17, 1982

VIRGINIA MANUFACTURERS ASSOCIATION
STATEMENT FOR THE JOINT SUBCOMMITTEE
STUDYING GRADUALLY-INCURRED WORK-RELATED INJURIES

The purpose of workmen's compensation insurance is to provide compensation for the legitimately injured worker and dependents for accidental injuries arising out of and in the course of employment. Unfortunately, the adoption of the "gradually-incurred" or so called "cumulative injury" concept by a few states has extended workmen's compensation coverage to disabilities resulting from the aging process and the wear-and-tear of daily life without regard to workplace causation. It has effectively changed workmen's compen sation insurance into a supplementary retirement plan. In Michigan, it is estimated that between 35% and 50% of their new claimants each year are retired.

In a recent study in California, where this concept cost an estimated $200 million in 1978, the median age of cumulative injury claimants was fifty one years old versus thirty three years for the injured work force generally. Seventy percent of these cases were heart and vascular disorders, back problems, and loss of hearing---conditions closely associated with the aging process. The Virginia Workmen's Compensation Act was never intended to be a general health, accident and old age insurance policy, or a supplementary retirement benefit.

There are several significant practical problems encountered in dealing with the cumulative injury concept.

First, many of these conditions particularly back problems are difficult to diagnose. Their symptoms are subjective and easily feigned.

Second, the cause of these "injuries" will be difficult, if not impossible, to determine. Circumstances off the job, hobbies, life style, drinking and health habits, and the like, will frequently be the real cause of these aging related problems. Hobbies such as weight lifting, gardening, wood working, auto repair and the like can easily have more impact on a person's health than the routine physical work required by their job.

The normal aging process is one of degeneration. The build-up of calcium deposits, development of arthritis, and degeneration of muscle tissue are simply part of living and growing older. While some may argue that some types of work can contribute to the symptoms of these problems, this argument is far outweighed by the fact that activities outside the work place and life style can frequently have a greater and more damaging impact. After all, the average worker usually spends only 40 hours of his total week on the job.

Lastly, there is no equitable way to assign responsibility for a particular cumulative "injury" claim to an employer without incurring enormous legal fees and lengthy lawsuits. Some states such as California arbitrarily assigned the costs to the companies who employed the claimant in the 12 months immediately preceding the submission of the claim. They have gone to this extreme simply to reduce litigation. In addition to being basically unfair and still open to litigation, this procedure would create a major problem for job applicants in their forties and fifties. Why should a company be penalized for employing an older worker?

The cost of workmen's compensation insurance to Virginia employers in 1981, was approximately $450 million---more than the combined cost of unemployment insurance and the state corporate income tax. It would be complete folly to add such an expensive and uncontrollable concept as cumulative injury to an already incredibly expensive system. This concept is so repugnant that its inclusion in the Virginia Code will have a devastating impact on the state's industrial development. Existing businesses would hesitate to expand, to relocate to or open new facilities in one of a handful of states which require that workmen's compensation benefits be provided for aging related infirmities. In fact some existing firms might well move their facilities to another state.

The Virginia Manufacturers Association, which represents approximately 650 member firms is unalterably opposed to the inclusion of "gradually-incurred" work-related injuries, in any form, under the coverage of the Virginia Workmen's Compensation Act. We urge the Joint Subcommittee to recommend against any change in law which would in any way incorporate a gradually-incurred work-related injury concept.

#4

Syllabus.

Richmond

BADISCHE CORPORATION AND LIBERTY MUTUAL INSURANCE COMPANY

v.

WINIFRED STARKS

March 6, 1981.

Record No. 800476.

Present: Carrico, C.J., Harrison, Cochran, Poff, Compton, and Thompson, JJ.*

Workmen's compensation award for an injury by accident reversed when claimant fails to bear burden to prove identified incident causing injury.

(1) Workmen's Compensation—Injury by Accident (Code § 65.1-7)—Statutory Construction—Injury by Accident Arises from Identified Incident Occurring at Reasonably Definite Time.

(2) Workmen's Compensation—Injury by Accident (Code § 65.1-7)—Employee Must Identify Incident Causing Injury to Recover.

(3) Workmen's Compensation—Evidence—Burden of Proof—Employee Does Not Sustain Burden of Proof When Fails to Prove Incident Accounting for Increased Pain.

The claimant suffered pain in her lower back and ache in her right leg while working as a creeler. Her job required her to lift weights of at least 40 pounds and push and pull heavy cans. Nothing unusual occurred on May 24th and 25th, 1979, when the pain occurred of which she complained. She had suffered an earlier non-compensable injury in a fall in 1977. Claimant gave 24 May 1979 as the date of the alleged accident and the date disability began as 26 May 1979. She was examined by a physician on 29 May and 1 June 1979 and a herniated disk was removed on 15 June 1979. Claimant was awarded temporary total disability and this award was confirmed by the Commission with one Commissioner dissenting.

1. An injury by accident arises from an identified incident occurring at some reasonably definite time (Code § 65.1-7).

2. When an employee cannot identify an incident causing her injury she cannot recover compensation.

3. Here there was no evidence of any sudden change in claimant's body. She had suffered pain in her back and leg since 1977. She suffered increasing pain on May 24 and 25, 1979, but could not attribute it to any identifiable movement, incident, or event on either day. She thus failed to sustain her burden of proof

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* Mr. Chief Justice I'Anson presided at the oral argument of this case but retired January 31, 1981.

and there is no evidence to support the Commission's award of compensation *Tomko* v. *Michael's Plastering*, 210 Va. 697, 173 S.E.2d 833 (1970), *followed.*

Appeal from an award of the Industrial Commission of Virginia.

Reversed and final judgment.

William L. Dudley, Jr. (*Doumar, Pincus, Knight & Harlan*, on brief), for appellants.

Susan Archer Bivins (*Martin & LaBell*, on brief), for appellee.

COCHRAN, J., delivered the opinion of the Court.

In this appeal by an employer and its insurer from an award made by the Industrial Commission, the sole question is whether the Commission erred in ruling that the claimant sustained an "injury by accident" entitling her to benefits under the Workmen's Compensation Act.[1]

On September 25, 1979, Winifred Starks filed her application for a hearing before the Commission, alleging that she suffered "pain" in her lower back and "ache" in her right leg on May 24 and 25, 1979, while employed by Badische Corporation. In her application, she gave the date of the alleged accident as May 24, 1979, and the date that disability began as May 26, 1979. After a hearing before one of the Commissioners, compensation was awarded Starks for temporary total disability resulting from an injury by accident that occurred on May 24, 1979, within the scope of her employment. Upon review, the Commission, by opinion dated February 28, 1980, one Commissioner dissenting, adopted the findings of fact and conclusions of law of the hearing Commissioner and affirmed the award.

The record shows that the claimant, employed by Badische as a creeler, last worked on May 25, 1979. She was examined by Dr. Hawes Campbell, III, on May 29 and June 1, and on June 15 Dr. Italo Rinaldi, a neurosurgeon to whom she was referred, removed a herniated disc by surgical procedure. That her temporary total disability has continued is not in dispute.

Starks first notified her employer of a possible claim on August 30, when she telephoned the company nurse, reported that she had

[1] Code § 65.1-7 provides:

Unless the context otherwise requires, "injury" and "personal injury" mean only injury by accident . . . arising out of and in the course of the employment . . . .

back problems which she believed came from working on her feet on concrete floors, and requested information about filing a claim for Workmen's Compensation. When asked by the nurse if she had an "injury" to report, Starks responded "no"; the nurse then told her that she could not process a claim without a report of an injury. A few minutes later Starks called back to get the date of a noncompensable injury that she suffered in May, 1977, when she fell at work. In a letter dated September 17, 1979, filed in the record, Starks stated that she was "certain" that her 1977 fall was the beginning of her back problem that resulted in the ruptured disc.

In the hearing before the Commissioner, Starks testified that her job required her to lift weights of at least 40 pounds and to "push and pull heavy cans all day". She did not know exactly what happened on May 24, but "sometime during the morning" before lunch her back "began to bother" her "and as the day went by it hurt more and more". She conceded that nothing unsual or different occurred at work and that she performed her duties as she had on any other day except for pain in her right leg and pain at her "waist line in the back", which she had experienced "off and on since sometime in '77 and...had mentioned to the doctor many times". She continued to work that day and worked again on May 25, but on May 26 she could scarcely walk and was incapacitated. The next day she went to the Emergency Room of Riverside Hospital where X-ray photographs were taken and examined, and her problem was diagnosed as back sprain. On May 29, she consulted Dr. Campbell.

The only case cited by the hearing Commissioner in his opinion was *Reserve Life Ins. Co.* v. *Hosey*, 208 Va. 568, 159 S.E.2d 633 (1968). In that case, the claimant in the course of her employment

> making a door-to-door survey. As she reached the top of a flight tone steps her knee caught and snapped as if a bone had broken, she experienced a sharp, severe pain. Her injury was diagnosed as matic synovitis of the knee, and an operation was required to eve her. Ruling that the claimant was disabled as a result of ıry by accident, the Commission awarded compensation. We held t the Commission's finding was supported by credible evidence and rmed the award.
>
> 1] *Hosey* is consistent with the established principle that an injury accident arises from an identified incident that occurs at some reaıably definite time. *See Aistrop* v. *Blue Diamond Coal Co.*, 181 Va. 7, 293-94, 24 S.E.2d 546, 548-49 (1943). Thus, in *Big Jack Over-* *Co.* v. *Bray*, 161 Va. 446, 171 S.E. 686 (1933), an injury by acciıt arose when a woman attempting to lift a bundle of clothes while

her body was in an awkward position felt a sudden snap or tear in her back and immediately experienced severe pain. In *Commonwealth* v. *Hughes*, 161 Va. 714, 172 S.E. 155 (1934), controlled by *Bray*, we upheld an award of compensation where abdominal injury resulted from a fall from a truck which suddenly jerked forward while the claimant was working on it. In *Derby* v. *Swift & Co.*, 188 Va. 336, 49 S.E.2d 417 (1948), while lifting a loading table, the claimant experienced a sharp pain in his side, later diagnosed as caused by a hernia. The Commission denied recovery on the ground that there had been no compensable accident. We reversed, holding that, although the claimant was performing his usual work, he suffered a sudden, unusual, unexpected, and painful abdominal rupture that constituted an accident. And, in *Virginia Electric Etc., Co.* v. *Quann*, 197 Va. 9, 87 S.E.2d 624 (1955), a claimant injured his back while lifting a heavy coil of wire that suddenly shifted and put an unanticipated strain upon him. He "felt something pop or make a definite snap" in his back. 197 Va. at 10, 87 S.E.2d at 625. We upheld an award of compensation for accidental injury.

[2] In *Bray*, *Hughes*, *Derby*, *Quann*, and *Hosey*, the employee in each case identified the injury with a movement made or action taken at a particular time at work and arising out of and in the course of the employment. Where the employee cannot so identify an incident causing his injury, however, he cannot recover compensation. *Tomko* v. *Michael's Plastering*, 210 Va. 697, 173 S.E. 2d 833 (1970). *See also Hurd* v. *Hesse & Hurt*, 161 Va. 800, 172 S.E. 289 (1934).

[3] In *Tomko*, the employee was engaged in installing pieces of sheetrock weighing approximately 150 pounds each, heavier than he usually handled. He normally experienced some soreness in his back on weekends after working during the week, but on the last Friday he worked he was more sore than usual. On Saturday, after working several hours, he was again sore, and his pain increased over the weekend. When, still suffering, he returned to work on Monday and completed the job, he complained to his employer and to a fellow-employee of pain in his back and leg. On Tuesday, he was examined by an orthopedic surgeon who diagnosed his problem as a herniated disc. We reaffirmed the applicable rule set forth in *Virginia Electric, Etc., Co.* v. *Quann*, *supra*, 197 Va. at 12, 87 S.E.2d at 626, as follows:

> "'. . .[W]hen usual exertion results in actually breaking, herniating, or letting go with an obvious sudden mechanical or structural change in the body, whether external or internal, the injury is accidental. . . .'"

210 Va. at 699, 173 S.E.2d at 835.

There was no evidence of any "sudden mechanical or structural change" in Tomko's body to bring him within the rule. Nor was there evidence of any work-related event giving rise to the injury. Therefore, in affirming the denial of compensation by the Commission, we held that the claimant had failed to sustain his burden of proving an injury by accident within the meaning of the statute.[2]

The facts in the present case are more akin to those in *Tomko* than to those in *Bray, Hughes, Derby, Quann,* or *Hosey*. Here, as in *Tomko,* there was no evidence of any sudden change in Starks's body. She had suffered pain in her back and leg since 1977. She suffered such pain in increasing intensity on May 24 and 25, but she could not attribute it to any identifiable movement, incident, or event on either day. Accordingly, we hold that the claimant has failed to sustain her burden of proof, that there is no evidence to support the Commission's award of compensation, and that we must, therefore, reverse the award and enter judgment in favor of Badische.

Reversed and final judgment.

[2] We also held that there was no proof of any causal relation between Tomko's disability and his job. *Id.* at 700, 173 S.E.2d at 835-36.

PRESENT: Carrico, C.J., Cochran, Poff, Compton, Thompson, Stephenson, JJ., and Harrison, Retired Justice

Record No. 810034

VIRGINIA ELECTRIC AND POWER COMPANY

-v- Record No. 810034 OPINION BY JUSTICE W. CARRINGTON THOMPSON
March 12, 1982

SARAH L. COGBILL

FROM THE INDUSTRIAL COMMISSION OF VIRGINIA

In this appeal of an Industrial Commission (Commission) award, the sole question for decision is whether the Commission erred in holding that Sarah L. Cogbill suffered an injury by industrial accident. Cogbill filed an application with the Commission on May 5, 1980, seeking compensation and medical benefits for a back injury, and on December 8, 1980, the Commission awarded her compensation.

The Virginia Electric and Power Company (Vepco) employed Cogbill as an operations clerk. This position required her to work seated at a desk in a cushioned office chair. Cogbill testified that she could "move around" when she wished.

On Saturday, April 19, 1980, Cogbill worked at a public auction of Vepco's surplus motor vehicles. She sat in a straight, hard-back chair on a truck bed while recording bids on a clipboard resting on her lap. She worked bent over for three and one-half to four hours without interruption. During the auction her back "began to bother her," and grew painful that evening. Cogbill worked at her regular job the following Monday, Tuesday, and Wednesday. On Thursday, at her supervisor's suggestion, she went to the company doctor. He referred her to an orthopedic doctor who diagnosed her backache as lumbar strain resulting from her prolonged sitting at the April 19 auction.

The record further establishes that Cogbill had had previous trouble with her back. Between 1969 and June 23, 1975, she took 111 days of sick leave. Of this, a portion was for back-related complaints. From October, 1977, to March 7, 1978, she was absent 20 days for back problems resulting from a fall. Since March,

1978, she had not taken sick leave and had not received medical

Record No. 810034

treatment for backaches or injury.

The hearing commissioner ruled that Cogbill had suffered an injury by accident and awarded compensation. Vepco sought a review before the full Commission. Affirming, the Commission referred to the broad definition of "accident" found in Reserve Life Ins. Co. v. Hosey, 208 Va. 568, 159 S.E.2d 633 (1968).

A year ago we addressed the interpretation of "injury by accident" in Badische Corp. v. Starks, 221 Va. 910, 275 S.E.2d 605 (1981). The claimant, a creeler, regularly lifted weights exceeding 40 pounds. She testified she did nothing unusual at work on the day her back "began to bother her." The pain increased that evening and during the next day at work. She did not work on the third day, but saw a physician who diagnosed her ailment as back sprain. The evidence also revealed that she had suffered similar, but less intense, pains for two years prior to this complaint.

After examining prior case law, we reaffirmed the rule set forth in Virginia Electric, Etc., Co. v. Quann, 197 Va. 9, 12, 87 S.E.2d 624, 626 (1955), which requires "an obvious sudden mechanical or structural change in the body" for accidents resulting from ordinary exertion to be compensable. We also noted that the claimant must prove that the injury by accident arose "from an identified incident that occurs at some reasonably definite time." Badische Corp. v. Starks, 221 Va. at 912, 275 S.E.2d at 606. Starks' normal activities caused her injuries, but those injuries did not produce a sudden, obvious physical change. We denied recovery because Starks merely had a worsening, but preexisting, condition which she could not attribute to any identifiable incident.

Cogbill's situation is analogous to that of the claimant in Badische. First, her injury resulted from an activity similar in nature to her regular job, requiring no different or unusual exertion. Cogbill argues that her bent position, the hard-back chair, and the enforced prolonged sitting combine to make this activity significantly different from her regular job. We disagree. Her required actions and the level of exertion in no way distinguish the two activities. Both jobs were sedentary, requiring Cogbill to write. During the auction, she was at liberty to stand, but chose not to do so because it was more convenient to sit. Finally, the difference between a hard-back and cushioned chair is immaterial.

Second, Cogbill suffered no sudden, obvious mechanical or structural change. Her back, like the claimant's in Badische, "bothered" her, growing more painful later. Cogbill could not pinpoint when her back began aching or what caused the ache, but she urges this court to accept her argument that prolonged sitting in a bent-over posture caused the injury. She relies on Hosey, supra, for the definition of accident as an unusual and unexpected event. We reject this argument.

In Rust Engineering Co. v. Ramsey, 194 Va. 975, 980, 76 S.E. 2d 195, 199 (1953), we held that "the Workmen's Compensation Act was adopted for the benefit of the employees and their dependents and that it should be liberally construed in order to accomplish this humane purpose. But liberal construction does not mean that the Act should be converted into a form of health insurance." With this principle in mind, we find Hosey, supra, factually distinguishable from the case before us. In Hosey, the claimant injured her knee while climbing steps. The evidence revealed that the step where the injury occurred was higher than normal steps, requiring unusual exertion, and her injury was sudden and severe.* Cogbill's exertions fell within the scope of her normal

* Our recent decisions in Richmond Memorial Hospital v. Crane, 222 Va. 283, 278 S.E.2d 877 (1981), and Badische Corp. v. Starks, supra, have limited the application of Hosey. In Crane, the employer admitted that the injury was accidental, arguing solely that it did not arise out of the employment.

activities; we do not consider her exertion unusual in any signif-
cant particular. Her injury developed slowly, not suddenly. We
ecord No. 810034 hold this injury stemming from mere sitting is not an accidental injury.

We will reverse the award entered against Vepco and enter final judgment dismissing Cogbill's application.

Reversed and final judgment.

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TO: MEMBERS OF THE JOINT SUBCOMMITTEE STUDYING GRADUALLY-INCURRED, WORK-RELATED INJURIES UNDER THE WORKMEN'S COMPENSATION ACT

FROM: VIRGINIA TRIAL LAWYER'S ASSOCIATION SUB-COMMITTEE ON WORKMEN'S COMPENSATION

DATE: October 14, 1982

RE: AN ANALYSIS OF THE PRESENT LAW AND A PROPOSAL AND JUSTIFICATION FOR CHANGE

The Present Virginia Law - Injury by Accident

The Virginia Supreme Court has established a fairly strict test to determine whether an accident which arises as a result of usual work exertion is compensable within the meaning of "injury by accident" in §65.1-7 of the Virginia Code. §65.1-7 states, in pertinent part, that "(u)nless the context otherwise requires, "injury" and "personal injury" mean only injury by accident, . . . arising out of and in the course of the employment.

Under current Virginia law, a claimant must be able to show that, as a result of work exertion, an unusual or sudden change in his body has occurred. The injury must be attributable to an identifiable movement or incident. This test effectively eliminates the possibility of compensation for claimants whose injuries develop gradually over time since these claimants are unable to point to any specific precipitating event causing injury.

Two recent cases are typical and illustrative of the Virginia Supreme Court's application of this test. In Badische Corp. v. Starks, 221 Va. 910 (1981), the Supreme Court reversed an Industrial Commission award for temporary total disability granted to Mrs. Starks. Mrs. Starks' job required regular lifting of 40 pound weights and pushing and pulling of heavy cans. One day her back began to bother her but she was unable to attribute the pain to any unusual work exertion or point to any specific time of injury. A few days after initial pain, Mrs. Starks was incapacitated and scarcely able to walk. Her physician diagnosed a back sprain.

The Supreme Court reaffirmed the strict rule set forth in Virginia Electric and Power Company v. Quann, 197 Va. 9 (1955), as follows:

> "...[W]hen usual exertion results in actually breaking, herniating, or letting go with an obvious sudden mechanical or structural change in the body, whether external or internal, the injury is accidental..." (emphasis supplied) 197 Va. at 12.

Mrs. Starks was denied compensation because there was "no evidence of any sudden change in (her) body." 221 Va. at 914. Although she suffered pain of increasing intensity over a period of a few days, "she could not attribute it to any identifiable movement, incident, or event on either day." 221 Va. at 914.

This mode of analysis and approach to defining accident was reaffirmed in the recent opinion Virginia Electric and Power Company v. Cogbill, 223 VRR 313, 288 S.E. 2d 485 (1982). Mrs. Cogbill began to experience back trouble while working at an auction sitting in a striaght, hard-back chair recording bids on a clipboard. She worked in a bent position for over 3-1/2 hours, during which time her back began to bother her and became worse in the evening. After three days of continuing pain, her supervisor suggested she see the company doctor. The company doctor referred her to an orthopedic doctor who diagnosed a lumbar strain resulting from her prolonged sitting at the auction.

The Supreme Court found that her activities at the auction were similar to her everyday work activities as an operation's clerk. Since Mrs. Cogbill was unable to prove any sudden, obvious mechanical or structural change occurring at a specifically identifiable movement, her award for compensation granted by the Industrial Commission was reversed by the Supreme Court.

As a result of these decisions, an individual must show both an obvious, sudden mechanical or structural change in his body and that the injury arose from an identifiable incident

reasonably definite in time. Therefore, in Virginia, a claimant must be specific in terms of time definiteness as to both the cause of the accident and the result - the injury.

The Majority Approach

The majority of jurisdictions would be satisfied either by statute or judicially on the time definiteness issue upon a showing that either the precipitating incident or the manifestation of the disability was sudden in occurrence. Larson, Workmen's Compensation Law, §38.00, §39.10 (1980). Similarly, most jurisdictions would deny compensation where neither the cause nor the result was sudden. Virginia represents the minority jurisdictions which require that both the accident cause and the resulting injury be reasonably specific in time.

The Proposal and Its Rationale

Elimination of the words "only" and "by accident" from the §65.1-7 definition would remove the judicial requirement of time specificity as to cause and result since it would eliminate the need to interpret or construe the meaning of "by accident."

Some justification exists in requiring time specificity since the Industrial Commission must be able to ascertain the date of the accident in order to award compensation. This can be satisfied by proof of the time of the incident which led to disability, or where that is unascertainable, by proof of the date of the manifestation of the injury. No justification exists in this regard for requiring specific time proof of both the cause and effect.

Additionally, the traditional requirements of suddenness or unexpectedness must still be satisfied by a showing that either the cause or effect was sudden or unexpected. That injury which develops gradually over time which never manifests itself through a sudden or unexpected pain or need for medical attention would still not be covered by the Act.

This most important requirement concerning the compensability of an injury, causation, must still be demonstrated through proof that the injury arose out of and in the course of employment as required by §65.1-7. A claimant would still have to prove that a gradual injury was linked to his employment environment and was not a result of conditions in everyday life. This requirement eliminates the fear that compensation would become a general health insurance for employees claiming gradual injuries which cannot be linked to the employment. No justification exists for the denial of compensation to a claimant who can unquestionably prove a direct causal link between his employment environment and a gradual injury but cannot meet the requirements as to time specificity of cause and result. His injury is no less work related because of his failure to meet the time specificity requirements than the most obvious case of injury, such as a breakage, which can clearly meet the time requirements. The purpose of the Virginia compensation act is to provide relief for those who are injured on the job. This purpose cannot be adequately accomplished where the Act can be interpreted to deny

compensation for injuries which are clearly causally related to the work environment but which might not be as clearly time definite as to cause and result.

The proposed elimination of the words "only" and "by accident" would eliminate the inherent inequity in the judiciary's interpretation of the elements necessary to prove an entitlement to workmen's compensation benefits and would in no way change the claimant's burden to establish the factual basis which links his injury to the employment environment.

The foregoing consideration and analysis of the present case law concerning gradually-incurred, work-related injuries demonstrates the need for legislative attention to this problem. Should the Joint Subcommittee feel a need for further analysis or research in this regard, the Virginia Trial Lawyer's Association Subcommittee on Workmen's Compensation stands willing and anxious to pursue investigation at the Joint Subcommittee's request.

Respectfully submitted,

Lawrence J. Pascal

Michael W. Heaviside

An Analysis Of The State Of The Law Before And After The Badische And Cogbill Decisions Of Virginia Supreme Court

In 1943 the Virginia Supreme Court first discussed the concept of awarding compensation for gradually incurred injuries. In Aistrop v. Blue Diamond Coal Co., 181 Va. 287 (1943) the Court rejected that theory of compensation because such injuries would be difficult to trace to the employment and because of the "burden of pensioning every workman worn out or invalided" by former employment or presumably by the degenerative processes of life. 181 Va. at 293.

Instead, the Court in Aistrop set forth a rule to define the time frame in which an injury could be said to have occurred "by accident."

> . . . the incident [accident], the act done or condition encountered, must be shown to have occurred at some reasonably definite time . . . . (emphasis added).

181 Va. 287, 293 (1943).

The requirement that an accident be identified to have occurred only at a "reasonably definite" rather than at a specific time has been consistently applied by the Court ever since.[1/]

1/ Derby v. Swift and Co., 188 Va. 336 (1948); Virginia Electric and Power Co. v. Quann, 197 Va. 9 (1955); Reserve Life Insurance Co. v. Hosey, 208 Va. 568 (1968); Tomko v. Michael's Plastering, 210 Va. 697 (1970); Badische Corp. v. Starks, 221 Va. 910 (1981).

In 1955 the Supreme Court ruled on the question of when an injury resulting from usual, rather than unusual, activity would be compensable under the Workmen's Compensation Act. The Court held:

> . . . when the usual exertion results in actually breaking, herniating, or letting go with an obvious sudden mechanical or structual change in the body, whether external or internal, the injury is accidental . . . .

Virginia Electric and Power Co. v. Quann, 197 Va. 9, 12 (1955).

This rule has likewise remained constant.[2/]

A review of the decisions of the Court demonstrates that it has not applied these rules mechanically, but rather has been guided by the facts of each case. The recent decisions of the Court, Badische and Cogbill, do not alter these rules of law.

A comparison between the 1970 case of Tomko v. Michael's Plastering and the recent Badische and Cogbill decisions demonstrates the Court's consistency. In Tomko the claimant's occupation for many years involved the installation of sheet rock. On Friday of a routine workweek Tomko's back was unusually sore and, after working Saturday and Monday, his back required medical attention on Tuesday. Tomko was unaware of any incident or specific activity which led to his back ailment. The Industrial Commission (by Commissioner Miller) denied compensation and asserted at one point that Tomko was required to pinpoint the specific day of his "accident." The Supreme Court

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2/ Reserve Life Insurance Co. v. Hosey, supra; Tomko v. Michael's Plastering, supra; Badische Corp. v. Starks, supra; Virginia Electric and Power Co. v. Cogbill, 223 VRR 313, 288 S.E. 2d 485 (1982).

affirmed the denial of compensation, but not because Tomko was unable to identify the specific date of an accident.

> It is true that Commissioner Miller stated at one point in his opinion that Tomko 'must, at the least, be able to point to a particular date as the time of his accident.' But in another place in his opinion the Commissioner correctly stated the ruling enunciated in the Aistrop case to be that 'the incident . . . must be shown to have occurred at some reasonably definite time.'

210 Va. at 699.

Instead, the Court ruled that Tomko's usual work activity was sufficient to constitute an accident if it resulted in a sudden mechanical or structural change in his body. 210 Va. at 699. However, compensation was denied because Claimant Tomko's back ailment did not occur at a particular point in time and, in fact, Tomko "wondered how he hurt his back." 210 Va. at 697. The Court in Tomko made it clear that it is not necessary to specifically pinpoint an act or event in order for an injury to be considered accidental. What the Court did require was that the work activity produce an identifiable, sudden injury.

Eleven years later in Badische the Court reaffirmed its Tomko decision. In Badische the claimant, Mrs. Starks, first injured her back in mid-1977 and experienced back and leg pain consistently thereafter. Her 1977 injury was non-compensable. Like Mr. Tomko, Mrs. Starks' job involved pushing, pulling and lifting and she performed these duties on a regular basis through May 26, 1979. On August 30, 1979, she notified her employer of a back ailment which allegedly manifested itself three months

earlier on May 24, 25, 26, 1979. Similar to Mr. Tomko's testimony, Ms. Starks testified that nothing unusual happened on those days in May and that she had routinely performed her job during that time. She also testified that, for unknown reasons, at some point on May 24 her back began to "bother" her.

The Supreme Court disallowed compensation, once again affirming the rule that for an injury to be by accident the incident must occur only at "some reasonably definite time." 221 Va. at 910. The Court held that,

> The facts in the present case are more akin to those in Tomko than those in Bray, Hughes, Derby, Quann or Hosey. Here, as in Tomko, there was no evidence of any sudden change in Starks' body. She had suffered pain in her leg and back and leg since 1977. She suffered such pain in increasing intensity on May 24 and 25, but she could not attribute it to any identifiable movement, incident or event on either day. [emphasis added]

221 Va. at 910.

To reach its decision the Court relied directly on its previous decisions in Derby, Quann, Hosey and Tomko. 221 Va. at 912, 913. A factual comparison between Tomko and Badische demonstrates that the cases are almost indistinguishable.

The Cogbill case presented the Court with even a less compelling argument in favor of awarding compensation. In Cogbill the claimant had a history of back ailments, some of which were severe, from 1969 through 1978. Her regular job was sedentary and clerical in nature. The circumstances of her injury likewise involved sedentary, clerical work wherein she simply sat in a chair. She did not claim to have been bumped, moved, jostled or to have been prevented in any way from

voluntary movement. She alleged that at some point, while sitting, her back began to "bother" her for unknown reasons. Unlike the claimants in Quann, Hosey, Tomko and Badische, Mrs. Cogbill did not claim to have engaged in any activity at all.

The Court denied compensation for the identical reasons cited in Tomko. The claimant's activity had not resulted in an identifiable injury which manifested itself suddenly. The Court ruled that "mere sitting does not constitute an accidental injury." 288 S.E.2d at 487.

Explicit in both the Badische and Cogbill cases is that each case turned on its own particular circumstances. Of importance to the Court was the fact that both claimants had a long history of non-compensable back ailments. Neither claimant could point to any work-related event or activity occurring at a "reasonably definite" time which caused their non-compensable ailments to re-occur.

The Court's painstaking attention to the facts in Badische and Cogbill is consistent with its historical approach to compensation cases. For example, in Reserve Life Insurance Company v. Hosey, supra, decided in 1968, the claimant's job involved a door-to-door survey. Upon walking up a set of steps the claimant felt a sharp pain in her knee. While her work activity was usual and the same type of activity in which all individuals engage regularly, the Court noted that the steps were made of stone and were a "little bit higher than usual for a step." 208 Va. at 569. While the manifestation of her injury

after "usual" exertion enabled the Court to find that Mrs. Hosey's injury was "by accident," the Court's particular attention to the factual setting of her accident allowed a finding that the injury "arose out" of her employment.

The Badische and Cogbill decisions are consistent with previous decisions of the Industrial Commission. Significantly, ten years ago the Commission reached a conclusion identical to the Court's Cogbill decision. The case of Blevins v. Newport News Shipbuilding and Dry Dock Company, 53 OIC 13 (1972) is indistinguishable from Cogbill. In Blevins the Commission ruled:

> This prolonged chair sitting occurrence does not constitute an accident arising out of the employment under the Virginia Workmen's Compensation Act and it is so found.

53 OIC at 14.

Neither Badische nor Cogbill represent a departure from the well established legal standards set by the Supreme Court in Aistrop, Hosey and Tomko. Factually and analytically the recent cases are extremely similar to the 1970 Tomko case. In Cogbill the Court did no more than what the Industrial Commission itself had done ten years ago. In each case the Court affirmed that an accident need only occur at a "reasonably definite" time. In each case the Court affirmed that injuries resulting from usual exertion must appear at a particular point in time.

The Supreme Court has consistently attempted to avoid the impermissible specter of a blanket health insurance plan while at the same time effectuating the remedial purposes of the Act. Balancing those concerns has required the Court to measure the

particular facts of each case against the applicable legal standards. In Tomko, Badische and Cogbill the Court denied compensation to claimants, who had pre-existing ailments, for inevitably degenerative conditions which affect the population as a whole and the specific claimants in particular. However, it did so utilizing the identical legal standards pursuant to which the Act has been interpreted for over forty years.

Unquestionably the Court will have ample opportunity to review and refine the legal principles applicable to the injury by accident issue. Currently pending before the Court are at least five cases wherein, if the appeals are granted, the issue will be reviewed. They are Bottom v. Manchester Paper and Board Co., I.C. Case No. 104-37-48; Young v. Quality Inn, I.C. Case No. 104-36-45; Morris v. The Lane Co., I.C. Case No. 103-12-75; Beasley v. Sun Publishing Co., I.C. Case No. 102-39-01; Brown and Root v. Hamilton, I.C. Case No. 102-38-38.

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Appendix 7

A Report to the Industry

Dilbert Table 415-981-2107

cumulative injury in california:
the continuing dilemma

Last year the California Workers' Compensation Institute released results of a research study that defined, for the first time, the dimensions of the cumulative injury phenomenon. The 1977 study was only a photograph, however, a picture of cumulative injury in California at a particular point in time. Accordingly, a companion study was conducted during a comparable period of this year—to sharpen the focus, to refine the detail, to offer a basis for comparison and, where appropriate, to test and validate the earlier findings.

Results of the two studies establish the extent to which the cumulative injury phenomenon has pervaded the California workers' compensation system. Items:

The incidence of cumulative injury claims increased threefold since 1974.

Cumulative injury losses of insured employers are expected to exceed $200 million this year, a 45 per cent increase in just two years.

Older workers are most affected. Half of the claimants are 52 years or older, an age when many employees are eligible for early retirement or begin preparation for retirement. Nearly every fifth claimant already has retired.

Eighty per cent of cumulative injury loss dollars are paid for disabilities more common to the aging process than industrial causation.

Virtually all cumulative injury claims are initiated by litigation. The out-of-pocket legal expense of the adversary process amounts to upwards of 27 per cent of the employee's net benefits – more than the expense of medical treatment.

This report to the industry outlines results of the two research studies. Of necessity, the following pages repeat some of the data and part of the text from the report of the earlier study. The redundancy, however, may be offset by the availability of a single document for ready reference and use by insurers, regulatory agencies, legislators and others concerned with a vexing and growing problem.

California Workers' Compensation Institute
September 1978

Principal Findings

The incidence of claims for cumulative injury under the California workers' compensation law increased again in early 1978, continuing an escalation pattern that began nearly 20 years ago.

The doctrine originally developed through the judicial, not legislative process. Over the years California courts in a series of decisions gave increasing recognition to the effects of job-related stress and strain on the human organism as a precipitant to compensable disability. The landmark case came in 1959 with a holding that an employee's back injury was due to the cumulative effect of work effort aggravating a pre-existing condition. The decision is notable for the court's articulation of the cumulative injury process:

We think the proposition irrefutable that while a succession of slight injuries in the course of employment may not in themselves be disabling, their cumulative effect in work effort may become a destructive force. The fact that a single but slight work strain may not be disabling does not destroy its causative effect, if in combination with other such strains it produces a subsequent disability. The single strand, entwined with others, makes up the rope of causation.

The fragmentation of injury, the splintering of symptoms into small pieces, the atomization of pain into minor twinges, the piecemeal contribution of work effort to final collapse, does not negate injury. The injury is still there, even if manifested in disintegrated rather than total, single impact. Beveridge vs IAC, *175 Cal App 2nd 592, 24 CCC 274 (1959).*

With *Beveridge* cumulative injury became a part of the California workers' compensation system. Initially the impact was slight. As recently as 1974 claims for cumulative injury were less than 1 per cent of all work injuries. Last year, however, the incidence rate reached 2.5 per cent (see *Report to the Industry*, September 1978, available from the CWCI executive offices). And now the most recent measurement shows cumulative injury claims account for 3 per cent of all lost-time injuries in California, a one-fifth increase in just one year and more than treble the rate five years ago.

The true growth probably exceeds the indicated 20 per cent annual increase. In the first instance, this frequency measurement is based on resolved cases only, and the 20 per cent increase came at a time when total decisions declined 12 per cent because of backlog at the Workers' Compensation Appeals Board, the state adjudicatory agency.

A better index of incidence may be the increase in the number of new cumulative injury claims filed. Insurers participating in the two Institute studies reported 30 per cent more new claims sub-

mitted in January-February 1978 than in the corresponding period last year. This increase forecasts a rising volume of cumulative injury claims to be resolved in the years ahead.

But even the 30 per cent increase in new claims may understate the real growth. An employee may file a claim alleging cumulative injury to the heart, back, lungs and knees. Or the employee may file four separate claims, one for each condition. Cumulative injury claims most frequently involve more than one employer and two or more insurers, each of which may create separate claim files. To avoid duplicate reporting of claims by the same employee, both CWCI studies consolidated data by the file number assigned by the Appeals Board, producing a count of "cases" without regard to the number of individual, separate reports. Using this method, the increase in new cumulative injury reportings in just one year approached 40 per cent.

Cumulative Injuries Reported
(January-February)

	1977	1978	% Change
New Claims	2324	3026	+30.6
New Cases	1840	2566	+39.5

Rising Costs

Cumulative injuries still represent only a small percentage of total work injuries, but their incidence takes on added dimension when costs are considered. Last year the Institute's study found the value of cumulative injury cases resolved during January-February was 10.1 per cent of insured lost-time claims closed during the same period. This year the comparable figure reached 11.3 per cent, up about 12 per cent, not including the claims of self-insured and legally-uninsured municipal agencies.

Cumulative injury losses cost insured California employers $137 million in 1976, according to estimates of the Workers' Compensation Insurance Rating Bureau, the industry's statistical agency. Last year's cost is projected at $166 million and, if the results of the Institute's latest study are an indication, incurred cumulative injury losses will exceed $200 million, or every seventh insured compensation claims dollar, during 1978.

Litigation

Litigation remains a fact of life in cumulative injuries. Ninety-eight per cent of such claims are litigated, up from 94 per cent a year earlier. Virtually all of these claims are initiated by the employee's attorney filing an application for a hearing before the Appeals Board, the first step in the litigation process. In most instances the notice of controversy is the insurer's first knowledge that an injury has occurred and benefits are being claimed.

Cumulative injury cases resolved during January-February 1978 had an average value of $9,027, slightly below the $9,218 average recorded in last year's study, but four times greater than the amount paid in other disability claims. Although the average value declined marginally, fees paid to the employee's attorney increased, an average of $843 compared to $780 last year.

After payment of attorney fees, the employee nets $8,184, or 91 per cent of the gross value of the case. The overall costs of providing these benefits, however, are far greater than the employee's attorney fee. When other costs are included—legal fees of the insurer/employer, the expense of forensic medical reports, and other related costs —the total exceeds $2200 per case, a litigation overhead of 27 per cent of the employee's net benefits. Collectively, the out-of-pocket legal expense associated with cumulative injury cases in the 1978 study amounts to 133 per cent of the cost of medical treatment of such injuries.

Cumulative Injury and the Future

The introduction and growing magnitude of the cumulative injury phenomenon has created unnatural stresses in a system intended to rehabilitate employees injured in their employment. To employers who finance the system, the most visible impact of these stresses is increased cost —to pay for conditions never before considered to be compensable, to pay claims today for conditions which developed 10, 20 or more years in the past, and to pay the expense of administering, and usually litigating, an escalating volume of cumulative injury claims. Less direct but nonetheless real is the inflationary impact of cumulative injuries upon consumers, in higher prices for goods and services, and upon taxpayers, who fund the state administrative structure.

Results of the two Institute studies establish that cumulative injury costs, both direct and indirect, are continuing to increase. The studies do not suggest that workers' compensation is an inappropriate remedy for the cumulative effect of job-caused disability; nor that most or all cumulative injury claims are an abuse of that remedy. Nevertheless, the data indicate some abuses exist. The Institute believes these realities dictate the addressing of two fundamental issues: (1) The extent to which workers' compensation should be responsible for systemic disorders, the aging process and the wear-and-tear of daily life; and (2) The design of

more cost-effective means to deliver appropriate, adequate and equitable compensation benefits.

In submitting its report of the 1977 study, the Institute offered a series of proposals to respond to these issues:

A more equitable method of allocating the cost of cumulative injury so the eight-hour workday is not held solely responsible for all manner and types of conditions resulting from or contributed to during the remaining 16 hours of the employee's daily routine.

A stronger work-related test for the compensability of cumulative injuries. The National Commission on State Workmen's Compensation Laws recommends employment be a significant causative factor before compensability is allowed, a standard supported by the Institute.

Restructuring permanent disability benefits to assure payments are directed for their intended purpose. Indemnity paid as damages for normal bodily wear-and-tear, for employment longevity, or as a pension supplement, is a misallocation of resources and in the long run penalizes employees whose work injuries in fact reduce their ability to compete in the open labor market.

An examination of the validity of current statutory provisions which attribute the cause of certain conditions solely to employment.

A change in procedure to restrict the initiation of litigation to those instances in which a litigable controversy exists.

Simplification of the benefit delivery process, particularly in disputed claims. Neither medicine nor law is an exact science. To attempt to determine questions of medical fact in a legal forum, as is now the case, only compounds the chance of error – and inequity. Issues of causation and the existence and extent of permanent impairment should be established by independent, impartial medical experts whose determinations are accepted as conclusions of fact.

Reappraisal of the "liberal construction" provision of the California workers' compensation law. The original 1913 enactment was intended to restrain the courts from applying 19th century tort concepts to the then-new compensation law. Today, however, the doctrine is used increasingly to justify payment of benefits for disabilities which have only incidental connection to employment. The Institute agrees reasonable doubt should be resolved in the injured employee's favor, but acceptance of that concept should not preclude an unbiased, factual determination that recognizes the rights of all parties.

The analysis of the two research studies leads the Institute to conclude these recommendations still are appropriate and merit legislative consideration to restore balance to a social insurance program that has served employees, employers and the public over the past 65 years.

Objectives of the Study

The primary purpose of the research study was to define the extent and scope of the cumulative injury phenomenon in California on an industrywide basis. More specifically, the study was designed to:

Determine the dimensions of cumulative injury and quantify the impact objectively;

Develop a comparative base to track any significant shifts from the findings of the 1977 companion study; and

Verify, where appropriate, the results of the earlier research.

Methodology

Data for the study were compiled by cooperating insurers on cumulative injury claims resolved or opened during January and February 1978. For purposes of the study:

"Cumulative injury" is an injury which has occurred or is alleged to have occurred, from repetitive mentally or physically traumatic activities extending over a period of time, the combined effects of which caused any disability or need for medical treatment.

A "resolved" claim is any claim where the date of the Findings & Award or Order Approving Compromise & Release issued by the Appeals Board (or the date paid, in non-litigated claims) occurred between January 3 and February 28 inclusive.

A "new" claim is any claim in which the insurer's claim file was created between January 3 and February 28, even if the date of claimed injury preceded the study period.

Worksheets and detailed instructions were distributed to 180 California branch and division offices of insurers participating in the study. At the conclusion of the study period the data were forwarded for computer processing and, subsequently, the results were reviewed and analyzed by technical committees of the Institute prior to the preparation of this report.

For comparative purposes, the two cumulative injury studies are not identical, e.g., 43 insurers accounting for 89 per cent of statewide premiums participated in the 1978 program, versus 41 insurers and 92 per cent of premium a year ago. However, in terms of the scope of review, methodology and sample size, the two studies are statistically valid and reliable.

The balance of this report to the industry outlines baseline information concerning the dimensions and characteristics of the cumulative injury phenomenon in California.

to compete in the open labor market —even while many recipients already are retired or preparing to leave the active workforce voluntarily.

	Percentage of Total Incurred $		
	Medical	Temporary Disability	Permanent Disability
All injuries	39.0	22.1	38.9
Cumulative —1977	18.8	7.9	73.3
Cumulative —1978	19.0	5.9	75.1

Nature of Injury

Back injuries, heart and vascular conditions, and loss of hearing are the most common cumulative injuries, accounting for seven of every 10 cases in the Institute's studies. The incidence of these conditions, each closely associated with the aging process, is more than double that affecting the injured work force generally.

	Per Cent of Total		
	Cumulative Injuries		All Disabling
Principal Injury	1977	1978	Injuries
Back	37.7	34.3	24.9
Heart/Vascular	21.1	22.7	7.4
Hearing Loss	15.7	13.2	0.2
Extremities	11.5	14.4	54.1
Neuroses	7.2	5.9	n.a.
Pulmonary	1.0	1.9	0.6
All Other	5.8	7.6	12.6

These same injuries account for 80 per cent of all cumulative injury benefit dollars. Heart and vascular conditions consume the largest portion, in part because "heart trouble" of policemen, firemen and certain other public safety employees is attributable solely to employment by specific provisions of California law.

	Per Cent of Total Incurred $	
Principal Injury	1977	1978
Back	32.7	26.9
Heart/Vascular	40.8	39.9
Hearing Loss	6.6	10.2
Extremities	7.3	4.4
Neuroses	7.0	7.1
Pulmonary	1.0	4.3
All Other	4.6	7.2

In absolute terms, the average heart case in the Institute studies cost $15,942, more than double the $7,127 value of an average cumulative back injury claim. Hearing loss cases average $4,719 each.

Occupation

Upwards of 80 per cent of the cumulative injury benefit dollars are paid to workers employed in five broad industry groups — municipal government, construction, metal working, wholesale and retail trade, and clerical and professional.

Industry	Per Cent of Total Incurred $ Cumulative Injuries 1977	1978	All Injuries
Agriculture	1.4	3.1	6.3
Mining, Petroleum	0.6	0.8	1.6
Food & Tobacco	1.8	3.5	4.1
Textiles	0.6	1.8	1.5
Rubber, Plastics	2.2	1.0	4.8
Wood Products	1.8	1.8	2.2
Metal Working	5.1	8.0	14.2
Construction	7.2	6.1	14.4
Trucking	1.1	3.1	5.0
Utilities, Service	5.1	7.2	9.7
Wholesale/Retail	7.2	6.5	13.5
Clerical/Professional	8.0	16.6	8.9
Municipal Government	54.3	39.7	11.4
Miscellaneous	0.2	0.3	2.7
Unclassified	3.4	1.5	—

The cumulative injury loss distributions above are influenced by two factors: the statutory presumptions of compensability for heart trouble and certain other conditions of public safety employees, and the recent trend to permissible uninsurance by many governmental agencies (believed to be the principal factor in the downward shift between 1977 and 1978 for the municipal category). When these factors are taken into consideration and the distributions recalculated, however, the loss patterns approximate those of other job injury claims. Thus, cumulative injuries are not peculiar to any particular occupation, nor confined to specific industries. With some limited exceptions, more of degree than substance, cumulative injuries occur universally across the entire range of California business.

Litigation

Ninety-eight per cen f cumulative injury claims are litigated, anc almost without exception the notice of controversy from the employee's attorney is the insurer's *first* knowledge of the injury. This latter finding is illustrative of the professional role reversal common to many cumulative injury claims: the attorney makes the diagnosis and the doctor determines the extent of liability.

The employee's attorney is paid an average fee of $843 from the employee's recovery, or 9 per cent of the $9027 award in the typical cumulative injury case in the 1978 study. But there are other expenses to the litigation process. The employer/insurer incurs similar costs and, in addition, usually is required to pay the balance of the employee's litigation expense —for forensic reports and other incidental costs —in addition to the benefit dollars paid the employee. When these out-of-pocket expenses are included, it cost $2202 to litigate the typical cumulative injury case in 1978, up 13 per cent from a year earlier.

Litigation Expense		1977	1978	% Change
Attorney fees	—employee	$ 780	$ 843	+ 8.1
	—employer	401	478	+ 19.2
Medical-Legal	—employee	357	446	+ 24.9
	—employer	272	274	+ 0.7
Other	—employee	52	37	− 28.9
	—employer	88	124	+ 40.9
TOTALS		$1,950	$2,202	+ 13.9

The costs shown above are understated, to an unknown but significant degree, because the figures do not include the legal expenses of non-reporting defendants, nor the unsegregated cost of house counsel employed by some insurers. Moreover, the figures do not reflect an unquantified but nonetheless real cost to taxpayers —for judges, reporters, hearing rooms, and the sundry other items —to operate the litigation machinery. Minimally, however, it costs $2202 in legal expenses to deliver $8184 in net benefits to a cumulative injury claimant, a litigation overhead of 27 per cent.

The litigation that characterizes the vast majority of cumulative injury claims produces extended delays. Typically 1.7 appearances are required before disposition by the Appeals Board. The reality is it takes time to determine which of numerous employers (an average of 2.7 per case) are liable and for how much, and which of several insurers (3.3 average) provided coverage during the exposure period. About 40 per cent of the cases are resolved within a year, but one in five is still pending two or more years after the original filing of the claim.

Time-Lag Between Filing and Disposition	% of Cases 1977	1978
12 months or less	40.3	35.3
13-24 months	37.4	41.9
25-36 months	13.8	14.2
More than 3 years	8.7	7.6

Two-thirds or more of cumulative injury cases are resolved by a Compromise & Release agreement. The reliance on settlement stems from the nature of cumulative injury: the difficulty of defense, the splintering of liability and the desire of both parties to minimize further delays and legal costs. The extensive use of the C&R mechanism also may reflect the uncertainties inherent in attempting to distinguish, in both a medical and legal sense, between the causal effects of employment and the bodily wear-and-tear of everyday life.

Further information concerning the cumulative injury research studies may be obtained from the California Workers Compensation Institute, 201 Sansome Street, San Francisco, CA 94104.

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J. G. KIRKENDALL, *Vice President*
Operations & Administration

TO THE MEMBERS OF THE JOINT COMMITTEE
STUDYING GRADUALLY-INCURRED, WORK-
RELATED INJURY - HJR NO. 37

Gentlemen:

I would like to address this issue, if you will permit me, by looking at two sentences forming a part of the Joint Resolution itself.

The resolution states "many states include as compensable in their workmen's compensation laws all work-related injuries, whether sudden or gradual".

A traditional test for compensation has been a "personal injury" caused by an "accident". An "accident" has frequently been defined as a sudden unexpected event, determinate as to time and place. Compensation, for example, has been denied when nothing unexpected or unusual occurred. [1.]

The facts are that very few states cover, as a part of their Act, gradually-incurred injury. California, Michigan, Kentucky and Rhode Island are the only four states I am aware of who treat gradual injury in their laws, by some specific reference. Rather, court rulings in several jurisdictions, not the Act, have addressed the issue.

The resolution also says "the National Commission on State Workmen's Compensation Laws has stated that workmen's compensation laws should provide broad coverage to employees for work-related injuries". This should not be taken to mean, in the context of that study, that benefits should be broadened. The actual recommendation made was that coverage be extended, on a compulsory basis, to all

1. The Report of the National Commission on State Workmen's Compensation Laws - 1972.

workers now excluded by various provisions of the Act, either because of their occupation, or because of numeric requirements (for example, an employer having less than three employees).

Although, as the resolution says, our Supreme Court has interpreted that an accident must occur at a specific time and place, there are a number of cases which have been litigated, or awards which have been made by the Industrial Commission, where the "accident" occurred over a somewhat protracted period. So - there is already in the mechanism recourse under certain circumstances.

The statistical definition of cumulative (gradually-incurred) injury that we use in compiling data is this:

(1) The injury is not traceable to a definite compensable accident occurring during the employee's present or past employment;

(2) It has occurred from and has been aggravated by, a repetitive employment-related activity;

(3) It has resulted in a disability or death.

Example: A laborer's back injury caused by repetitive bending and twisting of the spine on the job.

Several of you are aware that the insurance industry began what is called a Detailed Claim Study on indemnity claims occurring in Virginia from April 1, 1979 through March 31, 1980.

The study is based on a random sampling of 40% of all indemnity claims reported, and tracks claims from the time they are first reported until they are finally closed out, which can be over a period of several years or more.

I have just received the latest update on the study, which includes data on 16,416 cases. Before releasing copies to you, I want to obtain some more

specific information on certain of the exhibits, as they bear directly on this study. When the information is received, which should be shortly, we will see to it that you all receive copies.

I can tell you, however, that of the 16,416 cases reported, 561 of them, or 3.42% are coded as cumulative injuries, following our statistical definition. The average total Medical and Indemnity cost per case at this point is $13,781. These claims represent 6.77% of the total claims dollars paid or expected to be paid for all types of losses.

The National Council on Compensation Insurance, located in New York, was kind enough to also supply some partial data on states having either (1) a strict definition of injury, which would exclude cumulative injuries, (2) an intermediate definition, and (3) a liberal definition, which would include cumulative injuries.

The incidence of claims in states with the varying levels of law is quite interesting:

STRICT LAWS	-	Cumulative Injury:	.213	Indemnity & Medical:	.485
INTERMEDIATE	-	Cumulative Injury:	.333	Indemnity & Medical:	.8
LIBERAL	-	Cumulative Injury:	1.76	Indemnity & Medical:	2.84

It would seem that as laws are liberalized, utilization is higher, perhaps disproportionate. However, the inference could also be drawn that a broader base of benefits results in more claims being approved.

The issue of cumulative injury is both philosophical and economic. On the philosophic side, it can be argued that the compensation system should pay for any loss arising out of and in the course of employment; that gradually-incurred injury is an inevitable result of long-term exposure to the operative hazards

of the workplace - that industry should bear the burden of relief to those workers injured in their employ.

On the other hand, is it fair for a benefits system to provide recompense to a worker whose physical condition deteriorates merely due to the aging process? Is there a way to truly determine whether the gradual injury occurred as a result of the work process, or from a non-occupational cause, such as raking leaves at your house every Fall.

Even with a strict law, such as we have in Virginia, the Detail Claim Study reveals that 6.77% of those claims dollars are for our statistical definition of cumulative injury. What if the law were broadened? What is the cost to the employer and ultimately to the purchaser? Initial calculations would suggest perhaps a 10-15% increase in rates at the outset; perhaps more, perhaps less. Would broadened benefits lead to greater utilization, simply because the rewards were available?

We had heard that the State of Michigan had all sorts of cumulative injury claims presented over the last several years. We found out that the incidence of insured claims was higher here than in most other states, but not excessively so. Curiously enough, 50% or more of the compensation dollars paid out represented payments to retirees in the auto industry, a relatively high percentage of which was for cumulative injuries. Bear in mind that this is mainly Ford and General Motors - both self-insured manufacturers. There may be a definite connection here between the availability of benefits and the severe economic crisis in that state, and that industry in particular.

Legislative Services has, I believe, distributed copies of three articles from the August 9, 1982 issue of Business Insurance. These articles would seem to support the Michigan situation.

I'm not speaking either in favor of or against a revision of the Virginia Workmen's Compensation Act in this area. Rather, I'm trying to suggest to you that this is an extremely difficult issue to address without a great deal of thought and study. The cost of the change is important. The philosophy of the change has far-reaching implications. If you conclude that a change is indicated, proper controls are an absolute necessity to prevent abuses, because the potential is certainly there. The worker would certainly hope for a broadening of benefits, while the employer would acquire yet another cost of doing business - maybe just the one to put him under.

Over the next month or so, we will be assembling as much data as we can on this issue. Hopefully, the data will be of help to you.

George D. Weston, CPCU
President

D 10/19/82 Cramme T 10/20/82 tmg

A BILL to amend and reenact § 65.1-7 of the Code of Virginia, defining the term "injury" under the Workmen's Compensation Act.

Be it enacted by the General Assembly of Virginia:

1. That § 65.1-7 of the Code of Virginia is amended and reenacted as follows:

§ 65.1-7. "Injury" defined.--Unless the context otherwise requires, "injury" and "personal injury" mean only injury by accident, or occupational disease as hereinafter defined, arising out of and in the course of the employment and do not include a disease in any form, except when it results naturally and unavoidably from either of the foregoing causes. For the purposes of this section and Act, an accident need not occur suddenly at a definite time and place, but shall be shown to have occurred at some reasonably definite time and place.

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LD5126574 BH 574

D 10/18/82 CRAMME T 10/20/82 bgh

A BILL to amend and reenact § 65.1-7 of the Code of Virginia, defining the term "injury" as used in the Workmen's Compensation Act.

Be it enacted by the General Assembly of Virginia:

1. That § 65.1-7 of the Code of Virginia is amended and reenacted as follows:

§ 65.1-7. "Injury" defined.--Unless the context otherwise requires, "injury" and "personal injury" mean only injury by accident, or occupational disease as hereinafter defined, arising out of and in the course of the employment and do not include a disease in any form, except when it results naturally and unavoidably from either of the foregoing causes. For the purposes of the terms "injury" and "personal injury" as defined, the mere fact that the employee's injury did not occur simultaneously with an identified incident of his work-related duties shall not, by itself, preclude an employee from receiving compensation under this Act so long as the injury and that incident causing the injury occurred within a reasonably definite time and place.

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D10/19/82CRAMME T10/20/82BAM

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MEMORANDUM

IN RE: A BILL to amend and reenact §65.1-7 of the Code of Virginia, defining the term "injury" as used in the Workmen's Compensation Act.

This memorandum is being furnished to the members of the joint sub-committee studying proposed changes in §65.1-7 of the Code of Virginia for the purpose of pointing out the many pitfalls in the proposed legislative change.

The basic principle of the Workmen's Compensation Law is to compensate an employee for disability flowing from a specific accident arising out of and during the course of the employment. The law is not intended to provide compensation to an employee who becomes disabled for work over a period of time because of an inherent physical weakness or infirmity which is not causally related to the employment.

Since the enactment of the Workmen's Compensation Law in Virginia in 1918, §65.1-7 of the Code has remained in tact. This section has been construed in thousands of cases by the Industrial Commission of Virginia and in hundreds of cases by the Supreme Court of Virginia. The precedents established in these forums are well known by all attorneys who practice Workmen's Compensation Law and the personnel of workmen's compensation insurance carriers who are responsible for the payment of claims presented under the Workmen's Compensation Law. By virtue of these legal precedents, ninety-five per cent or more of the cases reported to the Industrial Commission of Virginia are voluntarily assumed without litigation. If any of the proposed changes are made in §65.1-7, the Industrial Commission would be flooded with claims over a period of years. Due to the verbage employed in the proposed amendments there could not be any clear cut precedents established for the voluntary assumption of claims due to the indefiniteness of the verbage employed in the proposed changes.

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Under TG 574 the proposed change states:

> For the purposes of this section and act, an accident need not occur suddenly at a definite time and place, but shall be shown to have occurred at some reasonably definite time and place.

The application of this proposed amendment turns on an interpretation of the word "reasonably". There could never be any concensus of opinion as to what constitutes a reasonable time. To one decision maker, it could be five minutes while to another a reasonable time could mean days or weeks.

The proposed change in BH 574 is as follows:

> For the purposes of the terms "injury" and "personal injury" as defined, the mere fact that the employee's injury did not occur simultaneously with an identified incident of his work related duties shall not, by itself, preclude an employee from receiving compensation under this Act so long as the injury and that incident causing the injury occurred within a reasonable definite time and place.

The same objection applies as that previously stated in discussing TG 574.

DM 574 sets forth the following change:

> For the purposes of this section and act, an accident need not occur suddenly at a definite time and place, but shall be shown to have occurred by some unusual exertion or duty within two consecutive work shifts of any employee's employment.

The person who must make a decision as to the compensability of a claim filed under this provision must determine whether or not the employee suffered unusual exertion or performed some unusual duty for his employer during two consecutive work shifts. In construing what is unusual exertion or duty, does the decision maker ask whether the exertion or duty encountered was unusual in the particular employment environment or was it unusual to that particular employee? "Unusual" exertion is an indefinite term. For example, an employee who is accustomed to lifting five pound weights is called upon to lift a six pound weight on a

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particular occasion. It would follow that the hitting of the six pound weight would be an unusual exertion as to that employee.

It is our opinion that any of the proposed changes to §65.1-7 would materially increase the administrative costs of the Virginia Workmen's Compensation Act and pyramid the already exorbitant costs of workmen's compensation insurance in the mining industry as well as many other industries which are required to carry workmen's compensation insurance. Under the Virginia Workmen's Compensation Law as it now exists, an employer takes an employee as he is. If the employee aggravates a pre-existing condition by an accident arising out of and during the course of his employment, the employer is held fully responsible for all medical expense incident to treating the condition for the life of the employee and must also pay workmen's compensation benefits during the period of work disability. Under any of the proposed amendments an employer would be subject to great financial loss if an employee became disabled for work by virtue of an inherent physical weakness or an acquired disease after being employed. For example, let us assume that the employee hires an employee who has or acquires arthritis, rheumatism or a degenerative disc disease. The employee reaches a point where he can no longer work because of one of these diseases and makes claim for workmen's compensation benefits on the basis that the unusual exertion of his regular employment, the dampness of the environment in his employment or the posture that he was forced to assume in his employment, caused him to become disabled. Under any of the proposed legislative changes, compensation benefits would be awarded if the trier of the facts determined that the conditions of the employment during the last two days of the employment or any reasonable period of time prior thereto brought on the work disability. The result would be untenable within the purview of the Workmen's Compensation Law. Such cases are properly placed under the Social Security Laws or health insurance policies and not one that should be taxed against the employer under the Workmen's Compensation Act.

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The Virginia Workmen's Compensation Law as it exists, is one of the most liberal in monetary benefits to an employee and the administration of this law by the Virginia Industrial Commission is deemed a model by the other states of the Union. It is urged that the proposed amendments to §65.1-7 of the Virginia Workmen's Compensation Act be refused. The deletion of the proposed amendments will insure prompt handling of all workmen's compensation cases without administrative delay or expensive litigation and protect the integrity of the Virginia Workmen's Compensation Law and not convert it to a health insurance plan.

Respectfully submitted,

M. Edward Evans

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October 18, 1982

VIRGINIA DIVISION OF INDUSTRIAL DEVELOPMENT
STATEMENT FOR THE SUBCOMMITTEE
STUDYING GRADUALLY-INCURRED WORK-RELATED INJURIES

We have two main concerns with any proposal to include "gradually-incurred" or "cumulative" injuries under Workers' Compensation coverage. These are cost and competitiveness, and they are closely related.

Naturally any change that increases coverage or benefits increases costs to employers. The size of the increase will depend on the specific law as well as its implementation by the Industrial Commission and the courts. The cost of gradually-incurred injuries is particularly difficult to know in advance because such injuries are so difficult to define and to distinguish from the normal effects of aging. We do know that shortly after the Kentucky Supreme Court ruled in favor of a gradually-incurred injury case, a rate increase of 8.1% was filed and approved.

To attract new industry to the State, Virginia must remain competitive with other states. Only a few states nationwide cover gradually-incurred injuries. In most cases it has been instituted by the courts rather than through legislation. Of our immediate neighboring states, who are our most direct competitors for new industry, only Kentucky has made awards for gradually-incurred injuries.

Workers' Compensation is an important area to employers. In the 1981 Alexander Grant study of business climate in the 48 contiguous states, two of the 22 measures related to Workers' Compensation. These were factor B3: Maximum weekly payment for temporary total disability and factor B4: Average Workers' Compensation insurance rate per $100 of payroll, of selected manufacturing occupations. Together these two factors accounted for 10.61% of a state's total rank.

Virginia is currently only moderately competitive in Workers' Compensation, receiving ranks of 23 on factor B3 and 16 on factor B4. It is B4, the cost measure, that would be affected by including gradually-incurred injuries. As the table shows, costs are already higher in Virginia than in North and South Carolina and Tennessee, our main competitors for new industry. Adding gradually-incurred injuries would further erode Virginia's competitive position in this area.

Asking business to take on the type of open-ended cost increase associated with coverage of gradually-incurred injuries certainly would not improve Virginia's business climate. As you heard from the Virginia Manufacturers Association at the last hearing, existing manufacturers are opposed to this change. It is this group that provides the majority of new job opportunities, particularly in times of recession such as the present.

In addition to the costs themselves, this change would be seen as a measure of the government's philosophy and attitude toward business. It would be a fundamental change in the Workmen's Compensation Act. It would be a clear movement away from the reasonable and fair practice of employers' providing compensation for injuries that are directly related to an employee's work.

Rank of Selected States in Workers' Compensation

Alexander Grant Study, 1981

State	Factor B3 Weekly Payment	Factor B4 Cost
Virginia	23*	16
North Carolina	22	5
South Carolina	27	9
Tennessee	3	10
Kentucky	33	18**
Factor weight	4.35%	6.26%

* tied with two other states
** tied with one other states