REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

Workers' Compensation

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

House Document No. 27

COMMONWEALTH OF VIRGINIA
RICHMOND
1986

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INTRODUCTION

During the 1985 Session of the General Assembly, a bill expanding the definition of "injury" under the Workers' Compensation Act to include injuries occurring in the course of one workshift was introduced and referred to the House Committee on Labor and Commerce. Although the full Committee and Workers' Compensation Subcommittee heard extensive testimony on the bill they felt that the issue warranted more study therefore it was carried over by Rule 23 of the Rules of the House for study during the interim.

In April, the Supreme Court ruling in Western Electric Co. v. Gilliam greatly affected occupational disease rulings in the Commonwealth by narrowing the discretion of the Industrial Commission of Virginia in awarding compensation in such cases. Since this issue was of such great importance it was incorporated into the study of the gradually-incurred injury bill, House Bill No. 1566. Copies of House Bill No. 1566 and the Gilliam case appear as Appendices 1 and 2 to this report.

The Workers' Compensation Subcommittees of the House Committee on Labor and Commerce whose members included William T. Wilson of Covington, Kenneth E. Calvert of Danville, George W. Grayson of Williamsburg, Frank D. Hargrove of Glen Allen and Frank Medico of Alexandria, and of the Senate Committee on Commerce and Labor whose members included Elmon T. Gray of Waverly, Edward M. Holland of Arlington and Elliot S. Schewel of Lynchburg, studied the issues.

C. William Cramme', III, Senior Attorney and Terry Mapp Barrett, Research Associate, of the Division of Legislative Services served as legal and research staff for the subcommittee. Ann Howard of the House Clerk's Office provided the clerical and administrative support for the subcommittee.

WORK OF THE SUBCOMMITTEE

The subcommittee heard a large amount of testimony during meetings held in 1985 on August 7 and October 31 and in 1986 on January 22 from a number of organizations and individuals including: the Industrial Commission of Virginia, Commissioner Charles G. James and Chief Deputy Commissioner L. W. Hiner; the Virginia State AFL-CIO, David Laws, President and Dan LaBlanc, Secretary-Treasurer; the Virginia Coal Association, Ed Evans; the Virginia Manufacturers' Association, Frank Talbott; the Virginia Association of Defense Attorneys, Charles Midkiff; the Association of General Contractors of Virginia, John Farnham; the American Insurance Association, James C. Roberts and Anthony F. Troy; Wilson Trucking Company, Ed Layman, Director of Safety; the Virginia Compensation Rating Bureau, George Weston; several claimant and defense attorneys including Lawrence J. Pascal, Donald Pendleton, Robert Dely, C. Torrence Armstrong and Roger Williams and a representative of self-insured employers, James A. Harper. The overall issue of whether gradually incurred injuries should be compensated was discussed during a portion of the August 7 meeting yet most of the testimony heard and discussion that took place concerned the Gilliam case. The major question that surfaced during the discussions was whether the Supreme Court reasonably interpreted the definition of "occupational disease" in Gilliam .

At the onset of the study, the Industrial Commission informed the joint subcommittee that over the years there have been some problems with the accident and occupational disease concepts as far as awards have been concerned. They explained that although one thinks of an accident as the result of a quick or sudden impact and of an occupational disease as a result of exposure over a period of time, there is some overlapping of the two in the gradually-incurred issues. The Commission reviewed four cases that were significant to the issues being considered that have been handed down by the Supreme Court since the last study of the gradually-incurred injury issue (1982). In each of these cases the claim was awarded by the Commission and reversed by the Supreme Court. Summaries of these cases appear as Appendix 3 to this report.

House Bill No. 1566

Regarding the gradually-incurred injury bill, House Bill No. 1566, its patron, Delegate Jay DeBoer, testified that the purpose of the legislation was to eliminate the sudden impact requirement for injuries under current law as many workers who are injured on the job cannot pinpoint the exact time of or the exact motion causing the injury and are therefore unable to be compensated under the Workers' Compensation Act. He proposed an amendment to the bill, a

copy of which, along with House Bill No. 1566, appears as Appendix 4 to this report, which would broaden the definition of "injury" under § 65.1-7 to include those injuries that occur within a workshift.

The opponents to such legislation informed the subcommittee that Virginia's Workers' Compensation system is adequate in terms of providing benefits for injured workers and that the same assertions that were made at the time of the 1982 study of the gradually-incurred injury issue apply now. House Document No. 20 of the 1983 General Assembly provides a detailed account of the arguments made for and against the compensation of such injuries at that time. The opponents pointed out that as far as injuries are concerned, § 65.1-7, the heartstone of the Workers' Compensation Act, has been the subject of precise judicial interpretation for sixty years and any changes to it would substantially increase the number of claims filed and carried to court to have the precedence reestablished.

It was explained that forty states require that the injury has to be accidental in nature and thirty states have the suddenness requirement. Eight states have adopted the gradually-incurred concept which has resulted in workers' compensation coverage being extended to disabilities resulting from the aging process and everyday wear and tear. In California the cumulative injury approach was adopted by judicial decision resulting in a threefold increase in cumulative trama claims between 1974 and 1978. Eighty percent of their cumulative trama injury loss dollars paid were for disabilities more common to the aging process than to work-related injuries and after the change, fifty percent of their claimants were 52 years of age or older whereas before the average age was 33. Michigan experienced similar problems as, by 1983, their definition of disability was so broad that an employee just had to think that he was injured, and workers' compensation premiums were so high that businesses, no longer being able to afford to operate in the state, moved elsewhere and new businesses chose to locate elsewhere.

The opponents argued that the current definition of "injury" is the only safeguard between workers' compensation and health insurance. They explained that broadening the definition would open up the system for further abuses and that employers and the public would have to absorb the costs of unnecessary claims. They noted that the courts are already overloaded and that they were afraid that changing the law now to allow injuries occurring in one workshift to be compensated would be the "nose under the tent" and that over time the timeframe of one workshift would be extended. It was pointed out that this was not a good year to broaden the statute because workers' compensation insurance premiums are so high. The Virginia Compensation Rating Bureau indicated that it recently had been granted permission by the State Corporation Commission to increase premiums by 18.7 percent overall. They explained that some industries would be hit harder (manufacturing - 25.3 percent). They explained further that prior to this increase, they had received a rate reduction based on 1982 claims which were low, yet, since claims were up in 1983 and 1984 they had to raise their rates which, overall, returned to 1982 levels.

The Compensation Rating Bureau informed the joint subcommittee that cumulative injury claims currently amount to only two-tenths of one percent of all claims in Virginia whereas, in Michigan they are six percent. Costs attributable to these injuries amount to only one-tenth of all claim costs in Virginia whereas in Michigan they amount to seven and two-tenths. They explained that many states have much broader interpretations of their statutes, and that the percentage of workers' compensation claims goes up in direct proportion with the broadness of the statutes or judicial decisions. Attached as Appendix 5 to this report is a copy of a letter to the Industrial Commission from the Rating Bureau explaining more fully the differences between the states regarding the definition of "injury."

Regarding the costs that would result from the passage of House Bill No. 1566, the Compensation Rating Bureau stated that, basing their estimates on awards for cumulative injury in other states, they anticipated a range of an increase in workers' compensation premiums of nine to eleven percent on the high side which would amount to approximately $30 million. They noted however that if back cases were eliminated, the increase would be only five percent.

Gilliam Case

The joint subcommittee learned that in the Gilliam case the Supreme Court ruled that tenosynovitis is an ordinary disease of life to which the general public is exposed therefore it was not compensable as an occupational disease. Many people testified that the Court imposed an unreasonably restrictive interpretation on the definition of "occupational disease" resulting in an overall feeling that no disease other than black lung or an infectious or contagious disease

contracted while working in a hospital would be compensated. It was pointed out that in June the Supreme Court denied a claim for asbestos-related cancer because it was ruled that the cancer was an "ordinary disease of life."

The Industrial Commission informed the subcommittee that the feeling at the Commission prior to Gilliam was that even though a claimant's disease was "an ordinary disease of life" it could be compensated if all six conditions specified in § 65.1-46 were met. A copy of § 65.1-46 appears as Appendix 6 of this report. They pointed out that over the years they have made a conscious effort to show a causal connection between the disease and the work before awarding claims and that they felt the system worked fairly for both the injured employee and the employer.

Since Gilliam , the Industrial Commission indicated that they have denied twenty-five cases that would have been awarded prior to Gilliam and noted that this number did not include those workers who did not file because of the ruling. The Commission informed the subcommittee that Virginia would be the most backward state in the nation in the area of the compensation of occupational diseases if no legislative changes were made. They explained that in other states, when talking about occupational diseases being ordinary diseases of life, some courts say that the general public does not have the exposure to the extent that the worker does therefore compensation is awarded. A copy of an amendment to § 65.1-46 proposed by the Commission appears as Appendix 7 to this report.

The Commission explained that in Gilliam the Court recognized that an extension of a disease to include gradually incurred injuries is costly and said that if the legislature had intended to cover such injuries it should have spelled it out. In Gilliam , the Court established the guidelines to adhere to until the General Assembly addresses the issue and indicated that they interpreted the repeal of the schedule of occupational diseases in 1970 as narrowing the coverage of the Act. The Commission informed the subcommittee that they felt that the intent of the legislature in repealing the schedule was to give them broader discretion to determine what conditions should be compensable as occupational diseases.

The following history of the schedule of occupational disease, was presented to the joint subcommittee:

1924 – No disease covered unless an accident.
1942 – Schedule of diseases was added.
1952 – Schedule of diseases repealed.
1956 – Law provided full coverage for occupational diseases if conditions were met; no schedule.
1964 – Employer given the option of accepting all occupational diseases or a schedule.
1968 – Schedule of diseases only.
1970 – Schedule of diseases repealed.

Regarding the accuracy of the Supreme Court's interpretation of the law in its ruling in Gilliam , several people indicated that the Court had erred. The subcommittee learned that Larson, the "Dean of Workers' Compensation," called Virginia the most backward state in the nation in this area. It was pointed out that in its 1970 report to the Governor and General Assembly on workers' compensation laws (House Document No. 17), the Virginia Advisory Legislative Council recommended repealing the schedule to give the Industrial Commission the latitude and authority to consider each case individually. The actual recommendation and reasons therefore as set out in the report read as follows:

"Recommendation: That legislation be enacted repealing the schedule of occupational diseases and the election to be bound thereby, deleting all references to it, and amending § 65.1-46 to include infectious or contagious diseases contracted in the course of employment in or in immediate connection with a public health laboratory.

The schedule of occupational diseases as set out in § 65.1-47 attempts to be all-inclusive. However, the only possible effect the schedule can have is to eliminate a disease which may in fact be an occupational disease. The employee who contracts such a disease while working for an employer who has elected to be bound only by the schedule of occupational diseases receives no compensation. On the other hand, if an employee contracts a disease enumerated in the schedule, he must still prove it to be an occupational disease as defined in § 65.1-46. The elimination of the schedule insures the most comprehensive coverage of occupational diseases; yet the employer is not prejudiced because the disease must in fact be an occupational disease, arising out of and in the course of employment.

If the schedule is repealed, the election to be bound thereby should be repealed and all references to the schedule deleted."

Many testified that they felt that with Gilliam the Court challenged the legislature to do something about the occupational disease statute.

Others indicated that the Court could hardly have reached a different decision given the language of the statute. They pointed out that by hearing four cases on the general subject of whether a gradual injury should be compensated as an accident or as a disease, the Court was trying to resolve the inconsistencies regarding the issue. The Court had had the benefit of case law as well as the 1969 and 1983 studies in considering Gilliam . They explained that the Court was not saying that the law needed to be changed but that it was tired of hearing arguments that it should change the law because, as it said, "such a consequential decision, impacting as it must a broad spectrum of economic and social values is a matter of public policy reserved to the original and exclusive jurisdiction of the General Assembly..."

Those agreeing with the Court decision informed the subcommittee that it was never the intent of the Workers' Compensation Act to compensate all diseases even if they were related to the employee's occupation and that the Act is a careful compromise that the Court tried to maintain with Gilliam . They stressed that there must be safeguards to protect employers by preventing the compensation of ordinary diseases of life and that the question was not of fairness but of what the governmental policy should be.

Concern was expressed by many for those who were drawing temporary total benefits for diseases such as carpal tunnel syndrome whose benefits may be cut off if employers or insurance companies appeal the employees' awards because of Gilliam . Concern was also expressed for those who "fell in the crack" between the date of the Court decision and the date of legislative action and for those who failed to file with the Commission because they knew they would not be awarded compensation. It was stressed that any legislative changes be made retroactive to the date of the the Gilliam decision, April 26, 1985. It was pointed out that the only alternatives for people whose conditions are no longer compensable are welfare and medicaid and that employers, not taxpayers, should have to bear the costs.

Several persons indicated that they would like to see the law restored to where it was prior to Gilliam but that they did not want to incorporate back and neck injuries into any legislative changes. Language amending § 65.1-46 by deleting "No ordinary disease of life...", a copy of which appears as Appendix 8 to this report, was suggested. It was explained that this would allow for legitimate diseases to be compensated if the facts supported it yet the claimant would still have to prove his case by a preponderance of the evidence.

The subcommittee learned that it is difficult to determine what was "pre- Gilliam " and that many felt that the elimination of the "ordinary disease of life" language would not do this. It was explained that the problem is in pinpointing where the line of demarcation should be, between those ordinary diseases of life that should be compensated and those that should not. The subcommittee was urged to consider the consequences of broadening the language before doing so as some argued that a change in the statute could result in $40-$50 million in additional premiums for the industry. It was pointed out that workers' compensation is not health insurance and that in times of high employment workers' compensation claims increase. The Virginia Compensation Rating Bureau indicated that if the law was returned to pre- Gilliam , there would be no increase in costs to the industry.

A special committee of industry and employee representatives and the Industrial Commission was requested by the joint subcommittee to come up with language agreeable to all sides addressing the problem and to report back to them with recommendations.

A letter discussing the work of the drafting committee and including a draft that represented a compromise between the drafting committee members (Draft 1A) and a draft representing an improvement over the first draft (Draft A) in the opinion of the person reporting to the joint subcommittee was sent to the members in early January. A copy of this letter appears as Appendix 9 to this report. House Bill No. 466, introduced by Delegate Warren G. Stambaugh during the 1986 Session, is identical to Draft 1A.

A meeting to discuss the drafts and to determine the final recommendations of the joint subcommittee was held on January 22, 1986. During the meeting various members of the drafting committee presented their views on the draft and the joint subcommittee members discussed at length what their final recommendations should be. The joint subcommittee learned that the group considered several approaches including reverting back to a schedule of diseases, doing nothing, going along with Draft 1A, or amending Draft 1A, and compromised with the two section approach of Draft 1A as a basis for discussion.

Considerations Regarding Gilliam

The joint subcommittee agreed that it was important that the language they recommended was clear and easily understood so that the Industrial Commission and the courts would understand the intent of the General Assembly. Although the subcommittee was able to reach a final recommendation it's members felt that their full committees, House Labor and Commerce and Senate Commerce and Labor, should be apprised of the alternatives they considered so that they could make the final recommendation based upon such alternatives and the joint subcommittee's final recommendation.

During their study the joint considered the following alternatives:

1. Reverting back to a schedule of occupational diseases.

Today very few states have schedules of occupational diseases because it is very difficult if not impossible to list all occupational diseases. Most have adopted a catch-all clause similar to Virginia's. According to a report by the Virginia Advisory Legislation Council, the schedule of occupational diseases was repealed in Virginia in 1970 so as to give the Industrial Commission broader discretion in determining what conditions should be compensated as occupational diseases.

In Gilliam the Supreme Court interpreted the General Assembly's repealing of the schedule in 1970 as narrowing the discretion of the Industrial Commission in awarding compensation for occupational diseases. Although a schedule was considered, it was not recommended as only those occupational diseases on the schedule could be compensated, and the schedule would have to be amended frequently as new diseases develop.

2. Leaving the law as it is (doing nothing).

Several people testifying before the joint subcommittee indicated that it would be a mistake to change the law as the Workers' Compensation Act is a careful compromise between all interested parties which has been maintained for many years. They pointed out that the Act is not health insurance and was never intended to compensate all diseases even if they are related to the employee's occupation.

Those favoring a change in the law indicated that in Gilliam the Supreme Court imposed an unreasonable restriction in the interpretation of the definition of occupational diseases resulting in the feeling that no diseases other than lung diseases and infectious conditions or diseases contracted by a person while working in a hospital would be compensable under the occupational disease statute. They pointed out that for many of those who have diseases which are no longer compensable the only alternatives are welfare and medicaid, the costs of which are borne by taxpayers. They indicated that employers should have to bear the costs of compensating their injured employees and that Larson, the "Dean of Workers' Compensation" referred to Virginia as the most backward state in the nation in this area.

Additional arguments favoring or opposing a change in the law may be found in the WORK OF THE SUBCOMMITTEE portion of this report.

3. Recommending Draft 1A which is identical to House Bill No. 466 which was introduced this year by Delegate Warren G. Stambaugh.

The two section approach of House Bill No. 466 (Draft 1A) was designed to avoid confusion where the concepts of occupational diseases and ordinary diseases of life overlap. Neck, back and spinal column injuries were excluded from coverage (paragraph 4 of § 65.1-46).

Those favoring a change in the law testified that such change would put the Industrial Commission back into the position it was in prior to Gilliam , enabling those occupational diseases which result from exposure in the workplace to be compensated. Concern was expressed that the burden of proof standards in the bill were too strict as the injured employee would have to prove by "clear and convincing evidence, to a reasonable medical certainty" that his disease arose out of and in the course of the employment and that it "did not result from causes outside of the employment." Concern was also expressed that if any percentage of the

disease arose out of exposure outside of the employment, compensation for such disease would be barred.

There was considerable discussion over whether a disease of which ninety percent of exposure was in the workplace and ten percent was from outside of the workplace would be compensated under Draft 1A/House Bill No. 466. Commissioner James with the Industrial Commission stated that he would award that case under Draft 1A/House Bill No. 466.

It was suggested that "materially" or "substantially" be inserted on line 41 of House Bill No. 466 after the word result so that a disease would not have to result entirely from exposure in the workplace to be awarded as this is rarely the case.

It was also suggested that "in any degree" rather than "substantially" or "materially" be inserted yet this was objected to by a claimants' attorney as he felt that this would emasculate the statute as there would be no way an employee could show that the disease resulted one hundred percent from exposure in the workplace. He advocated a "substantial" or "equal" burden of proof.

The joint subcommittee learned that one-half of the members of the drafting committee felt that it was a mistake to change the law as the decision in Gilliam was not a departure from the rulings in a number of other cases but agreed to Draft 1A as a basis for discussion. Those opposing a change in the law explained that in Gilliam the Court confirmed that ordinary diseases of life were not meant to be compensated. An amendment was suggested to paragraph 4 of § 65.1-46 of Draft 1A/House Bill No. 466 which would exempt any conditions originating or arising within the muscular, ligamentous, or skeletal system so as to draw a line where the Supreme Court makes its determinations in cases involving such systems. It was explained that this would eliminate "wear and tear" conditions and that any change in the law would result in additional costs to employers.

The Industrial Commission testified that the drafting committee had tried to put them back into the position it was in prior to Gilliam yet the above proposed amendment would not do this as it would "gut" the bill by eliminating every ligamentous, skeletal or muscular condition. They explained that the amendment would put them back to how the Supreme Court interpreted the law in Gilliam so that only hearing loss and lung disease cases could be awarded. They explained further that the language in Draft 1A/House Bill No. 466 would restrict them a little more in what they were doing prior to Gilliam because of the heavier burden of proof with "clear and convincing evidence." They pointed out, however, that this restriction would not reduce costs.

RECOMMENDATIONS

1 - The joint subcommittee makes no recommendations regarding House Bill No. 1566 which had been carried over for study during the interim by the House Labor and Commerce Committee.

2. The joint subcommittee recommends Alternative 3 of their considerations regarding Gilliam , the passage of House Bill No. 466 (introduced by Delegate Warren G. Stambaugh) with two amendments. A copy of the bill with the amendments written in is attached to this report as Appendix 10.

The bill without any amendments would put the Industrial Commission back into the position it was in prior to Gilliam yet the joint subcommittee felt that language should be more restrictive therefore they recommend amending the bill to exclude from coverage those conditions originating or arising within the muscular, ligamentous and skeletal systems and to require injured employees to prove that their diseases resulted only from exposure in the workplace.

Although the joint subcommittee members recommend this, they reserve their rights to offer further comments or amendments when House Bill No. 466 comes before their full committees.

Respectfully submitted,

William T. Wilson,

Kenneth E. Calvert

George W. Grayson

Frank D. Hargrove

Frank Medico

Elmon T. Gray

Edward M. Holland

Elliot S. Schewel

1985 SESSION

LD6605451

HOUSE BILL NO. 1566

Offered January 22, 1985

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

Patron--DeBoer

Referred to Committee on Labor and Commerce

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 within the course of one workshift.*

Official Use By Clerks	
Passed By The House of Delegates	**Passed By The Senate**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
Clerk of the House of Delegates	Clerk of the Senate

APPENDIX 2

Present: All the Justices

WESTERN ELECTRIC COMPANY

v. Record No. 831835

BRENDA E. GILLIAM

PER CURIAM

April 26, 1985

FROM THE INDUSTRIAL COMMISSION OF VIRGINIA

The question posed by this appeal is whether, as the Industrial Commission ruled, tenosynovitis, a condition gradually incurred on account of repeated, work-related trauma, is compensable as an occupational disease under the Workers' Compensation Act.

On January 28, 1983, Brenda Gilliam filed an application for a hearing before the Commission. Alleging that she had contracted tenosynovitis and that the "[c]ondition developed gradually", she claimed medical benefits for the treatment of an "occupational disease". We review the evidence in the light most favorable to the claimant, who prevailed below.

Gilliam was employed by Western Electric Company in 1978. Her duties as a telephone-repair worker involved rapid, repetitive, and virtually continuous manipulation of her hands as telephone components moved along an assembly line. Gilliam first complained of pain in her hands in March 1980 when she was examined by Dr. J. J. Bellas, a physician employed by Western. During the remainder of that year, she visited Dr. Bellas on numerous occasions, reported the same symptoms,

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COUNSEL OF RECORD: C. Torrence Armstrong (Boothe, Prichard & Dudley, on brief, for appellant. Jack T. Burgess (Koonz, McKenney & Johnson, P.C., on brief), for appellee.

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and attributed her problem to her duties at work. In February 1981, Dr. Bellas recommended a "work restriction", and Western changed her work assignment.

Based upon an examination conducted February 19, 1981, Dr. Charles Emich, an orthopedic surgeon, diagnosed Gilliam's condition as "[t]enosynovitis of long flexors of the thumb in both hands". As appears from progress reports recorded in February and March 1981, Dr. Emich found "no underlying disease process", concluded that Gilliam's symptoms were "due to an overuse type of syndrome", opined that "her condition was related to the repetitive motions involved in her job", and prescribed physical therapy, "resistive exercises", and a change in her work routine. In his final report, he stated that he had found "no persistent symptoms relative to her hands" and discharged his patient effective April 25, 1981.

Characterizing tenosynovitis as an occupational disease and finding that the claimant had proved causal connection, the deputy commissioner entered an award directing Western to pay the medical expenses Gilliam had incurred in the course of her treatment. Upon review, the full Commission affirmed the award.

As defined in section 107 of The Merck Manual of Diagnosis and Therapy (14th ed. 1982), a medical treatise cited by both parties, tenosynovitis is an "[i]nflammation of the lining of the tendon sheath . . . [which] may be involved in systemic diseases . . . [or may be caused by] [e]xtreme or repeated trauma, strain, or excessive (unaccustomed) exercise".

For purposes of this opinion, we accept the Commission's factual finding that tenosynovitis is a disease. Compensability of a disease, gradually-incurred on account of repeated, work-related trauma, is not necessarily controlled by our decisions that an injury so induced is beyond the coverage of the Workers' Compensation Act. See, e.g., Kraft Products v. Bernardini, 229 Va. ____, ____ S.E.2d ____ (this day decided); Lane Company, Inc. v. Saunders, 229 Va. ____, ____ S.E.2d ____ (1985). However, the General Assembly has provided that an ordinary disease of life, i.e., a disease "to which the general public is exposed outside of the employment", Code § 65.1-46, is not covered by the Act unless it falls within one of the two exceptions stated in the statute. And, construing that statute and citing Commission decisions, we have held that disability resulting from work-related aggravation of such a disease is not compensable. Ashland Oil Co. v. Bean, 225 Va. 1, 300 S.E.2d 739 (1983).

In Holly Farms v. Yancey, 228 Va. 337, 321 S.E.2d 298 (1984), we reviewed a decision in which the Commission found that a back strain, which had its origin in repeated, work-related trauma, was an ordinary disease of life.[1] In terms of cause and effect, we find no legally significant difference between Yancey's back strain and Gilliam's tenosynovitis. Because Yancey's ordinary disease of life did not fall within

[1] Accepting that finding for purposes of our analysis in that case, we noted that the Commission and this Court have consistently treated a back strain as an injury rather than a disease. Id. at ____, 321 S.E.2d at ____.

one of the statutory exceptions, we reversed her award. For the same reason, we must reverse Gilliam's award and enter final judgment for Western.

Our decision here is based, as it was in Holly Farms, upon our interpretation of legislative intent as reflected in the totality of the Workers' Compensation Act as it exists today.[2] Some contend that any disability arising out of and during the course of employment, including disabilities resulting from both injuries and diseases caused gradually by repeated trauma, should be made compensable under the Workers' Compensation Act.[3] But such a consequential decision, impacting as it must a broad spectrum of economic and social values, is a matter of public policy reserved to the original and exclusive jurisdiction of the General Assembly, and we will not trespass upon its domain.

Reversed and final judgment.

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[2] Former Code § 65.1-47 listed tenosynovitis in its "Schedule of Occupational Diseases". Construing the effect of the repeal of that section 15 years ago, Acts 1970, c. 470, Western believes that the General Assembly intended to narrow coverage of the Act; Gilliam believes that the legislative purpose in eliminating the itemized schedule was to vest the Commission with broader discretion to determine what conditions should be compensable as occupational diseases.

[3] A joint subcommittee commissioned by the legislature to study one aspect of this question has recently reported no recommendations. Report of the Joint Subcommittee Studying the Feasibility of Compensating Gradually-Incurred, Work-Related Injuries under the Virginia Workmen's Compensation Act, H. Doc. No. 20 (1983).

106-63-71 Holly Farms/Federal Company, et al v. Linda J. Yancey 228 Va. 337

The evidence established that claimant at her work station turned her body to left to right to place five (5) pound packages onto a rack weighing forty (40) pounds which were placed on a conveyor belt by the claimant either physically or by pushing a button to initiate the movement. This activity caused from 4000-7000 twisting moves per eight hour shift. During week ending July 23, 1982 after five (5) months of this work, on Friday after five (5) or six (6) hours of activity she felt a pulling in her back. After a week's vacation she sought medical attention and was diagnosed as low back pain secondary to muscle strain which the doctor attributed to the twisting motion.

The hearing Deputy Commissioner found a compensable accident and awarded compensation with the finding that the case was also compensable as an occupational disease.

The employer reviewed the decision upon which the Commission reversed the Award based upon accidental injury citing VEPCO v. Cogbill, Virginia Electric v. Quann and Badische. The majority citing numerous Industrial Commission cases found that claimant was suffering from an ordinary disease of life which was compensable as occupational because of its particular and peculiar relation to the employment. There was one dissent only as to the award of compensation as Occupational Disease.

The employer appealed to Supreme Court who reversed and entered final judgment. The Supreme Court agreed with the Commission that the claimant had not sustained an accidental injury but disagreed with the Commission as to the award for Occupational Disease. The Supreme Court held that an ordinary disease of life cannot be compensable unless it falls within the two exceptions stated in Section 65.1-46 of the Code, a condition not met in this case.

229 Va. _____, I. C. No. 109-89-45 The Lane Company, Incorporated, et al v. Hammie L. Saunders

Saunders was assigned work different from his regular work on June 7, 1983. The work was repititive and required bending and twisting from the waist as opposed to his regular job which required use of the upper part of the body. At an undetermined time in the morning he experienced some back pain but he worked the day. His back hurt when he entered his car to drive home. Next morning he "had to roll out of bed". He sought medical attention the history of which does not relate to a single episode or injury.

The hearing Deputy Commissioner awarded benefits with a finding of accidental injury. At Review, the Commission affirmed on the ground that the claimant was doing a different kind of work unusual to him which caused a problem in course of a few hours related by medical opinion.

The employer appealed and Supreme Court reversed and entered final judgment finding that Saunders proved no accident, identifiable incident, or sudden precipitating event to which his injury could be attributed.

109-83-11 Kraft Dairy Group, Incorporated, et al v. Ann M. Bernardini, S.C. 840619

Bernardini was assigned new duties in April of 1983 which involved removing four (4) one-half gallon containers from a production line and stacking them on a pallet. After 360 half gallons were stacked the pallet was covered with a towel, then with the help of the foreman the pallet, 75-100 pounds, was lifted to top of completed stack. On June 6, 1983 after filling eighteen (18) to twenty (20) pallets while putting a towel on top of the second layer the claimant felt a strong pain in left arm. She continued to work through June 9, 1983 and saw her doctor who found chronic musculo-ligamentous strain caused by heavy lifting at work. Another doctor attributed the injury to repetitive heavy lifting at work.

The hearing Deputy Commissioner denied the claim on ground that claimant had failed to carry burden of proving industrial and accidental injury. On Review, the decision was reversed and compensation awarded with one dissent. The employer appealed and the Supreme Court reversed, agreeing with the opinion of the Deputy Commissioner and the dissent. Lane, Badische, Quann, and Cogbill are cited.

S. C. Record 831835, I. C. No. 108-12-75 Western Electric Company v. Brenda E. Gilliam

Gilliam worked for a number of years as a telephone repair worker. The duties involved rapid repetitive and continuous manipulation of her hands. She developed tenosynovitis bilaterally from an overuse type syndrome.

The hearing Deputy Commissioner awarded compensation for the tenosynovitis as an occupational disease and the Commission affirmed on Review. The Supreme Court reversed. Accepting the Commission's factual finding that tenosynovitis is a disease, the Supreme Court found the disease to be an ordinary disease of life and as such is not compensable since it does not fall within the two statutory exceptions.

1985 SESSION

LD6605451

HOUSE BILL NO. 1566

Offered January 22, 1985

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

Patron–DeBoer

Referred to Committee on Labor and Commerce

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 within the course of one workshift.*

Official Use By Clerks

Passed By The House of Delegates		Passed By The Senate	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

_____ _____

Clerk of the House of Delega Clerk of the Senate

HOUSE OF DELEGATES

SESSION 19____

*Amendment proposed by Committee on (for)*_____

House **BILL NO.** 1566

Page 1 *of the printed / engrossed bill* *Line* 16 *After the word* Act,

Strike out the rest of line 16 and all of lines 17 and 18

And insert an injury by accident must be identifiable by time and place of occurrence and member of the body affected, and need not occur suddenly at a definite time or place, but shall be shown to have been caused by a specific event or incident or series of events or incidents within a single day or work shift

Agreed to by Committee –		*Agreed to by House –*	
Committee Clerk	*Date*	*Clerk, House of Delegates*	*Date*

VIRGINIA COMPENSATION RATING BUREAU

2720 ENTERPRISE PARKWAY · SUITE 114 · · RICHMOND, VA. 23229 · 804—747-1800

GEORGE D. WESTON, CPCU, *President*

October 21, 1985

Mr. Charles G. James, Chairman
Industrial Commission of Virginia
P.O. Box 1794
Richmond, VA 23214

Dear Commissioner James:

In response to your letter of August 14, 1985, wherein you requested information relating to cumulative trauma injuries in the workplace, we have been piecing together what data we could. Although a lot of information has been obtained, it is not in such form as to be statistically expressed for easy review.

Let me begin by saying that only one state - California - has a cumulative injury definition included in its definition of injury. It reads essentially as follows:

> An injury may be either "specific", occurring as the result of one incident or exposure which causes disability or need for medical treatment, or "cumulative", occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative injury, or date of injury in occupational disease cases, shall be the date upon which the employee first suffered disability and either knew, or should have known, that such disability was caused by the employee's present or prior employment. As to certain public employments, "injury" includes hernia, pneumonia, heart trouble or tuberculosis, all of which are presumed to arise out of and in the course of employment. The presumption is disputable.

On August 23, 1985, our Division of Legislative Services released the Minutes of the August 7th meeting. Those minutes contained a copy of the 1978 California study, done by the California Workers' Compensation Institute. The study points out that recognition of the cumulative injury concept began with a 1959 law case (Beveridge vs. IAC), and goes on to explain that from modest beginnings, cumulative injury has grown to an indicated 20% annual increase.

The study points out that although the percentage of cumulative injury cases is relatively small, the costs associated with these cases are 10-12% of total premium, and there is virtually 100% litigation on these cases.

I contacted the CWCI for an update on the 1978 study. The update is attached, and basically shows that the number of cumulative injury claims in

1982 exceeded the number of 1978 claims. CWCI also sent me copies of the revised California Labor Code, which has helped the California Rating Bureau to utilize more loss data in their experience rating calculations and control some expense items.

As to the other states, 35 have a definition of "accident", or "injury", reasonably similar to Virginia's. They are:

Alabama	Idaho	New Hampshire	South Carolina
Alaska	Illinois	New Jersey	South Dakota
Arizona	Indiana	New Mexico	Tennessee
Arkansas	Iowa	New York	Utah
Colorado	Maryland	North Dakota	Vermont
Dist. of Columbia	Mississippi	Ohio	Washington
Florida	Missouri	Oklahoma	Wisconsin
Georgia	Montana	Oregon	Wyoming
Hawaii	Nevada	Pennsylvania	

Eight States departing from the "traditional" definition are:

California - specific cumulative injury statute
Connecticut - specific or "repetitive"
Delaware - violence to the physical structure of the body
Kansas - any lesion or change in physical structure of the human body
Kentucky - any work-related harmful change in the human organism
Louisiana - violence to the physical structure of the body
Nebraska - violence to the physical structure of the human body
Texas - damage or harm to the physical structure of the body

States using the phrase "personal injury" are:

Maine	Michigan	Rhode Island
Massachusetts	Minnesota	West Virginia

We find that it's difficult to identify specific times or specific cases which have triggered a so-called cumulative trauma approach, and you really don't find it by statutory definition, other than in California. The fifteen or so states not having the strict accident definition have had awards made more by judicial interpretation, than by statutory definition.

Kentucky, we find, broadened their interpretations around 1974-1975. In 1977, the rate level was raised 8.1%, to compensate for this.

Dr. Arthur Larson, Law Professor Emeritus at Duke University, has published a series of volumes on Workers' Compensation. I have attached the supplements to his research on gradual injury, not included in the material previously distributed, citing specific law cases in the several states which either do - or do not - show the awards on a gradual injury basis. A number of awards have been made even in states with strict definitions of accident.

I can state categorically that in any jurisdiction where the concept of compensating gradual injuries has occurred, there has been an increase in the

number of claims reported, paralleling the CWIC study, along with an increase in litigation and the amount of resulting awards.

Rate level increases have ranged from 5-10% in the various states, with an 8-10% range being the more common.

I am enclosing a copy of the National Council's Workers' Compensation Claim Characteristics, published in 1984. The data contained therein is a summary of the types of data previously furnished to Chairman Wilson and others as an ongoing report on the industry's Detailed Claim Information (DCI) study begun in 1980.

A wealth of statistical information is contained in this document. I would like to call your particular attention to Section 11 - Cumulative Injuries, on pages 11 through 15.

States with which I am familiar; Kentucky, Maine, Michigan and Minnesota, are all states with chronic problems, such as high unemployment, have a more liberal approach to legislation than, say, Virginia, and have either more court-mandated awards or have an Act construed to provide cumulative injury benefits, such as Michigan has. There have been, over the last decade, all sorts of stories concerning the Michigan experience. For example, a current legislative reform package is attempting to remove the requirement that an injured worker is considered disabled if he or she cannot return to his or her specific occupation.

With reference to the decision rendered in Gilliam, our legal staff does not conclude that this case has suddenly disenfranchised a multitude of claimants, heretofore eligible for benefits. Certainly, some cases would be affected, but our view is that the Supreme Court has merely defined "accident", as currently included in the Virginia Workers' Compensation Act.

As to H. B. 1566, broadening 65.1-7 either on the "one workshift" concept as proposed, or on the "specific event or incident" approach suggested in Mr. DeBoer's amendment, will have a cost associated with it, probably in the 9-11% range. That is, premiums would increase, on average, 9-11%. Some classes would ultimately cost more, some less, as classification experience is developed.

Should you need more information, we will be pleased to get it for you.

Very truly yours,

George D. Weston, CPCU
President

GDW:dvz

CC: Hon. William T. Wilson
House of Delegates
228 North Maple Avenue
Covington, VA 24426

§ 65.1-46. "Occupational disease" defined. — As used in this Act, unless the context clearly indicates otherwise, the term "occupational disease" means a disease arising out of and in the course of the employment. No ordinary disease of life to which the general public is exposed outside of the employment shall be compensable, except:

(1) When it follows as an incident of occupational disease as defined in this title; or

(2) When it is an infectious or contagious disease contracted in the course of employment in a hospital or sanitarium or public health laboratory.

A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances:

(1) A direct causal connection between the conditions under which work is performed and the occupational disease,

(2) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment,

(3) It can be fairly traced to the employment as the proximate cause,

(4) It does not come from a hazard to which workmen would have been equally exposed outside of the employment,

(5) It is incidental to the character of the business and not independent of the relation of employer and employee, and

(6) It must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction. (Code 1950, § 65-42; 1952, c. 603; 1968, c. 660; 1970, c. 470.)

§ 65.1-46. "Occupational disease" defined. -- As used in this Act, unless the context clearly indicates otherwise, the term "occupational disease" means a disease arising out of and in the course of the employment. ~~No ordinary disease of life to which the general public is exposed outside of the employment shall be compensable, except:~~

~~(1) When it follows as an incident of occupational disease as defined in this title, or~~

~~(2) When it is an infectious or contagious disease contracted in the course of employment in a hospital or sanitarium or public health laboratory.~~

No infectious or contagious disease shall be compensable unless contracted in the course of employment in a hospital, sanitarium, public health laboratory, or nursing home as defined in § 32.1-123(2).

A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances:

(1) A direct causal connection between the conditions under which work is performed and the occupational disease,

(2) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment,

(3) It can be fairly traced to the employment as the proximate cause,

~~(4) It does not come from a hazard to which workmen would have been equally exposed outside of the employment,~~

(4) That the disease is not of a character to which the employee may have had substantial exposure outside of the employment,

(5) It is incidental to the character of the business and not independent of the relation of employer and employee, and

(6) It must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction. (Code 1950, § 65-42; 1952, c. 603; 1968, c. 660; 1970, c. 470.)

for payment of compensation. *Owens* v. *Va. Beach City School Board*, 53 O.I.C. 238. Nor will the signing of this form by employee for compensation benefits on account of an injury prevent him from obtaining an award for any additional compensation due him under the Act. *Wise Coal Co.* v. *Roberts*, 157 Va. 782, 161 S.E. 911. Where agreed statement of fact has been executed by employee, filed with the Commission and approved by it, any additional claim must be under § 65.1-99. *Biggs* v. *Clinchfield Coal Corp.*, 9 O.I.C. 950. Void where executed when claimant is still disabled and unable to return to work. *Johnson* v. *Jewell Ridge Coal Corp.*, 58 O.I.C. 203.

Agreed statement of fact is far more than mere receipt; period of time for reopening claim printed on form. *Lee* v. *Benefit Group Admrs., Inc.*, 54 O.I.C. 203.

CHAPTER 4.

Occupational Diseases.

Sec.

§ 65.1-46. "Occupational disease" defined. — As used in this Act, unless the context clearly indicates otherwise, the term "occupational disease" means a disease arising out of and in the course of the employment. ~~No ordinary disease of life to which the general public is exposed outside of the employment shall be compensable, except~~:

(1) ~~When it follows as an incident of occupational disease as defined in this title; or~~

(2) ~~When it is an infectious or contagious disease contracted in the course of employment in a hospital or sanitarium or public health laboratory.~~

A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances:

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(3) It can be fairly traced to the employment as the proximate cause,

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(5) It is incidental to the character of the business and not independent of the relation of employer and employee, and

(6) It must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction. (Code 1950, § 65-42; 1952, c. 603; 1968, c. 660; 1970, c. 470.)

APPENDIX 9

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C. TORRENCE ARMSTRONG
VIRGINIA, DISTRICT OF COLUMBIA AND
NORTH CAROLINA BARS

January 10, 1986

The Honorable William T. Wilson
General Assembly Building
Room 806
910 Capital Street
Richmond, Virginia 23219

Dear Chairman Wilson:

I want to begin by thanking you and the members of the Joint Sub-Committee Studying Worker's Compensation for appointing me to participate in efforts to draft legislation pertaining to the occupational disease statute. I was very flattered to be asked and enjoyed the experience. I would also like to take this opportunity to share with you and the other members of the Committee some particular thoughts I had about our group's effort.

First, I think all six of us on this drafting committee approached the task constructively. The discussions were open and candid, and the many subtleties of each approach and wording were dealt with frankly and with care to be sure that what was said was actually intended. I found these discussions stimulating and challenging, and I hope we were able to accomplish something to aid your Committee in its deliberations.

Our group considered at least 15 different drafts and revisions of legislation dealing with the issues. These ranged from the proposals made by Mr. Pascal and Chairman James to proposals to return to a schedule of compensated conditions. Each member attempted at least one draft himself, and some drafts were not even favored by those who wrote them. We wrote them to focus and advance the discussions.

I think the guiding force behind this study was to try to avoid legislation which would not meet the expectations of the General Assembly or which would present unintended problems during the litigation of worker's compensation cases. In other words, we did not want to create litigation within litigation, which might be the result of unclear legislation. We also tried to avoid language which would not present the key political

issues forthrightly. As the Supreme Court pointed out in the Gilliam case, this kind of legislation has the potential for being very sweeping in scope.

Based upon this detailed study, it is still my feeling that the statutory scheme for worker's compensation should not be changed. No version of legislation which we discussed was at the same time both comprehensive and logical, except the existing statute. This statute has been on the books for many years now and has been consistently interpreted by the Virginia Supreme Court. It appears to represent the policy of this Commonwealth not to compensate for ordinary diseases of life, stated in language very similar to or identical with the language of statutes in a majority of jurisdictions. While it is true that some courts in other states and, on occasion, the Industrial Commission in our state, have applied somewhat different interpretations to this statutory language, the consistent premise remains that these kinds of conditions are not to be generally compensable.

In general, each of the drafts of legislation we considered was intended to be a consistent and comprehensive alternative to the existing system. Unfortunately, I do not believe that we were able to come up with a workable and comprehensive alternative to the existing statutory scheme without going all the way to the extreme of compensating all ordinary diseases of life connected with employment. Therefore, my own view is that the existing statutory framework should not be changed at all, at least for several years while the new, intermediate Court of Appeals gets into full swing.

Should the General Assembly wish to change the results in the Gilliam case, allowing for compensation just for the ordinary disease of life known as tenosynovitis, I recommend doing so by means of a schedule or specific listing of this condition as compensable. This approach is obviously simple and avoids many of the pitfalls that our group discussed and thought about at great length, as we tried to draft something understandable and workable. Though we did specifically consider a schedule and this particular response to Gilliam, I believe our work would not have been at all helpful had we stopped at that.

We sensed that you wanted us to give thought to the overall problem, should the legislature decide that a change is necessary in this area of the law.

The particular draft submitted to you by Mr. Pascal in his January 7, 1986, letter was the last of a number of drafts which we had compared and typed up. I enclose a variation of that draft which our group discussed but did not get typed before our meeting adjourned. Several of us wanted this draft submitted to you, along with the other one, and feel that it highlights a key decision to be made.

Let me say that it is not the position of any member of our group that either draft should be enacted. On this, I am sure that each member has his own preference on whether there should be any legislative change and, if so, what that change should be. I do not believe that I am the only one who feels that no change should be made this year, but in considering what such a change might be, we thought it would be useful to compare these two drafts.

The two drafts differ only at subparagraph (4) of Section 46. Both drafts would permit compensation for an ordinary disease of life, provided proper proof were furnished. This, in itself, would be a radical departure from existing law.

You will also see language of limitation with regard to the degree of proof and relationship to employment. As a practical matter, this language might tip the balance in a close case, but ordinarily these words of caution would not have a significant practical effect from a practitioners point of view. Any doctor who believes that employment produced a medical condition would be required to give his opinion to a "reasonable degree of medical certainty." This is the standard of proof for medical opinions in Virginia, and always has been. Therefore, this level of proof would almost automatically allow the Industrial Commission to cross the threshold of "clear and convincing evidence", were it so inclined from the facts of a particular case. Though stating these standards of proof might discourage the weak case from ever being filed, or protect an employer when a doctor equivocates, ordinarily a medical opinion could be obtained using the litany of such a statute. I have even seen some doctors who use form letters, or other forms in these types of cases, since

their getting paid depends on a finding of compensability. Nonetheless, we thought that such language was worthy of your consideration and included it.

The difference in drafts, found at paragraph (4) of Section 46, is one of scope rather than concept. As I said, I think any legislative change is frustrated when it comes to trying to be both consistent and logical in all aspects. However, in this instance, the proposal designated as "Draft A" would be more in keeping with my own concerns from a litigation point of view. Rather than exempting just certain areas of the anatomy and allowing compensation for all others, "Draft A" would exempt all of the ordinary diseases of life attributed to muscular, ligamentous or skeletal system problems.

These conditions are by far and away the most difficult ones to say are actually caused by employment and, as a result, are nearly impossible to defend against. At one time or another almost everyone is susceptible to aches and pains, real or imagined, in the moving parts of the body. Normally, it is a matter of age or predisposition more than anything else. If these types of problems are studied, as they were in the recent series of cases presented to the Supreme Court, they all seem to come down to conditions associated with unaccustomed or excessive use of the muscles, ligaments, and joints, including pinching of nerves frequently associated with nearby muscle strain or tendon inflammation. In addition to the fact that these types of problems are so common that it is impossible to attribute them to any one cause, they are also the type of problems which will turn up in almost every conceivable employment setting.

As I believe I mentioned to the Committee during its last hearing, these kinds of conditions have been found compensable where the employee was doing tasks such as scrubbing brick, writing invoices, and a variety of other motions, as well as simply standing or sitting for long periods of time. In other words, people would be getting disability worker's compensation for pain caused by nearly any type of job, were the ordinary disease of life exemption abolished, unless a limitation such as contained in "Draft A" is provided. While "Draft 1(a)" does have the virtue of limiting this kind of exposure somewhat, it is a very piece meal and inconsistent approach. There seems to be no

reason to compensate someone for wear, tear or aging of the shoulders, knees, hands or elbows, but not for the neck or back. Therefore, I think the fundamental question should be whether the compensation system, assuming it allows coverage for ordinary diseases of life, should compensate for the conditions which are produceable by ordinary movement.

If a distinction is to be made, I believe that it is made here. My understanding of your Committee's previous study is that these aging process, wear and tear, or cumulative injury/ trauma situations posed the most troubling questions. The answer to these questions did not reveal itself to our group either; but if there is to be a change in the occupational disease law, elimination of this problem area would make the most sense. It has the virtue of not being as costly as a broader approach would be, yet would place Virginia among those states which allow compensation for many ordinary diseases of life. The negative impact on employment opportunities for older workers would also be minimized.

I will conclude this rather lengthy letter, and again thank you for your confidence in me personally. I hope you and the Committee are satisfied with our work. I am sure that all of us would be glad to answer any questions you might have and discuss any other details or concerns.

Sincerely yours,

C. Torrence Armstrong

CTA/jld

§ 65.1-46. "Occupational disease" defined. - As used in this Act, unless the context clearly indicates otherwise, the term "occupational disease" means a disease arising out of and in the course of the employment, but not an ordinary disease of life to which the general public is exposed outside of the employment. A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances:

(1) A direct causal connection between the conditions under which work is performed and the occupational disease,

(2) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment,

(3) It can be fairly traced to the employment as the proximate cause,

(4) It is neither a disease to which an employee may have had substantial exposure outside of the employment, nor any condition originating or arising within the muscular, ligamentous, or skeletal systems.

(5) It is incidental to the character of the business and not independent of the relationship of employer and employee, and,

(6) It had its origin in a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.

§ 651.-47 "Ordinary disease of life" coverage. - An ordinary disease of life to which the general public is exposed outside of the employment may be treated as an occupational disease for purposes of this Act if it is established by clear and convincing evidence, to a reasonable medical certainty, that it arose out of and in the course of employment as provided in § 65.1-46 with respect to occupational diseases and did not result from causes outside of the employment, and that:

(1) It follows as an incident of occupational disease as defined in this title; or

(2) It is an infectious or contagious disease contracted in the course of the employment in a hospital or sanitarium or public health laboratory or nursing home as defined in § 32.1-123(2), or

(3) It is characteristic of the employment and was caused by conditions peculiar to such employment.

Being submitt[illegible] to Joint Committee:

§ 65.1-46. "Occupational disease" defined. - As used in this Act, unless the context clearly indicates otherwise, the term "occupational disease" means a disease arising out of and in the course of the employment, but not an ordinary disease of life to which the general public is exposed outside of the employment. A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances:

(1) A direct causal connection between the conditions under which work is performed and the occupational disease,

(2) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment,

(3) It can be fairly traced to the employment as the proximate cause,

(4) It is neither a disease to which an employee may have had substantial exposure outside of the employment, nor any condition of the neck, back or spinal column.

(5) It is incidental to the character of the business and not independent of the relationship of employer and employee, and,

(6) It had its origin in a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.

§651.-47. "Ordinary disease of life" coverage. - An ordinary disease of life to which the general public is exposed outside of the employment may be treated as an occupational disease for purposes of this Act if it is established by clear and convincing evidence, to a reasonable medical certainty, that it arose out of and in the course of employment as provided in § 65.1-46 with respect to occupational diseases and did not result from causes outside of the employment, and that:

(1) It follows as an incident of occupational disease as defined in this title; or

(2) It is an infectious or contagious disease contracted in the course of the employment in a hospital or sanitarium or public health laboratory or nursing home as defined in § 32.1-123(2) or

(3) It is characteristic of the employment and was caused by conditions peculiar to such employment.

LD1659574

HOUSE BILL NO. 466

Offered January 21, 1986

A BILL to amend and reenact § 65.1-46 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 65.1-46.1, relating to Workers' Compensation benefits for occupational diseases.

Patron–Stambaugh

Referred to Committee on Labor and Commerce

Be it enacted by the General Assembly of Virginia:

1. That §65.1-46 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 65.1-46.1 as follows:

§ 65.1-46. "Occupational disease" defined.–As used in this Act, unless the context clearly indicates otherwise, the term "occupational disease" means a disease arising out of and in the course of the employment ~~. No~~ *but not an* ordinary disease of life to which the general public is exposed outside of the employment ~~shall be compensable, except:~~ .

(1) ~~When it follows as an incident of occupational disease as defined in this title; or~~

(2) ~~When it is an infectious or contagious disease contracted in the course of employment in a hospital or sanitarium or public health laboratory.~~

A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances:

(1) A direct causal connection between the conditions under which work is performed and the occupational disease,

(2) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment,

(3) It can be fairly traced to the employment as the proximate cause,

(4) ~~It does not come from a hazard to which workmen would have been equally exposed outside of the employment,~~

It is neither a disease to which an employee may have had substantial exposure outside of the employment, nor any condition of the neck, back or spinal column.

(5) It is incidental to the character of the business and not independent of the relation of employer and employee, and

(6) It ~~must appear to have~~ had its origin in a risk connected with the employment and ~~to have~~ flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.

§ 65.1.-46.1. "Ordinary disease of life" coverage.–An ordinary disease of life to which the general public exposed outside of the employment may be treated as an occupational disease for purposes of this Act if it is established by clear and convincing evidence, to a reasonable medical certainty, that it arose out of and in the course of employemt as provided in § 65.1-46 with respect to occupational diseases and did not result from causes outside of the employment, and that:

1. It follows as an incident of occupational disease as defined in this title;

2. It is an infectious or contagious disease contracted in the course of the employment in a hospital or sanitarium or public health laboratory or nursing home as defined in § 32.1-123 (2) of this Code: or

3. It is characteristic of the employment and was caused by conditions peculiar to such employment.

HOUSE OF DELEGATES

SESSION 19 86

Amendment proposed by Committee on (for) Labor and Commerce

House **BILL NO.** 466

Page 1 *of the* ~~printed engrossed~~ *bill* *Line* 31 *After the word* condition

Strike out of the neck, back or spinal column

And insert originating or arising within the muscular, ligamentous, or skeletal systems

Agreed to by Committee –		*Agreed to by House –*	
Committee Clerk	*Date*	*Clerk, House of Delegates*	*Date*

HOUSE OF DELEGATES

SESSION 19 86

Amendment proposed by Committee on (for) Labor and Commerce

House **BILL NO.** 466

Page 1 *of the* ~~*engrossed*~~ *printed bill* *Line* 41 *After the word* result

~~*Strike out*~~

~~*and*~~ *insert* in any degree

Agreed to by Committee –		*Agreed to by House –*	
Committee Clerk	*Date*	*Clerk, House of Delegates*	*Date*