

**REPORT OF THE
VIRGINIA CODE COMMISSION OF THE**

**Recodification of
Title 65.1 of the
Code of Virginia**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



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RICHMOND
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Table of Contents

	<u>Page</u>
<u>APPENDIX I:</u>	
Chapter 1: Definitions and General Provisions	1
Chapter 2: Virginia Workers' Compensation Commission	7
Chapter 3: Application and Effect of Act	11
Chapter 4: Occupational Diseases	16
Chapter 5: Compensation and Payment Thereof	20
Chapter 6: Notice of Accident; Filing Claims; Medical Attention and Examination	31
Chapter 7: Procedure in Connection with Awards	34
Chapter 8: Insurance and Self-Insurance	38
Chapter 9: Reports and Records	44
Chapter 10: Administrative Fund and Tax Therefor	45
Chapter 11: Second Injury Fund	47
Chapter 12: Uninsured Employer's Fund	48
Chapter 13: Peer Review of Medical Costs	49
<u>APPENDIX II: Comparative Tables</u>	52
<u>APPENDIX III:</u>	
House Joint Resolution 18 of the 1990 General Assembly	60
Commissioners of the Industrial Commission of Virginia and their staff	61
Membership of the Special Task Force Appointed to Assist the Code Commission	61

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Report of the Virginia Code Commission
on the Recodification of Title 65.1 of the Code of Virginia
to
The Governor And the General Assembly of Virginia

Richmond, Virginia
January 1991

TO: The Governor
and
The General Assembly of Virginia

Introduction and Summary

House Joint Resolution 18 of the 1990 General Assembly directed the Virginia Code Commission to study Title 65.1 of the Code of Virginia and to report its findings in the form of a recodification of the title to the Governor and the General Assembly. The resolution stated that the title had undergone many changes since its last revision in 1968, and that numerous changes had made it legally ambiguous and structurally obscure.

The study has been completed. The result is a recodification of Title 65.1 into a new Title 65.2, comprised of thirteen chapters. The new title's chapter organization is identical to that of its predecessor in number, subject matter and sequence. However, the Commission has rewritten or consolidated many sections, frequently combining ones that, while topically related, were scattered throughout the title. In addition, obsolete references and redundant language contained in Title 65.1 were eliminated. Finally, the Commission endeavored to introduce clarity in key provisions throughout the title by revising or reorganizing where necessary. Drafting notes highlighting significant changes or reorganization are provided throughout this report, some preceding chapters where significant revisions took place, and others following key sections in the Title 65.2 draft. Where drafting notes do not follow sections, existing language was retained -- verbatim or in substance -- and therefore no significant changes were effected.

The Commission is indebted to the members of the Virginia Industrial Commission and their staff for their efforts in this undertaking. Commissioners O'Neill, James and Joyner, and their staff worked with the Code Commission's staff to develop and structure a draft that served as the foundation for this recodification. In addition, the analysis and historical insights the Commissioners provided at Code Commission meetings enriched and invigorated this study and the draft that resulted.

The Commission is equally grateful to those individuals who devoted their time and expertise to this project by serving on a Special Task Force appointed by the Code Commission to assist it in reviewing the draft proposals. Task force members, representing a variety of interests and constituencies in the workers' compensation arena, helped refine the Title 65.2 draft through helpful criticism, comment and suggestions.

The outline and text of proposed Title 65.2 follow this introduction and summary as Appendix I. Appendix II contains comparative tables that cross reference the provisions of Title 65.1 to corresponding provisions in Title 65.2. Those sections in Title 65.1 proposed for repeal are so identified. A comparative table showing the distribution of Title 65.1 sections in proposed Title 65.2 is also part of this appendix. Appendix III furnishes the names and affiliations of the Special Task Force Members and the names of the Industrial Commissioners and their staff assigned to this project.

The Virginia Code Commission recommends that the General Assembly enact legislation at the 1991 session to implement the revisions proposed in this report.

Respectfully submitted,

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APPENDIX I

TITLE ~~65.1~~ 65.2 . Workers' Compensation.

Chapter 1.

Definitions and General Provisions.

Chapter drafting note: The provisions of Chapter 1 were reorganized to create a comprehensive definitions section. Many of the definitions were rewritten for clarity; all will be arranged alphabetically. The key "employee" definition was revised extensively and now includes provisions previously scattered throughout Title 65.1 that were relevant to the threshold issue of coverage under the Act. Much of the language presently in § 65.1-4 (the current "employee" definition section) remains intact in deference to a body of case law construing and interpreting the provisions of that section.

§ ~~65.1-1~~ 65.2-100 . Short title.—This title shall be known as the " Virginia Workers' Compensation Act " and is hereinafter sometimes referred to as "the Act" or "this Act." .

§ ~~65.1-2~~ 65.2-101 . Meanings of certain terminology and scope of law. *Definitions.* — The meanings to be attached to certain terminology and the scope and coverage of this Act are as set forth specifically in the several following sections. As used in this title:

"Award" means the grant or denial of benefits or other relief under this Act or any rule adopted pursuant thereto.

"Commission" means the Virginia Workers' Compensation Commission as well as its former designation as the Virginia Industrial Commission.

§ ~~65.1-2.1~~ "Filed" defined.— "Filed" as used in this Act shall mean means hand-delivered to the Commission's office in Richmond or any regional office maintained by the Commission; sent by the telegraph, electronic mail or facsimile transmission; or posted at any post office of the United States Postal Service by certified or registered mail. Filing by first-class mail, telegraph, electronic mail or facsimile transmission shall be deemed completed only when the application actually reaches the a Commission's Commission office.

Drafting note: The amendment to this definition is intended to eliminate apparent confusion about whether certain documents were required to be filed in the Commission's main office in Richmond.

§ ~~65.1-3~~ "Employers" defined.—Unless the context otherwise requires, "employers" "Employer" includes any person, the Commonwealth and any municipal corporation therein or any political division subdivision thereof and any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay. If the employer is insured it includes his insurer so far as applicable.

§ ~~65.1-4~~ "Employee" defined.—Unless the context otherwise requires, "employee" includes every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is not in the usual course of the trade, business, occupation or profession of the employer. The term "employee" shall include any person who is an apprentice, trainee, or retrainee who is regularly employed while receiving training or instruction outside of regular working hours and off the job, so long as the training or instruction is related to his employment, and is authorized by his employer. Relating to the Commonwealth the term "employee" includes, but is not limited to, the members of the Virginia National Guard and the Virginia State Defense Force, registered members on duty or in training of the United States Civil Defense Corps of this Commonwealth, the forest wardens, the clerks and other employees of the district courts and all other officers and employees of the Commonwealth. The term does not include those who are elected by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate. This exception shall not apply to any "state employee" as defined in subdivision (5) of § ~~51-111.10~~ nor to Supreme Court Justices nor judges of the Court of Appeals, nor to judges of circuit or district courts, nor to members of the Industrial Commission and the State Corporation Commission, nor to the Superintendent of State Police. Relating to municipal corporations and political subdivisions of the Commonwealth, the term "employee" includes all officers and employees thereof, except such as are elected by the people or by the governing body of the municipal corporation or political subdivision, who act in purely administrative capacities and are to serve

for a definite term of office. Policemen and fire fighters, and sheriffs and their deputies, town sergeants and their deputies, county and city commissioners of the revenue, county and city treasurers, attorneys for the Commonwealth, clerks of circuit courts, and their deputies, officers and employees, shall be deemed to be employees of the respective cities, counties or towns in which their services are employed and by whom their salaries are paid or in which their compensation is earnable. Judges, clerks, deputy clerks and employees of juvenile and domestic relations district courts and general district courts shall be deemed employees of the Commonwealth. Every executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation, municipal or otherwise, shall be an employee of such corporation under this Act, except as otherwise provided herein with respect to municipal corporations and political subdivisions of the Commonwealth. The governing body of any county, city or town in this Commonwealth may, by resolution or ordinance duly adopted, elect to have its members included as employees under this Act. Further, by resolution or ordinance duly adopted, the governing body of any county, city, town or any political subdivision thereof may provide coverage under this Act to its volunteers or to any officers and employees of any commission or board of any authority created or controlled by the local governing body, or any local agency or public service corporation owned, operated or controlled by such local governing body. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents and other persons to whom compensation may be payable.

Drafting note: Section 65.1-4 has been incorporated into the comprehensive "employee" definition that is part of proposed § 65.2-101.

"Employee" means:

A. 1. Every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except (i) one whose employment is not in the usual course of the trade, business, occupation or profession of the employer, or (ii) as otherwise provided in subsection B of this section.

2. Any apprentice, trainee, or retrainee who is regularly employed while receiving training or instruction outside of regular working hours and off the job, so long as the training or instruction is related to his employment, and is authorized by his employer.

3. Members of the Virginia National Guard, whether on duty in a paid or unpaid status or when performing voluntary service to their unit in a nonduty status at the request of their commander.

Income benefits for members of the National Guard shall be terminated when they are able to return to their customary civilian employment or self-employment, but if they are neither employed nor self-employed those benefits shall terminate when they are able to return to their military duties. If a member of the National Guard who is fit to return to his customary civilian employment or self-employment remains unable to perform his military duties and thereby suffers loss of military pay which he would otherwise have earned, he shall be entitled to one day of income benefits for each unit training assembly or day of paid training which he is unable to attend.

4. Members of the Virginia State Defense Force.

5. Registered members of the United States Civil Defense Corps of this Commonwealth, whether on duty or in training.

6. Except as provided in subsection B, all officers and employees of the Commonwealth, including forest wardens, as well as judges, clerks, deputy clerks and employees of juvenile and domestic relations district courts and general district courts, who shall be deemed employees of the Commonwealth.

7. Except as provided in subsection B, all officers and employees of a municipal corporation or political subdivision of the Commonwealth.

8. Except as provided in subsection B, every executive officer, including president, vice-president, secretary, treasurer or other officer, elected or appointed in accordance with the charter and bylaws of a corporation, municipal or otherwise.

9. Policemen and fire fighters, sheriffs and their deputies, town sergeants and their deputies, county and city commissioners of the revenue, county and city treasurers, attorneys for the Commonwealth, and clerks of circuit courts and their deputies, officers and employees, who shall be deemed employees of the respective cities, counties and towns in which their services are

employed and by whom their salaries are paid or in which their compensation is earnable.

10. Members of the governing body of any county, city or town in the Commonwealth, whenever coverage under this Act is extended to such members by resolution or ordinance duly adopted.

11. Volunteers, officers and employees of any commission or board of any authority created or controlled by a local governing body, or any local agency or public service corporation owned, operated or controlled by such local governing body, whenever coverage under this Act is authorized by resolution or ordinance duly adopted by the governing board of any county, city town, or any political subdivision thereof.

12. Except as provided in subsection B, volunteer fire fighters, volunteer lifesaving or rescue squad members, auxiliary or reserve police and auxiliary or reserve deputy sheriffs, who shall be deemed employees of the political subdivision in which the principal office of such volunteer fire company, volunteer lifesaving or rescue squad, auxiliary or reserve police force or auxiliary or reserve deputy sheriff force is located if the governing body of such political subdivision has adopted a resolution acknowledging such volunteer fire fighters, volunteer lifesaving or rescue squad members, auxiliary or reserve police or auxiliary or reserve deputy sheriffs as employees for the purposes of this Act.

13. Volunteer fire fighters, volunteer lifesaving or rescue squad members, auxiliary or reserve police and auxiliary or reserve deputy sheriffs and any other persons who respond to a hazardous materials incident upon request of the Department of Emergency Services pursuant to a plan or agreement developed under § 44-146.35 or § 44-146.36, who shall be deemed employees of the Department of Emergency Services for the purposes of this Act.

14. Any sole proprietor or all partners of a business electing to be included as an employee under the workers' compensation coverage of such business if the insurer is notified of this election. Any sole proprietor or the partners shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this title.

When any partner or proprietor is entitled to receive coverage under this title, such person shall be subject to all provisions of the Act as if he were an employee, provided, however, that the notices required under §§ 65.2-405 and 65.2-600 of this title shall be given to the insurance carrier and that the panel of physicians required under § 65.2-603 shall be selected by the insurance carrier.

15. The independent contractor of any employer subject to this Act at the election of such employer provided (i) the independent contractor agrees to such inclusion, and (ii) unless the employer is self-insured, the employer's insurer agrees in writing to such inclusion. All or part of the cost of the insurance coverage of the independent contractor may be borne by the independent contractor.

When any independent contractor is entitled to receive coverage under this section, such person shall be subject to all provisions of the Act as if he were an employee, provided that the notices required under §§ 65.2-405 and 65.2-600 shall be given either to the employer or its insurance carrier.

However, nothing in this Act shall be construed to make the employees of any independent contractor the employees of the person or corporation employing or contracting with such independent contractor.

16. The legal representative, dependents and any other persons to whom compensation may be payable when any person covered as an employee under this Act shall be deceased.

B. "Employee" shall not mean:

1. Officers and employees of the Commonwealth who are elected by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate. This exception shall not apply to any "state employee" as defined in subdivision (5) of § 51-111.10 nor to Supreme Court Justices, nor judges of the Court of Appeals, nor to judges of the circuit or district courts, nor to members of the Workers' Compensation Commission and the State Corporation Commission, nor to the Superintendent of State Police.

2. Officers and employees of municipal corporations and political subdivisions of the Commonwealth who are elected by the people or by the governing bodies, and who act in purely administrative capacities and are to serve for a definite term of office.

3. Any person who is a licensed real estate salesperson, or a licensed real estate broker associated with a real estate broker if (i) substantially all of the salesperson's or associated broker's remuneration is derived from real estate commissions, (ii) the services of the salesperson or associated broker are performed under a written contract specifying that the salesperson is an independent contractor, and (iii) such contract includes a provision that the salesperson or associated broker will not be treated as an employee for federal income tax purposes.

4. Any taxicab driver, provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act.

5. Casual employees.

6. Domestic servants.

7. Farm and horticultural laborers, unless the employer regularly has in service more than two full-time employees.

8. Employees of any person firm or private corporation, including any public service corporation, that has regularly in service less than three employees in the same business within this Commonwealth, unless such employees and their employers voluntarily elect to be bound by this Act. However, this exemption shall not apply to the operators of underground coal mines or their employees.

9. Employees of any common carrier by railroad engaging in commerce between any of the several states or territories or between the District of Columbia and any of the states or territories and any foreign nation or nations, and any person suffering injury or death while he is employed by such carrier in such commerce. This Act shall not be construed to lessen the liability of any such common carrier or to diminish or take away in any respect any right that any person so employed or the personal representative or kindred or relation or dependent of such person may have under the act of Congress relating to the liability of common carriers by railroad to their employees in certain cases, approved April 22, 1908, or under §§ 8.01-57 through 8.01-62 or § 56-441.

10. Employees of common carriers by railroad who are engaged in intrastate trade or commerce. However, this Act shall not be construed to lessen the liability of such common carriers or take away or diminish any right that any employee or, in case of his death, the personal representative of such employee of such common carrier may have under §§ 8.01-57 to 8.01-61 or § 56-441.

11. Except as provided in subsection A, a member of a volunteer firefighting, lifesaving and rescue squad when engaged in activities related principally to participation as a member of such squad whether or not the volunteer continues to receive compensation from his employer for time away from the job.

Drafting note: This proposed "employee" definition builds on the provisions of current § 65.1-4 and incorporates pertinent provisions from §§ 65.1-4.1, 65.1-4.1:1, 65.1-4.2, 65.1-4.3, 65.1-4.4, 65.1-4.5, 65.1-4.6, 65.1-5, 65.1-27 and 65.1-28.

§ 65.1-4.1. Volunteers as employees.—A. 1. For the purpose of this Act, volunteer fire fighters, volunteer lifesaving and rescue-squad members, auxiliary and reserve police and auxiliary and reserve deputy sheriffs shall be deemed employees of the political subdivision in which the principal office of such volunteer fire company, volunteer lifesaving and rescue-squad, auxiliary or reserve police force or auxiliary or reserve deputy sheriff force is located; provided, that the governing body of such political subdivision has adopted a resolution acknowledging such volunteer fire fighters, volunteer lifesaving and rescue-squad members, auxiliary or reserve police or auxiliary or reserve deputy sheriffs as employees for the purposes of this Act.

Drafting note: The substance of subdivision A 1 of this section is now found in subdivisions A 12 and A 13 of the proposed "employee" definition in § 65.2-101.

2. For the purposes of this Act, the average weekly wage of such volunteer fire fighters, volunteer lifesaving and rescue-squad members, auxiliary or reserve police and auxiliary or reserve deputy sheriffs so acknowledged as employees of the political subdivision shall be deemed to be sufficient to produce the minimum compensation provided by this Act for injured workers or their dependents.

3. The provisions of this subsection shall not cause the auxiliary and reserve police and auxiliary and reserve deputy sheriffs covered hereunder to be included within the provisions of § 65.1-47.1.

Drafting note: The substance of subdivision A 2 is now part of the revised "average weekly wage" definition proposed in § 65.2-101; subdivision A 3 is now part of subsection F in proposed § 65.2-402.

1. Volunteer fire fighters, volunteer lifesaving and rescue-squad members, auxiliary and reserve police and auxiliary and reserve deputy sheriffs who respond to a hazardous materials incident upon request of the Department of Emergency Services pursuant to a plan or agreement developed under § 44-146.35 or § 44-146.36 shall be deemed employees of the Department of Emergency Services for the purpose of this Act. For the purpose of this Act, the average weekly wage of such volunteer fire fighters, volunteer lifesaving and rescue squad members, auxiliary and reserve police and auxiliary and reserve deputy sheriffs shall be deemed sufficient to produce the minimum compensation provided by this Act for injured workers or their dependents.

Drafting note: The substance of the first sentence of subdivision B 1 is now part of the proposed "employee" definition in § 65.2-101. The second sentence is incorporated into the "average weekly wage" definition in proposed § 65.2-101.

2. The provisions of this subsection shall not cause the volunteer fire fighters, volunteer lifesaving and rescue-squad members, auxiliary and reserve police and auxiliary and reserve deputy sheriffs covered hereunder to be included within the provisions of § 65.1-47.1.

Drafting note: The substance of subdivision B 2 is now found in subsection F of proposed § 65.2-402.

C. Any person, except those covered in subsection B of this section, who responds to a hazardous materials incident upon request of the Department of Emergency Services, pursuant to a plan or agreement developed under § 44-146.35 or § 44-146.36, shall be deemed an employee of the Department of Emergency Services for the purposes of this Act. For the purposes of this Act, the average weekly wage of such person shall be based upon the earnings of that person received from his primary employer.

Drafting note: The substance of subsection C is now found in the "employee" and "average weekly wage" definition in proposed § 65.2-101.

65.1-4.1.1. Volunteer firefighting, lifesaving and rescue squad members.—Except as provided in § 65.1-4.1, a member of a volunteer firefighting, lifesaving and rescue squad shall not be deemed an employee under this Act when engaged in activities related principally to his participation as a member of such squad whether or not the volunteer continues to receive compensation from his employer for time away from the job.

Drafting note: This provision is now part of the "employee" definition contained in proposed § 65.2-101.

§ 65.1-4.2. Sole proprietors and partners.—Notwithstanding any other provisions of this title, any sole proprietor or all partners of a business whose employees are eligible for benefits under this title may elect to be included as an employee under the workers' compensation coverage of such business if the insurer is notified of this election to be so included. Any sole proprietor or the partners shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this title.

When any partner or proprietor is entitled to receive coverage under this title, such person shall be subject to all provisions of the Act as if he were an employee, provided, however, that the notices required under §§ 65.1-51, 65.1-85 and 65.1-86 of this title shall be given to the insurance carrier and that the panel of physicians required under § 65.1-88 shall be selected by the insurance carrier.

Drafting note: This provision is now part of the "employee" definition contained in proposed § 65.2-101.

§ 65.1-4.3. Certain licensed real estate salespersons and brokers not deemed "employees".—For purposes of this Act, any person who is a licensed real estate salesperson, or a licensed real estate broker associated with a real estate broker, shall not be deemed an "employee" if (i) substantially all of the salesperson's or associated broker's remuneration is derived from real estate commissions, (ii) the services of the salesperson or associated broker are performed under a written contract specifying that the salesperson is an independent contractor, and (iii) such contract includes a provision that the salesperson or associated broker will not be treated as an employee for federal income tax purposes.

Drafting note: This provision is now part of the "employee" definition contained in proposed § 65.2-101.

§ 65.1-4.4. Virginia National Guard members.—A. Members of the Virginia National Guard shall be deemed to be employees of the Commonwealth as provided by § 65.1-6, whether on

duty in a paid or unpaid status or when performing voluntary service to their unit in a nonduty status at the request of their commander. [see § 65.2-101]

B. Income benefits for members of the National Guard shall be terminated when they are able to return to their customary civilian employment or self-employment, but if they are neither employed nor self-employed those benefits shall terminate when they are able to return to their military duties. If a member of the National Guard who is fit to return to his customary civilian employment or self-employment remains unable to perform his military duties and thereby suffers loss of military pay which he would otherwise have earned, he shall be entitled to one day of income benefits for each unit training assembly or day of paid training which he is unable to attend.

Drafting note: This provision is now part of the "employee" definition contained in proposed § 65.1-101.

§ 65.1-4.5. Certain taxicab drivers not deemed "employees."—For purposes of this Act, a taxicab driver shall not be deemed an "employee" provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act.

Drafting note: This provision is now part of the "employee" definition contained in proposed § 65.1-101.

§ 65.1-4.6. Independent contractor as an employee.—An employer subject to this Act may elect to include his independent contractor as an employee under the Workers' Compensation coverage of such business if the independent contractor agrees in writing to this inclusion and the insurer agrees in writing to such inclusion. Part or all of the cost of the insurance coverage of the independent contractor may be borne by the independent contractor.

When any independent contractor is entitled to receive coverage under this section, such person shall be subject to all provisions of the Act as if he were an employee, provided that the notices required under §§ 65.1-51, 65.1-85 and 65.1-86 shall be given either to the employer or its insurance carrier.

Drafting note: This provision is now part of the "employee" definition contained in proposed § 65.2-101.

§ 65.1-5. Employees of independent contractors.—Nothing in this Act contained shall be construed to make, for the purposes of this Act, the employees of an independent contractor the employees of the person or corporation employing or contracting with such independent contractor.

Drafting note: This provision is now part of the "employee" definition contained in proposed § 65.2-101.

"Executive officer" means the president, vice-president, secretary, treasurer or other officer, elected or appointed in accordance with the charter and bylaws of a corporation.

Drafting note: A definition for this term was developed to identify those individuals who, as "executive officers" may reject coverage under this Act pursuant to the provisions of current § 65.1-23 (included in proposed § 65.2-300).

§ 65.1-6. "Average weekly wages" defined.—A. 1. Unless the context otherwise requires, "average weekly wages" wage means: A.1. means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury, divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days during such period, although not in the same week, then the earnings for the remainder of the fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. When the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided that results fair and just to both parties will be thereby obtained. When by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

2. But when for exceptional reasons the foregoing would be unfair either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Whenever allowances of any character made to an employee in lieu of wages are a part of the wage contract, they shall be deemed a part of his earnings. For the purpose of this Act the average weekly wage of the members of the Virginia National Guard, the Virginia State Defense Force, registered members on duty or in training of the United States Civil Defense Corps of this Commonwealth, and forest wardens, shall be deemed to be the amount as will entitle them to the maximum compensation payable under this Act; however, any award entered under the provisions of this title on behalf of members of the National Guard or their dependents, or registered members on duty or in training of the United States Civil Defense Corps of this Commonwealth or their dependents, shall be subject to credit benefits paid them under existing or future federal law on account of injury or occupational disease covered by the provisions of the Virginia Workers' Compensation Act.

C. Whenever volunteer fire fighters, volunteer lifesaving or volunteer rescue squad members, auxiliary or reserve police, and auxiliary or reserve deputy sheriffs, are deemed employees under the Act, their average weekly wage shall be deemed sufficient to produce the minimum compensation provided by this Act for injured workers or their dependents.

D. The average weekly wage of persons, other than those covered in subsection C of this section, who respond to a hazardous materials incident at the request of the Department of Emergency Services, shall be based upon the earnings of such persons from their primary employers.

Drafting note: Subsection C is from former § 65.1-4.1(B)(1); subsection D is from former § 65.1-4.1(C).

§ 65.1-7. "Injury" defined.—Unless the context otherwise requires, "injury" and "personal injury" mean "injury" means only injury by accident, or occupational disease as hereinafter defined, arising out of and in the course of the employment or occupational disease as defined in Chapter 4 and does not include a disease in any form, except when it results naturally and unavoidably from either of the foregoing causes.

Drafting note: Changes to this section were intended to clarify the status of occupational diseases as "injuries" under the Act as provided in the occupational disease chapter.

§ 65.1-8. "Change in condition" defined.— "Change in condition" as used in this Act means a change in physical condition of the employee as well as any change in the conditions under which compensation was awarded, suspended, or terminated which would affect the right to, amount of, or duration of compensation.

Drafting note: Under current practice, an award may be suspended under certain circumstances. This amendment is intended for statutory clarification.

§ 65.1-9. No relief from penalty for failure or neglect of statutory duty.—Nothing in this Act shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty. [repealed]

Drafting note: There are specific penalty sections in the Act applicable to failure of employers and employees to pursue their statutory duties. Examples as to employers are former Code sections 65.1-75.1, 65.1-106, 65.1-106.1 and 65.1-127 (now §§ 65.2-524, 65.2-805, 65.2-806, and 65.2-902, respectively). As to employees, former Code sections 65.1-63, 65.1-88 and 65.1-91 (now §§ 65.2-510, 65.2-603, and 65.2-607, respectively) impose penalties. This section is eliminated and not carried forward into the new draft.

Chapter 2.

Industrial Virginia Workers' Compensation Commission.

Chapter drafting note: Key modifications in Chapter 2 include changing the name of the Industrial Commission of Virginia to the Virginia Workers' Compensation Commission, and the consolidation of several sections to create a proposed § 65.2-202 detailing the general duties and powers of the Commission.

§ 65.1-19 65.2-200. Industrial Commission continued as the Virginia Workers' Compensation Commission; number, election and terms of members; vacancies; chairman; members to devote entire time to office.— A. The Industrial Commission of Virginia is continued and shall hereafter be known as the Virginia Workers' Compensation Commission. All powers and duties conferred and imposed upon the Industrial Commission by any other law are hereby conferred upon and vested in the Virginia Workers' Compensation Commission. within the Department of Workers' Compensation, and

B. The Commission shall consist of three members, one of whom shall be chosen by the joint vote of the two houses of the General Assembly during the month of January of each regular session of the General Assembly convened in an even-numbered year and who shall serve for terms of six years from the first day of February next succeeding election.

C. Whenever a vacancy in the Commission shall occur or exist when the General Assembly is in session, it shall elect a successor for the unexpired term. If the General Assembly is not in session, the Governor shall forthwith appoint pro tempore a qualified person to fill the vacancy for a term ending thirty days after the commencement of the next session of the General Assembly, and the General Assembly shall elect a successor for the unexpired term.

D. Not more than one member of the Commission shall be a person who on account of his previous vocation, employment or affiliation shall be classified as a representative of employers, and not more than one such appointee shall be a person who on account of his previous vocation, employment or affiliation shall be classed as a representative of employees. The Commission thus composed shall elect one of its number chairman for a term of three years commencing on July 1, 1979, and each succeeding three years thereafter. Each member of the Commission shall devote his entire time to the duties of his office and shall not hold any position of trust or profit or engage in any occupation or business interfering or inconsistent with his duties as such member.

Drafting note: Amendments to this provision change the name of the Industrial Commission of Virginia to the Virginia Workers' Compensation Commission. This name change was recommended by the Joint Legislative Audit and Review Commission in its report to the Governor and the General Assembly (HD-68 of 1990) detailing its review of the Virginia Department of Workers' Compensation. As pointed out in this report, the Department of Workers' Compensation is known by two different names—the Department of Workers' Compensation and the Industrial Commission—as a result of the use of both references within Title 65.1. The report concluded that use of the title "Workers' Compensation Commission" would eliminate potential and actual confusion caused by the use of the two names. Additionally, the report noted, the proposed title would reflect both the existence of the Commissioners and the organization's purview over matters related to compensation of workers from all occupational categories.

§ 65.1-11. ~~Deputies, clerk, bailiffs, secretary and other employees of the Commission.—The Commission, subject to the provisions of Chapter 10 (§ 2.1-110 et seq.) of Title 2.1, may appoint deputies, a clerk, bailiffs, a secretary and such other clerical or other assistants as it may deem necessary, and the compensation of such secretary and of such clerical and other assistants shall be such as may be provided by law for the purpose.~~

Drafting note: The provisions of this section are incorporated into proposed § 65.2-201.

§ 65.1-12. ~~Deputy commissioners; powers thereof.—Deputy commissioners shall have the power to subpoena witnesses, administer oaths, take testimony and hear the parties at issue and their representatives and witnesses and decide the issues in a summary manner, and make an award carrying out the decision. Deputies may exercise such other powers and perform such duties of the Commission as may be delegated to them by the Commission.~~

Drafting note: The provisions of this section are incorporated into proposed § 65.2-203.

§ 65.1-13. ~~Powers and duties of bailiffs of Commission.—The bailiffs of the Commission shall, in all matters within the jurisdiction of the Commission, have the powers, discharge the functions, and perform the duties of a sheriff under the law. They shall preserve order during the public sessions of the Commission, and may make arrests and serve and make return on any writ or process awarded by the Commission, and execute any writ, order, or process of execution awarded upon the findings or judgments of the Commission in any matter within its jurisdiction. They shall exercise such other powers and perform such duties as may be delegated to them.~~

Drafting note: The provisions of this section are incorporated into proposed § 65.2-203.

§ 65.1-14. ~~Traveling expenses.—The members of the Commission and its assistants shall be entitled to receive from the Commonwealth their actual and necessary expenses while traveling on the business of the Commission.~~

Drafting note: This section is proposed for repeal because §§ 14.1-5 and 14.1-5.2 generally provide for travel expense reimbursement for persons on official business of the Commonwealth. Recent recodifications uniformly eliminate similar provisions in favor of the general provisions found in Title 14.

§ 65.1-15. ~~Audit and payment of salaries and expenses.—All salaries and expenses of the Commission shall be audited and paid out of the state treasury in the manner prescribed for similar expenses in other departments or branches of the state service.~~

Drafting note: The provisions of this section are incorporated into proposed § 65.2-204.

§ 65.1-16. ~~Offices of Commission; records, etc.—The Commission shall be provided with adequate offices in the Capitol or some other suitable building in the City of Richmond, in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery and other supplies.~~

Drafting note: The provisions of this section are incorporated into proposed § 65.2-204.

§ 65.1-17. Where sessions held.—The Commission or any member thereof may hold sessions any place within the Commonwealth as may be deemed necessary by the Commission.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-204.

§ 65.1-18. Rules of Commission; process and procedure.—The Commission may make rules, not inconsistent with this Act, for carrying out the provisions of this Act. Processes and procedure under this Act shall be as summary and simple as reasonably may be. The Commission or any member thereof or any person deputized by it may for the purpose of this Act subpoena witnesses, administer or cause to be administered oaths, and examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute arising in instances in which the Commission has power to grant compensation, and also in instances in which the like agency of some state has such power, provided like services are rendered to the Commission by such agency of such other state.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-201.

§ 65.1-19. Service of process; fees and mileage of witnesses and officers serving subpoenas.—The county or city sheriff or town sergeant, and their respective deputies, shall serve all subpoenas of the Commission or its deputies and shall receive the same fees as are now provided by law for like civil actions. Each witness who appears in obedience to such subpoena of the Commission shall receive for attendance the fees and mileage for witnesses in civil cases in courts.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-202.

§ 65.1-20. Enforcing attendance of witnesses; production of books and records; punishment for contempt, etc.—The Commission or any member or deputy commissioner shall have authority to enforce the attendance of all parties in interest and of witnesses and the production and examination of books, papers and records and to punish for contempt or disobedience of its orders as is vested in courts and judges by § 18.2-456, or Chapter 21 (§ 19.2-330 et seq.) of Title 19.2. Such attendance, production, and examination shall be required by subpoena of the Commission upon timely request therefor by any party to a proceeding before it, unless the Commission finds that the issuance of such subpoena is for dilatory purposes, would cause substantial inconvenience to such witnesses, or is not likely to produce significant relevant evidence.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-202.

§ 65.1-21. Means of enforcing attendance of witnesses.—The clerk of any court of record shall, upon the application of any party in interest to a proceeding pending under this title, issue subpoena for the attendance at such proceeding of any witnesses whose testimony is sought. The return of any subpoena so issued shall be made to the Commission, which shall enforce the attendance of any such witnesses at such proceeding.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-202.

§ 65.1-22. Blank forms and literature; workers' compensation guide; accident reports by and to Commission; publication; inspection; use.—The Commission shall prepare and cause to be printed, and upon request furnish free of charge to any employer, such blank forms and literature as it shall deem requisite to facilitate or promote the efficient administration of this Act. The Commission shall prepare and cause to be printed a workers' compensation guide for employees which informs an injured employee of his rights under this Act. Whenever an employee gives or causes to be given to his employer notice of an accident as required by § 65.1-85, the Commission shall give or cause to be given to the employee a workers' compensation guide for employees.

Drafting note: The provisions of this paragraph are incorporated into proposed § 65.2-201.

The Commission shall tabulate the accident reports received from employers in accordance with §§ 65.1-124 and 65.1-125, and shall publish the same in the annual report of the Commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports themselves shall be private records of the Commission and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

Drafting note: The provisions of this paragraph are incorporated into proposed § 65.2-201.

§ 65.2-201. General duties and powers of the Commission.—A. It shall be the duty of the Commission to administer this title and adjudicate issues and controversies relating thereto. The Commission shall make rules and regulations for carrying out the provisions of this Act.

B. The Commission may appoint deputies, bailiffs, and such other personnel as it may deem necessary for the purpose of carrying out the provisions of the Act.

C. The Commission or any member thereof or any person deputized by it may for the purpose of this Act subpoena witnesses, administer or cause to be administered oaths, and examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute arising in instances in which the Commission has power to award compensation. This authority shall extend to requests from like agencies of other states who honor similar requests from the Commission.

D. The Commission shall publish, and upon request furnish free of charge, such blank forms and literature as it shall deem requisite to facilitate or promote the efficient administration of this Act. The Commission shall publish a workers' compensation guide for employees which informs an injured employee of his rights under this Act. If the Commission receives notice of an accident, it shall provide a workers' compensation guide to the employee.

E. The Commission shall tabulate the accident reports received from employers in accordance with § 65.2-900, and shall publish the same in the annual report of the Commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports themselves shall be private records of the Commission and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

Drafting note: This section consolidates §§ 65.1-11, 65.1-18 and 65.1-22, setting forth the principal duties and powers of the Commission.

§ 65.2-202. Subpoena Powers of the Commission; Production of Records and Papers.—A. The Commission or any member or deputy commissioner shall have authority to enforce the attendance of all parties in interest and of witnesses and the production and examination of books, papers and records and to punish for contempt or disobedience of its orders as is vested in courts and judges by § 18.2-456, or Chapter 21 (§ 19.2-339 et seq.) of Title 19.2. Such attendance, production, and examination shall be required by subpoena of the Commission upon timely request therefor by any party to a proceeding before it, unless the Commission finds that the issuance of such subpoena is for dilatory purposes, would cause substantial inconvenience to such witnesses, or is not likely to produce significant relevant evidence.

B. The county or city sheriff or town sergeant, and their respective deputies, shall serve subpoenas of the Commission or its deputies and shall receive the same fees as are now provided by law for like civil actions. Each witness who appears in obedience to such subpoena of the Commission shall receive for attendance the fees and mileage for witnesses in civil cases in courts.

C. The clerk of any court of record shall, upon the application of any party in interest to a proceeding pending under this title, issue a subpoena for the attendance at such proceeding of any witnesses whose testimony is sought. The return of any subpoena so issued shall be made to the Commission, which shall enforce the attendance of any such witnesses at such proceeding.

Drafting note: This new section consolidates the provisions of §§ 65.1-19, 65.1-20, and 65.1-21.

§ 65.2-203. Powers and Duties of Deputy Commissioners and Bailiffs.—A. Deputy commissioners shall have the power to subpoena witnesses, administer oaths, take testimony and hear the parties at issue and their representatives and witnesses and decide the issues in a summary manner, and make an award carrying out the decision. Deputies may exercise such other powers and perform such duties of the Commission as may be delegated to them by the Commission.

B. The bailiffs of the Commission shall, in all matters within the jurisdiction of the Commission, have the powers, discharge the functions, and perform the duties of a sheriff under the law. They shall preserve order during the public sessions of the Commission, and may make arrests and serve and make return on any writ or process awarded by the Commission, and execute any writ, order, or process of execution awarded upon the findings or judgments of the Commission in any matter within its jurisdiction. They shall exercise such other powers and perform such duties as may be delegated to them.

Drafting note: This new section combines the provisions of §§ 65.1-12 and 65.1-13.

§ 65.2-204. Administrative provisions: offices, meetings, travel, salary and expenses. — A. The Commission shall be provided with adequate offices in the Capitol or some other suitable building in the City of Richmond, in which the records shall be kept and its official business

acted during regular business hours; it shall also be provided with necessary office furniture, stationery and other supplies.

1. Commission or any member thereof may hold sessions at any place within the state, as may be deemed necessary by the Commission.

2. All salaries and expenses of the Commission shall be audited and paid out of the state treasury in the manner prescribed for similar expenses in other departments or branches of the service.

Drafting note: Sources of subsections: A: § 65.1-16; B: § 65.1-17; C: § 65.1-15.

Chapter 3.

Application and Effect of Act.

Drafting note: Several key provisions of the Act are consolidated, revised, or rewritten in Chapter 3. Proposed § 65.2-300 consolidates the provisions of §§ 65.1-23, 65.1-26 and others to create a section that details the presumption of coverage under the Act; means by which an executive officer (now defined in proposed § 65.2-101) may reject—and subsequently revoke such rejection—the Act's coverage; and the legal effect of coverage rejection (e.g., the availability of certain common law defenses such as contributory negligence, etc.). This new consolidated section is not intended to effect any substantive change in existing law.

The "statutory employer" issue was broached in discussions that led to proposed § 65.2-302 that blends the provisions of §§ 65.1-29, 30 and 31. Some observed that the legislative policy behind the statutory employer concept was decidedly more clear than the current statutory language implementing it. Consequently, § 65.2-302 was developed with the intent of clarifying the roles of "owners," "contractors," and "subcontractors," and their relationships for the purpose of establishing liability for payment of workers' compensation benefits.

§ 65.1-23. Presumption of acceptance of provisions of Act to pay and accept compensation; exemption of certain employees.—Every employer and employee, except as herein stated, shall be conclusively presumed to have accepted the provisions of this Act respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby, except in the case of an executive officer, who shall have given prior to any accident resulting in injury or death notice to the contrary in the manner herein provided. No notice by an employee shall be effective to exempt an employer from the provisions of this Act in respect to occupational diseases under Chapter 4 (§ 65.1-46 et seq.) hereof.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-300.

§ 65.2-300. Presumption of acceptance of provisions of Act; exemptions; notice and rejection.—A. Every employer and employee, except as herein stated, shall be conclusively presumed to have accepted the provisions of this Act respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby. Except as otherwise provided herein, no contract or agreement, written or implied, and no rule, regulation or other device shall in any manner operate to relieve any employer in whole or in part of any obligation created by this Act.

B. An executive officer may reject coverage under this Act for injury or death by accident, but not with respect to occupational disease, provided that prior to such accident, notice is given to the employer and filed with the Commission in the manner described herein.

The notice shall be in writing or print in substantially the form prescribed by the Commission and shall be given by the executive officer by sending the same in a registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in a civil action may be served under the laws of the Commonwealth. A copy of the notice in prescribed form shall also be filed with the Commission.

C. If an accident resulting in injury or death occurs within thirty days after such notice is given, the notice shall be deemed ineffective unless given concurrent with the commencement of employment.

D. An executive officer who rejects coverage under this Act shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this Act, proceed at common law, and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant and assumption of risk, as such defenses exist at common law.

E. An executive officer who has rejected coverage under this Act may nevertheless by notice

revoke such rejection and thereby accept coverage under the provisions of this Act. A notice revoking such rejection shall be given to the employer and a copy filed with the Commission in the manner provided for rejecting such coverage. Coverage under this Act shall not be extended to injuries that occur within thirty days of the giving of such notice.

Drafting note: Rights and duties of employers under the Act; acceptance and rejection of rights under the Act. First sentence of subsection A is from the first sentence of section 65.1-23, the second sentence is taken from § 65.1-37. First paragraph of subsection B is a restatement of the balance of § 65.1-23; the second paragraph is the last half of § 65.1-26. Subsection C is a restatement of the first sentence of § 65.1-26. Subsection D is restatement of § 65.1-44. The first sentence of subsection E is § 65.1-25; second sentence is taken from § 65.1-26.

§ 65.1-23.1 65.2-301. Victims of sexual assault.—A. Any employee who, in the course of employment, is sexually assaulted, as defined in §§ 18.2-61, 18.2-67.1, 18.2-67.3, or § 18.2-67.4, and promptly reports the assault to the appropriate law-enforcement authority, where the nature of such employment substantially increases the risk of such assault, upon a proper showing of damages compensable under this title, shall be deemed to have suffered an injury arising out of the employment and shall have a valid claim for workers' compensation benefits.

B. Notwithstanding the provisions of this Act, an employee who is sexually assaulted and can identify the attacker may elect to pursue an action-at-law against the attacker, even if the attacker is the assaulted employee's employer or co-employee, for full damages resulting from such assault in lieu of pursuing benefits under this Act, and upon repayment of any benefits received under the Act.

§ 65.1-24. Repealed by Acts 1973, c. 542.—

§ 65.1-25. Waiver of exemption.—An employee, who has exempted himself, by proper notice, from the operation of this Act, may at any time waive such exemption and thereby accept the provisions of this Act by giving notice as herein provided.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-300 E.

§ 65.1-26. When notice of exemption effective; how given.—The notices referred to in §§ 65.1-23 and 65.1-25 shall not be effective as to any accident resulting in injury or death that occurs within thirty days after the giving of any such notice; provided that if any such accident occurs less than thirty days after the date of employment, a notice under § 65.1-23 given at the time of employment shall be effective as to such accident. The notice shall be in writing or print in substantially the form prescribed by the Industrial Commission and shall be given by the executive officer by sending the same in registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the Commonwealth.

A copy of the notice in prescribed form shall also be filed with the Industrial Commission.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-300 B and E.

§ 65.1-27. Interstate carriers by rail excepted from Act.—This Act shall not apply to any common carrier by railroad engaging in commerce between any of the several states or territories or between the District of Columbia and any of the states or territories and any foreign nation or nations; nor to any person suffering injury or death while he is employed by such carrier in such commerce; nor shall this Act be construed to lessen the liability of any such common carrier or to diminish or take away in any respect any right that any person so employed or the personal representative or kindred or relation or dependent of such person may have under the act of Congress relating to the liability of common carriers by railroad to their employees in certain cases, approved April 22, 1908, or under §§ 8.01-57 through 8.01-62 or § 56-441.

Drafting note: The provisions of this section are incorporated into subdivision B 9 within the "employee" definition of proposed § 65.2-101.

§ 65.1-28. Intrastate carriers; casual employees; other excepted employments.—This Act shall not apply to common carriers by railroad who are engaged in intrastate trade or commerce nor shall this Act be construed to lessen the liability of such common carriers or take away or diminish any right that any employee or, in case of his death, the personal representative of such employee of such common carrier may have under §§ 8.01-57 to 8.01-62 or § 56-441, nor to casual employees, nor to domestic servants; nor to farm and horticultural laborers, unless the employer regularly has in service more than two full-time employees, nor to any person, firm or private corporation, including any public service corporation, that has regularly in service less than three employees in the same business within this Commonwealth, unless such employees and their employers voluntarily elect to be bound by this Act. However, this exemption shall not

apply to the operators of underground coal mines or their employees.

Drafting note: The provisions of this section are incorporated into subdivisions B 5, 6, 7, 8, and 10 within the "employee" definition of proposed § 65.2-101.

§ 65.1-20. *Liability of owner to workmen of subcontractors.*—When any person (in this section and §§ 65.1-31 and 65.1-32 referred to as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 65.1-31 to 65.1-34 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if the workman had been immediately employed by him.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-302.

§ 65.2-302. *Statutory employer.*—A. When any person (referred to in this section as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this Act which he would have been liable to pay if the worker had been immediately employed by him.

B. When any person (referred to in this section as "contractor") contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any worker employed in the work any compensation under this Act which he would have been liable to pay if that worker had been immediately employed by him.

C. When the subcontractor in turn contracts with still another person (also referred to as "subcontractor") for the performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or contractor shall be the same as the liability imposed by the two preceding subsections.

Drafting note: The duties of owners, contractors and subcontractors are combined in one section for the purpose of explaining liability of statutory employers (combines §§ 65.1-29, 30 and 31).

§ 65.1-30. *Liability of contractor to workmen of subcontractor.*—When any person (in this section and §§ 65.1-31 through 65.1-34 referred to as "contractor") contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section and §§ 65.1-31, 65.1-32, 65.1-33 and 65.1-34 referred to as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-302 B.

§ 65.1-31. *Liability of subcontractor to workmen of sub-subcontractor.*—When the subcontractor in turn contracts with still another person (in this section and §§ 65.1-32, 65.1-33 and 65.1-34 also referred to as "subcontractor") for the performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or contractor shall be the same as the liability imposed by §§ 65.1-29 and 65.1-30.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-302 C.

§ 65.1-32. *Construction of Act when proceedings are against owner or contractor.*—When compensation is claimed from or proceedings are taken against the owner or contractor, then in the application of this Act reference to the owner or contractor shall be substituted for reference to the subcontractor, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the subcontractor by whom he is immediately employed.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-303 B.

§ 65.2-303. *Recovery from subcontractor; proceedings against owner or contractor.*—A. Nothing in §§ 65.2-302 and 65.2-304 shall be construed as preventing a worker from recovering compensation under this Act from a subcontractor (as defined in § 65.2-302) instead of from the principal contractor (as defined in § 65.2-302) but he shall not collect from both.

B. When compensation is claimed from or proceedings are taken against the owner or contractor (as defined in § 65.2-302), then in the application of this Act reference to the owner or contractor shall be substituted for reference to the subcontractor (as defined in § 65.2-302), except that the amount of compensation shall be calculated with reference to the earnings of the worker under the subcontractor by whom he is immediately employed.
Drafting note: Subsection A is derived from § 65.1-34, subsection B is derived from § 65.1-32.

~~§ 65.1-33~~ 65.2-304. Indemnity of principal from subcontractor.—When the principal contractor is liable to pay compensation under any of ~~§ 65.1-29~~ § 65.2-302 through or ~~65.1-32~~ § 65.2-303, he shall be entitled to indemnity from any person who would have been liable to pay compensation to the worker independently of such sections or from an intermediate contractor and shall have a cause of action therefor.

A principal contractor when sued by a worker of a subcontractor shall have the right to call in join that subcontractor or any intermediate contractor or contractors as defendant or codefendant as a party.

Drafting note: The word "join" was substituted for the phrase "call in" to conform to third-party practice nomenclature in civil actions, e.g., "joinder of parties," etc., within Title 8.01.

~~§ 65.1-34.~~ Workman may recover from subcontractor.—Nothing in §§ 65.1-29 through 65.1-33 shall be construed as preventing a workman from recovering compensation under this Act from a subcontractor instead of from the principal contractor but he shall not collect from both.
Drafting note: The provisions of this section are incorporated into proposed § 65.2-303 A.

~~§ 65.1-35~~ 65.2-305. Voluntary subjection to provisions of Act; effect of taking out insurance or qualifying as self-insurer.— A. Those employers and employees not subject to this Act may, by complying with the provisions of the Act and the applicable rules of the Industrial Commission, voluntarily elect to be bound by it as to accidents or occupational diseases or both.

B. Every employer taking out a workers' compensation insurance policy, or qualifying as a self-insurer, shall be subject to all the provisions of the Workers' Compensation Act, regardless of the number of employees or whether he is an employer of farm and horticultural laborers and domestic servants. Such employers not otherwise covered by the Act shall be subject to the Act only during the period covered by such insurance. Every employee of an employer who has complied with the foregoing requirements shall be subject to all the provisions of the Act unless and until he notifies the Industrial Commission that he elects not to be bound by the provisions thereof, in which case the provisions of § 65.1-44 shall be applicable except that executive officers may reject coverage as provided in § 65.2-300.

Drafting note: Eliminates reference to § 65.1-44 and refers to method of rejection of coverage set forth in proposed § 65.2-300.

~~§ 65.1-36.~~ [repeal] Contracts subject to Act.—Every contract of service between any employer and employee covered by this Act, written or implied, in operation or made or implied prior to the taking effect of this Act, shall be presumed to have continued, subject to the provisions of this Act, and every such contract made subsequent to the taking effect of this Act shall be presumed to have been made subject to the provisions of this Act, unless the employee shall have given or shall give notice, as provided in § 65.1-26, to the employer that the provisions of this Act other than §§ 65.1-44 and 65.1-124 to 65.1-128 are not intended to apply.

A like presumption shall exist equally in the case of all minors, unless notice of the same character be given by the parent or guardian of the minor.

Drafting note: This section is no longer applicable in the absence of sections which would affect employers and employees not now covered.

~~§ 65.1-37.~~ Limitation of liability of employer.—No contract or agreement, written or implied, and no rule, regulation or other device shall in any manner operate to relieve any employer in whole or in part of any obligation created by this Act, except as herein otherwise expressly provided.

~~§ 65.1-38~~ 65.2-306. When compensation not allowed for injury or death; burden of proof.— A. No compensation shall be allowed awarded to the employee or his dependents for an injury or death caused by:

(1) Due to the The employee's willful misconduct ; including or intentional self-inflicted injury,

(2) Growing out of his 2. The employee's attempt to injure another,

Due to intoxication, or 3. *The employee's intoxication,*

Due to 4. *The employee's willful failure or refusal to use a safety appliance or perform*
r *ed by statute , or the*

The employee's willful breach of any reasonable rule or regulation adopted by the
yer and approved by the Industrial Commission and brought prior to the accident to the
edge of the employee.

ae burden of proof shall be upon him who claims an exemption or forfeiture under this
a:

3. *The person or entity asserting any of the defenses in this section shall have the burden of*
f *with respect thereto.*

Drafting note: The new language in subsection B is intended to clarify an employer's burden of
f in showing willful misconduct, etc., barring to compensation. Source is § 65.1-38 as
ended. Instead of "due to," the draft proposes the words "caused by" in accord with *Ivey v.*
Kett Construction Co., 230 Va. 486, 338 S.E.2d 640 (1986), and *American Safety Razor Co. v.*
Iter, 2 Va. App. 258, 343 S.E.2d 461 (1986). The word "reasonable" precedes "rule or
ulation" and substitutes for "approved by the Industrial Commission." There has been
fusion over whether safety rules were required to be approved for all employees throughout
state, even before any litigation arises.

§ 65.1-39. [repeal] *Injuries, etc., prior to January 1, 1919.—The provisions of this Act shall not*
ply to injuries or death or accidents which occurred prior to January 1, 1919.

Drafting note: By passage of more than 70 years, this section is no longer deemed necessary.

§ ~~65.1-40~~ 65.2-307. *Employee's rights under Act exclude all others.—The rights and remedies*
erein granted to an employee when he and his employer have accepted the provisions of this
act respectively to pay and accept compensation on account of personal injury or death by
accident shall exclude all other rights and remedies of such employee, his personal
representative, parents, dependents or next of kin, at common law or otherwise, on account of
such injury, loss of service or death.

~~65.1-40.1~~ 65.2-308. *Discharge of employee for exercising rights prohibited; civil action;*
relief.—A. No employer or person shall discharge an employee solely because the employee
intends to file or has filed a claim under this Act or has testified or is about to testify in any
proceeding under this Act. The discharge of a person who has filed a fraudulent claim is not a
violation of this section.

B. The employee may bring an action in a circuit court having jurisdiction over the
employer or person who allegedly discharged the employee in violation of this section. The court
shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief,
including actual damages and attorney's fees to successful claimants and the rehiring or
reinstatement of the employee, with back pay plus interest at an annual rate not to exceed eight
percent the judgment rate as provided in § 6.1-330.54.

Drafting note: This section relates to actions brought in a circuit court for discharge of an
employee under § 65.1-40.1(A) (now in proposed § 65.2-308). Any award of damages and interest
would be made by the circuit court. The Code Commission suggests that interest payable under
this section accrue at the usual statutory rate (§ 6.1-330.54) rather than a specific amount as
now expressed in this section (8%).

§ ~~65.1-41~~ 65.2-309. *Subrogation of employer to employee's rights against third parties;*
evidence; recovery; compromise.— ~~The making of a lawful~~ A. A claim against an employer for
compensation under this Act for the injury or death benefits of his employee shall operate as an
assignment to the employer of any right to recover damages which the injured employee, or his
personal representative or other person may have against any other party for such injury or
death, and such employer shall be subrogated to any such right and may enforce, in his own
name or in the name of the injured employee or his personal representative, the legal liability
of such other party. The amount of compensation paid by the employer or the amount of
compensation to which the injured employee or his dependents are entitled shall not be
admissible as evidence in any action brought to recover damages.

B. Any amount collected by the employer under the provisions of this section in excess of
the amount paid by the employer or for which he is liable shall be held by the employer for
the benefit of the injured employee, his personal representative, or other person entitled
thereto, less a proportionate share of such amounts as are paid by the employer for reasonable
expenses and attorney's fees as provided in § ~~65.1-43~~ 65.2-311.

C. No compromise settlement shall be made by the employer in the exercise of such right of subrogation without the approval of the Industrial Commission and the injured employee or the personal representative or dependents of the deceased employee being first had and obtained. *Drafting note:* "Personal representative" was added to subsection B of this section to conform the language in that subsection to the language in subsection A.

§ 65.1-42 65.2-310 . Protection of employer when employee sues third party.— In any such action by such an employee, his personal representative or other person against any person other than the employer, the court shall, on petition or motion of the employer at any time prior to verdict, ascertain the amount of compensation paid and expenses for medical, surgical and hospital attention and supplies, and funeral expenses, incurred by the employer under the provisions of this Act, and deduct therefrom a proportionate share of such amounts as are paid by the plaintiff for reasonable expenses and attorney's fees as provided in § 65.1-43 65.2-311 ; and in event of judgment against such person other than the employer the court shall in its order require that the judgment debtor pay such compensation and expenses of the employer, less said share of expenses and attorney's fees, so ascertained by the court out of the amount of the judgment, so far as sufficient, and the balance, if any, to the judgment creditor.

§ 65.1-43 65.2-311 . Expenses and attorney's fees in action under § 65.1-41 or § 65.1-42 65.2-302 or § 65.2-310 .—In any such action, or claim for damages, by such an employee, his personal representative or other person against any person other than the employer, and in any such action brought, or claim asserted, by the employer under his right of subrogation provided for in § 65.1-41 65.2-309 , if a recovery is effected, either by judgment or voluntary settlement, the reasonable expenses and reasonable attorney's fees of such claimants shall be apportioned pro rata between the employer and the employee, his personal representative or other person, as their respective interests may appear.

§ 65.1-44. Employer's defenses when employee has elected not to come under Act.—An employee who elects not to operate under this Act shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this Act, proceed at common law, and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant and assumption of risk, as such defenses exist at common law.

Drafting note: The provisions of this section are incorporated into proposed § 65.1-300 D.

§ 65.1-45. Voluntary settlements.—Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer, but rather to encourage them, so long as the amount of compensation and the time and manner of payment are approved by the Commission in accordance with § 65.1-93 of this Act. A copy of such settlement agreement shall be filed, by employers, with the Commission.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-701 C.

Chapter 4.

Occupational Diseases.

Chapter drafting note: The key modification in this chapter is the extensive revision of what is commonly referred to as the "heart, lung and hypertension act"—§ 65.1-47.1. While no substantive change is intended in proposed § 65.2-402, improvements in the section's clarity are. The proposed section has six subsections that begin by describing the presumptions and the persons entitled to them. It describes the role of physical examinations and diagnostic tests in establishing eligibility for the presumption. The section concludes by describing claims under its provisions (subsections D and E), and expressly excluding certain groups (e.g., reserve police) who might otherwise be construed to fall within the coverage of its provisions. The latter provision (subsection F) is currently adjacent to the definition of "employee" as § 65.1-4.1.

§ 65.1-46 65.2-400 . "Occupational disease" defined.— A. 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 employment, but not an ordinary disease of life to which the general public is exposed outside of the employment.

(1), (2) ~~Repealed.~~

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

(2) 2. It can be seen to have followed as a natural incident of the work as a result of the

posure occasioned by the nature of the employment,

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

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

(6) 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.

§ 65.1-46.1 65.2-401 . "Ordinary disease of life" coverage.—An ordinary disease of life to which the general public is exposed outside of the employment may be treated as an occupational disease for purposes of this 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 65.2-400 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 one's employment in a hospital or sanitarium or laboratory or nursing home as defined in subdivision 2 of § 32.1-123, or while otherwise engaged in the direct delivery of health care, or in the course of employment as emergency rescue personnel and those volunteer emergency rescue personnel as are referred to in § 65.1-4.1 65.2-101 ; or

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

§ 65.1-47. Repealed by Acts 1970, c. 470.—

§ 65.1-47.1. Presumption as to death or disability from respiratory disease, hypertension or heart disease.—The death of, or any condition or impairment of health of, salaried or volunteer fire fighters caused by respiratory diseases, and the death of, or any condition or impairment of health of, salaried or volunteer fire fighters, or of any member of the State Police Officers Retirement System, or of any member of a county, city or town police department, or of a sheriff, or of a deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond, caused by hypertension or heart disease, resulting in total or partial disability shall be presumed to be an occupational disease suffered in the line of duty that is covered by this Act unless the contrary be shown by a preponderance of competent evidence; provided that prior to making any claim based upon such presumption, such salaried or volunteer fire fighter shall have been found free from respiratory diseases, hypertension or heart disease, as the case may be, or such member of the State Police Officers Retirement System, or such member of a county, city or town police department, or such sheriff, or such deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond, shall have been found free from hypertension or heart disease, as the case may be, by a physical examination which shall include such appropriate laboratory and other diagnostic studies as the appointing authority or as the governing body employing such person, in the case of a sheriff or deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond, the county or city of which he is sheriff or deputy sheriff, shall prescribe and which shall have been conducted by physicians whose qualifications shall have been prescribed by such appointing authority or by such governing body; and provided further, that any such fire fighter, law-enforcement officer, sheriff, or deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond, or, in the case of his death, any person entitled to make a claim under this Act, claiming the benefit of such presumption shall, if requested by such appointing authority or by such governing body or its authorized representative submit himself, in the case of a claim for disability benefits, to physical examination by any physician designated by such appointing authority or by such governing body which examination may include such tests or studies as may reasonably be prescribed by the physician so designated or, in the case of a claim for death benefits, submit the body of the deceased fire fighter, law-enforcement officer, sheriff, or deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond, to a postmortem examination to be performed by the medical examiner for the county, city or town appointed under § 32.1-282. Such fire fighter, law-enforcement officer, sheriff, or deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond, or claimant shall have the right to have present at such examination, at his own expense, any qualified physician he may designate.

Drafting note: The provisions of this section are rewritten as proposed § 65.2-402.

§ 65.2-402. *Presumption as to death or disability from respiratory disease, hypertension or heart disease.*—A. *Respiratory diseases that cause (i) the death of volunteer or salaried fire fighters or (ii) any health condition or impairment of such fire fighters resulting in total or partial disability, shall be presumed to be occupational diseases, suffered in the line of duty, that are covered by this Act unless such presumption is overcome by a preponderance of competent evidence to the contrary.*

B. *Hypertension or heart disease causing the death of, or any health condition or impairment resulting in total or partial disability of (i) salaried or volunteer fire fighters, (ii) members of the State Police Officers Retirement System, (iii) members of county, city or town police departments, (iv) sheriffs and deputy sheriffs, and (v) city sergeants or deputy city sergeants of the City of Richmond, shall be presumed to be occupational diseases, suffered in the line of duty, that are covered by this Act unless such presumption is overcome by a preponderance of competent evidence to the contrary.*

C. *The presumptions described in subsections A and B of the section shall only apply if persons entitled to invoke them have undergone physical examinations that (i) were conducted prior to the making of any claims under this Act that rely on such presumptions, (ii) were performed by physicians whose qualifications are as prescribed by the appointing authority or governing body employing such persons, (iii) included such appropriate laboratory and other diagnostic studies as the appointing authorities or governing bodies may have prescribed, and (iv) found such persons free of respiratory diseases, hypertension or heart disease at the time of such examinations.*

D. *Persons making claims under this Act that rely on such presumptions shall, upon the request of appointing authorities or governing bodies employing such persons, submit to physical examinations (i) conducted by physicians selected by such authorities, bodies or their representatives, and (ii) consisting of such tests and studies as may reasonably be required by such physicians. Provided, however, that a qualified physician, selected and compensated by the claimant, may, at the election of such claimant, be present at such examination.*

E. *Whenever a claim for death benefits is made under this Act and the presumptions of this section are invoked, any person entitled to make such claim shall, upon the request of the appropriate appointing authority or governing body that had employed the deceased, submit the body of the deceased to a postmortem examination to be performed by the medical examiner for the county, city or town appointed under § 32.1-282. A qualified physician, selected and compensated by the person entitled to make the claim, may, at the election of such claimant, be present at such postmortem examination.*

F. *Volunteer lifesaving and rescue-squad members, auxiliary and reserve deputy sheriffs, and auxiliary and reserve police are not included within the coverage of this section.*

Drafting note: This new section comprises all of § 65.1-42.1, rewritten for the sake of clarity. Subsection F includes language from former § 65.1-4.1.

§ 65.1-48: Repealed by Acts 1970, c. 470.—

§ 65.1-49 65.2-403. *Provisions in respect to injury by accident, etc., applicable to occupational disease.*—A. *When the employer and employee are subject to the provisions of this Act, first communication of the diagnosis of an occupational disease to the employee or death of the employee resulting from an occupational disease as herein listed and defined shall be treated as the happening of an injury by accident, or death by accident, and the employee or in case of his death his dependents shall be entitled to compensation as provided by the Act.*

B. *An employee who has an occupational disease that is covered by this Act shall be entitled to the same hospital, medical and miscellaneous benefits as an employee who has a compensable injury by accident, except that the period during which the employer shall be required to furnish medical attention, including reasonably necessary diagnostic services, shall begin as fifteen days prior to the date of first communication of the diagnosis of the occupational disease to the employee; and in . In the event of death the same funeral benefits shall be paid as in the case of death from a compensable accident. Notwithstanding the foregoing provisions, the employer shall pay such medical expenses incurred within fifteen days prior to the first communication of such diagnosis as may be determined by the Industrial Commission to be reasonable and necessary to such diagnosis. All provisions of the Act in respect to accidents shall be applicable to the coverage provided for by this chapter, except as otherwise provided herein. The provisions of this section, as amended, shall be applicable to occupational diseases contracted before and after July 1, 1966.*

Drafting note: Clarifies the sentence commencing "An employee who has an occupational disease..." and deletes the last two sentences of the section, having included the necessary language in the additions. The "reasonably necessary diagnostic services" language in subsection effects an effort by members of the Code Commission to strike a balance between those who believe in employer responsibility for necessary medical services and those who believed that compensation should be tied to reasonable and necessary medical expenses, as set forth in the existing language at the end of the section.

~~§ 65.1-50~~ 65.2-404 . A. What employer and carrier liable.—When an employee has an occupational disease that is covered by this Act, the employer in whose employment he was last injuriously exposed to the hazards of the disease and the employer's insurance carrier, if any, at the time of the exposure, shall alone be liable therefor, without right to contribution from any prior employer or insurance carrier.

B. For the purposes of this section, "injuriously exposure" means an exposure to the causative hazard of such disease which is reasonably calculated to bring on the disease in question. Exposure to the causative hazard of pneumoconiosis for ninety work shifts shall be conclusively presumed to constitute injuriously exposure.

C. The operator of a coal mining business covered by this Act who after July 1, 1972, acquires such business or substantially all of the assets thereof is liable for, and must secure the payment of, all benefits which would have been payable by the prior operator under this section with respect to persons previously employed by such business if the acquisition had not occurred and the prior operator had continued to operate such business; and the prior operator of such business is not relieved of any liability under this section.

Drafting note: Restated for clarification. "Injuriously exposure" definition transferred from former § 65.1-52 (now § 65.2-406); the definition was thought to have more utility when placed in this section, particularly because it gives meaning to the "injuriously exposure" reference in subsection A. Subsection B is from § 65.1-52.

~~§ 65.1-51~~ 65.2-405 . Notice to be given.—Within sixty days after a diagnosis of an occupational disease is first communicated to the employee, he, or someone in his behalf, shall give written notice thereof to the employer in accordance with §§ ~~65.1-85 and 65.1-86~~ § 65.2-600, but in no case shall the failure to give notice deprive the employee of his cause of action for occupational disease, unless it be shown that such failure resulted in clear prejudice to the employer.

~~§ 65.1-52~~ 65.2-406 . Limitation upon claim; "injuriously exposure" defined; diseases covered by limitation.—A. The right to compensation under this chapter shall be forever barred unless a claim be filed with the Industrial Commission within one of the following time periods:

1. For coal miners' pneumoconiosis, three years after a diagnosis of the disease is first communicated to the employee or within five years from the date of the last injuriously exposure in employment, whichever first occurs;

2. For byssinosis, two years after a diagnosis of the disease is first communicated to the employee or within seven years from the date of the last injuriously exposure in employment, whichever first occurs;

~~2a.~~ 3. For asbestosis, two years after a diagnosis of the disease is first communicated to the employee;

~~2b.~~ 4. For symptomatic or asymptomatic infection with human immunodeficiency virus including acquired immunodeficiency syndrome, two years after a positive test for infection with human immunodeficiency virus;

~~3.~~ 5. For all other occupational diseases, two years after a diagnosis of the disease is first communicated to the employee or within five years from the date of the last injuriously exposure in employment, whichever first occurs.

6. If death results from an occupational disease within any of such periods, the right to compensation under this chapter shall be barred, unless a claim therefor be filed with the Commission within three years after such death. The limitations imposed by this section as amended shall be applicable to occupational diseases contracted before and after July 1, 1962, and ~~§ 65.1-87~~ 65.2-601 shall not apply to pneumoconiosis. The limitation on time of filing will cover all occupational diseases except:

"Injuriously exposure" as used in this section and in § 65.1-50 means an exposure to the

causative hazard of such disease which is reasonably calculated to bring on the disease in question. Exposure to the causative hazard of pneumoconiosis for ninety work shifts shall be conclusively presumed to constitute injurious exposure. This limitation on time of filing will cover all occupational diseases, except:

Drafting note: The definition of "injurious exposure" was moved to proposed § 65.2-404 B (§ 65.1-50) in an effort to give meaning to its use in that section.

a. Cataract of the eyes due to exposure to the heat and glare of molten glass or to radiant rays such as infrared;

b. Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to pitch, tar, soot, bitumen, anthracene, paraffin, mineral oil or their compounds, products or residues;

c. Radium disability or disability due to exposure to radioactive substances and X ray;

d. Ulceration due to chrome compound or to caustic chemical acids or alkalies and undulant fever caused by the industrial slaughtering and processing of livestock and handling of hides;

e. Mesothelioma due to exposure to asbestos;

f. Angiosarcoma of the liver due to vinyl chloride exposure.

B. ~~In any case in which~~ When a claim is being made for benefits for a change of condition in an occupational disease, ~~(that is, advancing such as advance from one stage or category to another)~~ ~~the~~, a claim for change in condition must be filed with the Commission within three years from the date for which compensation was last paid for an earlier stage of the disease, except that a claim for benefits for a change in condition in asbestosis must be filed within two years from the date when diagnosis of the advanced stage is first communicated to the employee and no claim for benefits for an advanced stage of asbestosis shall be denied on the ground that there has been no subsequent accident. For a first or an advanced stage of asbestosis or mesothelioma, if the employee is still employed in the employment in which he was injuriously exposed, the weekly compensation rate shall be based upon the employee's weekly wage as of the date of communication of the first or advanced stage of the disease, as the case may be. If the employee is unemployed, or employed in another employment, the weekly compensation rate shall be based upon the average weekly wage of a person of the same or similar grade and character in the same class of employment in which the employee was injuriously exposed and preferably in the same locality or community on the date of communication to the employee of the advanced stage of the disease or mesothelioma. The weekly compensation rates herein provided shall be subject to the same maximums and minimums as provided in § ~~65.1-54~~ 65.2-500.

Drafting note: "Injurious exposure" definition moved to § 65.2-404B.

§ ~~65.1-53~~ 65.2-407. Waiver.— A. When an employee or prospective employee, though not incapacitated for work, is found to be affected by, or susceptible to, a specific occupational disease he may, subject to the approval of the Industrial Commission, be permitted to waive in writing compensation for any aggravation of his condition that may result from his working or continuing to work in the same or similar occupation for the same employer.

B. The Industrial Commission shall approve a waiver for coal worker's pneumoconiosis and silicosis only when presented with X-ray evidence from a physician qualified in the opinion of the Industrial Commission to make the determination and which demonstrates a positive diagnosis of the pneumoconiosis or the existence of a lung condition which makes the employee or prospective employee significantly more susceptible to the pneumoconiosis.

C. In considering approval of a waiver, the Commission may supply any medical evidence to a disinterested physician for his opinion as to whether the employee is affected by the disease or has the preexisting condition.

Chapter 5.

Compensation and Payment Thereof.

Chapter drafting note: Significant revisions in Chapter 5 include a rearrangement of § 65.1-56 into a tabular format as proposed § 65.2-503; 65.1-65 (compensation to dependents of a deceased employee) is substantially reorganized as proposed § 65.2-512 for the sake of clarity.

§ ~~65.1-54~~ 65.2-500. Compensation for total incapacity; computation of average wage.— A. When the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total incapacity, a

weekly compensation equal to $66 \frac{2}{3}$ sixty-six and two-thirds percent of his average weekly wages, with a minimum not less than 25 percent and a maximum of not more than 100 percent of the average weekly wage of the Commonwealth as defined herein. In any event, income benefits shall not exceed the average weekly wage of the injured employee. Any farm employer who continues to furnish benefits while the employee is incapacitated, shall be given credit for the value of such benefits so furnished when computing the compensation due the employee.

B. For the purpose of this section the average wage in the Commonwealth shall be determined by the Industrial Commission as follows: On or before January 1 of each year, the total wages, excluding wages of United States Government employees, reported on contribution reports to the Virginia Employment Commission for the twelve-month period ending the preceding June thirtieth shall be divided by the average monthly number of insured workers (determined by dividing the total insured workers reported for that twelve-month period by twelve). The average annual wage thus obtained shall be divided by fifty-two and the average weekly wage thus determined rounded to the nearest dollar. The average weekly wage as so determined shall be applicable for the full period during which income benefits are payable, when the date of occurrence of injury or of disablement in the case of disease falls within the year commencing with the July 1, following the date of determination.

C. The minimum or the maximum weekly income benefits shall not be changed for any year unless the computation herein provided results in an increase or decrease of two dollars or more, raised to the next even dollar in the level of the minimum or the maximum weekly income benefits.

D. In no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed the result obtained by multiplying the average weekly wage of the Commonwealth as defined herein for the applicable year by five hundred, except that weekly compensation on account of total and permanent incapacity as defined by ~~§ 65.1-56(18)~~ § 65.2-503C shall continue for the lifetime of the injured employee without limit as to total amount.

Drafting note: Subsection B: It has been the practice for the Virginia Employment Commission, which calculates the average weekly wage of the Commonwealth, to exclude Federal employees' wages when making the wage calculation annually. This addition is the result of JLARC recommendations following its examination of VEC calculations (see HD 68 of 1990).

§ 65.2-501. *Incapacity after permanent loss.*—After compensation has been paid as provided in § 65.2-503, the employee may, within one year from the date compensation was last due under this section, file an application for compensation for incapacity to work, subject to the provisions of §§ 65.2-500 and 65.2-502. Such application shall be considered and determined as of the date incapacity for work actually begins or as of the date ninety days prior to the date of filing, whichever is later.

Drafting note: Derived from subsection A of former § 65.1-56. "Ninety" days inserted to be consistent with period allowed for retroactive payment upon application for change in condition (Code § 65.1-99, now § 65.2-708; Rule 13, Rules of the Industrial Commission).

~~§ 65.1-55~~ 65.2-502. *Compensation for partial incapacity.*—Except as otherwise provided, in ~~§ 65.1-56~~ 65.2-503, when the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such incapacity a weekly compensation equal to $66 \frac{2}{3}$ sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than 100 percent of the average weekly wage of the Commonwealth as defined in ~~§ 65.1-54~~ 65.2-500. In no case shall the period covered by such compensation be greater than 500 weeks. In case the partial incapacity begins after a period of total incapacity, the latter period shall be deducted from the maximum period herein allowed for partial incapacity.

~~§ 65.1-55.1.~~ *Certain wages considered compensation.*—All wages paid, for a period not exceeding twenty-four consecutive months, to an employee (i) who is physically unable to return to his pre-injury work due to a compensable injury and (ii) who is provided work within his capacity at a wage equal to or greater than his pre-injury wage shall, for the sole purposes of ~~§ 65.1-99~~, be considered compensation.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-708.

~~§ 65.1-56.~~ *Cases in which incapacity shall be deemed to continue for periods specified in section; compensation.*—A. In cases included by the following schedule the incapacity payment for loss in each case shall be deemed to continue for the period specified and the compensation so paid for such injury shall be as specified therein and shall be in addition to all other compensation; however, an award made under this section, except for one made under

subdivision 18 herein, shall not extend the 500-week limit contained in § 65.1-54 or § 65.1-55 and will be paid at the conclusion of payments for incapacity to work pursuant to § 65.1-54. However, compensation awarded pursuant to this section may be payable simultaneously with payments awarded for temporary partial incapacity under § 65.1-55. After compensation has been paid as provided herein, the employee may within one year from the date compensation was last due under this section file an application for compensation for incapacity to work, subject to the provisions of §§ 65.1-54 and 65.1-55. Such application shall be considered and determined as of the date incapacity for work actually begins or as of the date fifty days prior to the date of filing, whichever is later. Any reference to loss of a body member or part of the anatomy as used in this section shall include permanent loss of use of that body member or part of the anatomy resulting from injury to the central nervous system.

1. For the loss of a thumb, sixty-six and two-thirds percent of the average weekly wages during sixty weeks.

2. For the loss of the first finger, commonly called the index finger, sixty-six and two-thirds percent of the average weekly wages during thirty-five weeks.

3. For the loss of the second finger, sixty-six and two-thirds percent of average weekly wages during thirty weeks.

4. For the loss of a third finger, sixty-six and two-thirds percent of average weekly wages during twenty weeks.

5. For the loss of a fourth finger, commonly called the little finger, sixty-six and two-thirds percent of average weekly wages during fifteen weeks.

6. The loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one-half of such thumb or finger, and the compensation shall be for one-half of the periods of time above specified.

7. The loss of more than one phalange shall be considered the loss of the entire finger or thumb; however, in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

8. For the loss of a great toe, sixty-six and two-thirds percent of the average weekly wages during thirty weeks.

9. For the loss of one of the toes other than a great toe, sixty-six and two-thirds percent of the average weekly wages during ten weeks.

10. The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe and the compensation shall be for one-half of the periods of time above specified.

11. The loss of more than one phalange shall be considered as the loss of the entire toe.

12. For the loss of a hand, sixty-six and two-thirds percent of the average weekly wages during 150 weeks.

13. For the loss of an arm, sixty-six and two-thirds percent of the average weekly wages during 200 weeks.

14. For the loss of a foot, sixty-six and two-thirds percent of average weekly wages during 125 weeks.

15. For the loss of a leg, sixty-six and two-thirds percent of average weekly wages during 175 weeks.

16. For the permanent total loss of the vision of an eye, sixty-six and two-thirds percent of the average weekly wages during 100 weeks; and for the permanent partial loss of the vision of an eye, the percentage of 100 weeks equivalent to the percentage of the vision so permanently lost.

17. For the permanent total loss of the hearing of an ear, sixty-six and two-thirds percent of the average weekly wages during fifty weeks; and for the permanent partial loss of the hearing of an ear, the percentage of fifty weeks equivalent to the percentage of the hearing so permanently lost.

18. The loss of both hands, both arms, both feet, both legs or both eyes, or any two thereof, in the same accident, or an injury for all practical purposes resulting in total paralysis as determined by the Commission based on medical evidence, or an injury to the brain which is so severe as to render the employee permanently unemployable in gainful employment, shall be deemed to be total and permanent incapacity, to be compensated according to the provisions of § 65.1-54.

19. For severely marked disfigurement of the body resulting from an injury not above mentioned in this section, sixty-six and two-thirds percent of the average weekly wages not exceeding sixty weeks.

20. For the pneumoconioses, including but not limited to silicosis, asbestosis, coal miner's pneumoconiosis and byssinosis, medically determined to be in the:

First stage, sixty-six and two-thirds percent of the average weekly wages during fifty weeks.

Second stage, sixty-six and two-thirds percent of the average weekly wages during 100 weeks.

Third stage, sixty-six and two-thirds percent of the average weekly wages during 300 weeks.

In construing this section the permanent loss of the use of a member shall be held equivalent to the loss of such member and for the permanent partial loss or loss of use of a member compensation may be proportionately awarded.

The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maxima and minima as set out in § 65.1-54.

Drafting note: The provisions of this section have been revised and rearranged in tabular format in proposed § 65.2-503.

§ 65.2-503. Permanent loss.—A. Compensation for permanent partial and permanent total loss and disfigurement shall be awarded as provided in this section.

B. The following losses shall be compensated for the period specified at the rate of sixty-six and two-thirds percent of the average weekly wage:

Loss	Compensation Period
1. Thumb	60 weeks.
2. First finger (index finger)	35 weeks.
3. Second finger	30 weeks.
4. Third finger	20 weeks.
5. Fourth finger (little finger)	15 weeks.
6. First phalanx of the thumb or any finger	one-half compensation for loss of entire thumb or finger.

The loss of more than one phalanx of a thumb or finger is deemed the loss of the entire thumb or finger. Amounts received for loss of more than one finger shall not exceed compensation provided for the loss of a hand.

7. Great toe	30 weeks.
8. A toe other than a great toe	10 weeks.
9. First phalanx of any toe	one-half compensation for loss of entire toe.

The loss of more than one phalanx of a toe is deemed the loss of the entire toe.

10. Hand	150 weeks.
11. Arm	200 weeks.
12. Foot	125 weeks.
13. Leg	175 weeks.
14. Permanent total loss of the vision of an eye	100 weeks.
15. Permanent total loss of hearing of an ear	50 weeks.
16. Severely marked disfigurement of the body resulting from an injury not otherwise compensated by this section...not exceeding	60 weeks.

17. *Pneumonconiosis, including but not limited to silicosis and asbestosis, medically determined to be in the*
 - (a). First stage 50 weeks.
 - (b). Second stage 100 weeks.
 - (c). Third stage 300 weeks.
18. *Byssinosis* 50 weeks.

C. Compensation shall be awarded pursuant to § 65.2-500 for permanent and total incapacity when there is:

1. Loss of both hands, both arms, both feet, both legs or both eyes, or any two thereof, in the same accident; or

2. Injury for all practical purposes resulting in total paralysis, as determined by the Commission based on medical evidence; or

3. Injury to the brain which is so severe as to render the employee permanently unemployable in gainful employment.

D. In construing this section, the permanent loss of the use of a member shall be equivalent to the loss of such member and for the permanent partial loss or loss of use of a member compensation may be proportionately awarded. Compensation shall also be awarded proportionately for partial loss of vision or hearing.

E. Except as provided in subsection C and subdivision F 2 of this section, the weekly compensation payments referred to in this section shall all be subject to the same limitations as to maximum and minimum as set out in § 65.2-500.

F. 1. Compensation awarded pursuant to this section shall be in addition to all other compensation and shall be payable after payments for temporary total incapacity pursuant to § 65.2-500.

2. Compensation pursuant to this section may be paid simultaneously with payments for partial incapacity pursuant to § 65.2-502.

Drafting note: The schedule of payments for permanent loss has been revised for clarification. Language regarding payment for incapacity after payment for scheduled loss has been deleted and placed in a new section (§ 65.2-501). Byssinosis is added to the scheduled compensation category and is no longer treated as a pneumoconiosis. The Industrial Commissioners stated that byssinosis is not a type of pneumoconiosis and is, therefore, not ratable according to the Pneumoconioses Guide. There is a guide for medically determining whether byssinosis is irreversible, called the Schilling Index. A determination of permanent irreversible byssinosis would qualify a worker for permanent partial incapacity. If byssinosis were a pneumoconiosis, the worker would be entitled to 50 weeks of compensation. After payment of this amount the worker would then be entitled under former Code § 65.1-56 (now § 65.2-503) to apply for additional compensation if there were disability for work and wage loss.

~~§ 65.1-56.1 65.2-504 . Compensation for disability from coal worker's pneumoconiosis; insurance of coal operator.— Notwithstanding any other provisions in this Act, on and after July 1, 1973, or any extended date allowed for state workers' compensation laws to comply with the standards imposed by the United States Department of Labor acting under the provisions of Title 4, part C, section 421 (a) of Public Law 91-173 (the 1969 Federal Coal Mine Health and Safety Act) and any subsequent amendments thereto, A. Any An employee having a claim eligible for an award for coal worker's pneumoconiosis benefits shall be compensated according to the following schedule:~~

Drafting note: The language stricken in this section is transitional language related to Virginia's implementation of provisions of the Federal "black lung act." The language is no longer deemed essential to the operation of this section. Identical language is stricken in proposed §§ 65.2-513, 514, and 519.

~~(1) 1. For first stage coal worker's pneumoconiosis medically determined from radiographic evidence and classified under International Labour Office Classification of Radiographs of the Pneumonconiosis (1980) where there is no present impairment for work, 66 2/3 sixty-six and two-thirds percent of the average weekly wage during the three years prior to the filing date, for fifty weeks, up to 100 percent of the average weekly wage of the Commonwealth as defined in § 65.1-54 65.2-500 .~~

~~(2) 2. For second stage coal worker's pneumoconiosis medically determined from~~

radiographic evidence and classified under International Labour Office Classification of Radiographs of the Pneumonconiosis (1980) where there is no present impairment for work ~~66 2/3 sixty-six and two-thirds~~ percent of the average weekly wages for 100 weeks, up to 100 percent of the average weekly wage of the Commonwealth as defined in ~~§ 65.1-54 65.2-500~~ .

(3) 3. For third stage coal worker's pneumoconiosis medically determined from radiographic evidence and classified under International Labour Office Classification of Radiographs of the Pneumonconiosis (1980) and involving progressive massive fibrosis or medically classified as being A, B or C under the International Labour Office (hereafter referred to as I.L.O.) classifications but where there is no apparent impairment for work, ~~66 2/3 sixty-six and two-thirds~~ percent of the average weekly wages, for 300 weeks, up to 100 percent of the average weekly wage of the Commonwealth as defined in ~~§ 65.1-54 65.2-500~~ .

(4) 4. For coal worker's pneumoconiosis medically determined to be A, B or C under the I.L.O. classifications or which involves progressive massive fibrosis, or for any stage of coal worker's pneumoconiosis when it is accompanied by sufficient pulmonary function loss as shown by approved medical tests and standards to render an employee totally unable to do manual labor in a dusty environment, and the employee is instructed by competent medical authority not to attempt to do work in any mine or dusty environment and if he is in fact not working, it shall be deemed that he has a permanent disability and he shall receive ~~66 2/3 sixty-six and two-thirds~~ percent of his average weekly wages, during the three years prior to the date of filing of the claim, up to 100 percent of the average weekly wage of the Commonwealth as defined in ~~§ 65.1-54 65.2-500~~ for his lifetime without limit as to the total amount.

B. In any case where partial disability as mentioned in subsection A of this section later results in total disability, the employer shall receive credit on any permanent disability payments by being allowed to deduct twenty-five percent of each weekly payment until payments for partial disability hereunder have been fully accounted for.

C. In any case where there is a question of whether a claimant with pneumoconiosis is suffering from coal worker's pneumoconiosis or from some other type of pneumoconiosis such as silicosis it shall be conclusively presumed that he is suffering from coal worker's pneumoconiosis if he has had injurious exposure to coal dust.

D. In the event that any coal operator wishes to insure himself under standard workers' compensation insurance rather than be self-insured against the risks and liabilities imposed by this section, or by ~~§ 65.1-65.1 65.2-513~~ , any such insurance issued in this Commonwealth covering such risks shall be rated separately for premium purposes and shall not affect workers' compensation rates for any other employers not exposed to such risks.

Drafting note: The General Assembly, in the 1990 Session, revised this section to be consistent with staged awards for pneumoconiosis as set forth in former ~~§ 65.1-56~~ (now ~~§ 65.2-503~~). The language eliminated is not necessary because it was transitional language tied to state implementation of the Federal "Black Lung" Act.

~~§ 65.1-57: Repealed by Acts 1983, c. 288.—~~

~~§ 65.1-58 65.2-505~~ . Successive injuries in different employments; injury to employee with disability.—If an employee has a permanent disability or has sustained a permanent injury in service in the armed forces of the United States or in another employment other than that in which he receives a subsequent permanent injury by accident, such as specified in ~~§ 65.1-56 65.2-503~~ , he shall be entitled to compensation only for the degree of incapacity which would have resulted from the later accident if the earlier disability or injury had not existed.

~~§ 65.1-59 65.2-506~~ . Compensation after second injury in same employment.—If an employee receives an injury for which compensation is payable while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries, but if he is, at the time of the second injury, receiving compensation under the provisions of ~~§ 65.1-56 65.2-503~~ , payments of compensation thereunder shall be suspended during the period compensation is paid on account of the second injury, and after the termination of payments of compensation for the second injury payments on account of the first injury shall be resumed and continued until the entire amount originally awarded has been paid. But if, at the time of the second injury, he is receiving compensation under the provisions of ~~§ 65.1-55 65.2-502~~ , then no compensation shall be payable on account of the first injury during the period he receives compensation for the second injury.

~~§ 65.1-60 65.2-507~~ . Same; when both injuries permanent.—If an employee receives a permanent injury as specified in ~~§ 65.1-56 65.2-503~~ , after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the

total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation.

~~§ 65.1-61~~ 65.2-508 . Foreign injuries.— A. When an accident happens while the employee is employed elsewhere than in this Commonwealth which would entitle him or his dependents to compensation if it had happened in this Commonwealth, the employee or his dependents shall be entitled to compensation, if:

- (1) 1. The contract of employment was made in this Commonwealth; and
- (2) 2. The employer's place of business is in this Commonwealth;
- (3) ~~-Repealed-~~

Provided the contract of employment was not expressly for service exclusively outside of the Commonwealth.

B. But if an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Act.

~~§ 65.1-62~~ 65.2-509 . Commencement of compensation.—No compensation shall be allowed for the first seven calendar days of incapacity resulting from an injury except the benefits provided for in ~~§ 65.1-88~~ 65.2-603 ; but if incapacity extends beyond that period compensation shall commence with the eighth day of disability. If, however, such incapacity shall continue for a period of more than three weeks, then compensation shall be allowed from the first day of such incapacity.

~~§ 65.1-63~~ 65.2-510 . Refusal of employment.—If an injured employee refuses employment procured for him suitable to his capacity, he shall ~~not only~~ be entitled to any compensation at any time the benefits provided for in ~~§ 65.2-603~~ during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.

Drafting note: The section was revised to clarify that medical benefits are retained by an injured employee who refuses selective employment. This is consistent with Commission and court interpretations now in effect.

~~§ 65.1-64~~ 65.2-511 . Compensation to employee's distributees upon his death from any other cause.—When an employee receives or is entitled to compensation under this Act for an injury covered by ~~§ 65.1-56~~ 65.2-503 and dies from any other a cause other than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his statutory distributees, dependent upon him for support dependents under this chapter , in lieu of the compensation the employee would have been entitled to had he lived. But if the death is due to a cause that is compensable under this Act and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine terminate .

Drafting note: Rewritten for clarification.

~~§ 65.1-65~~ . Compensation to dependents of employee killed.—If death results from the accident within nine years, the employer shall pay, or cause to be paid, subject, however, to the provisions of the other sections of this Act in one of the methods hereinafter provided, to the dependents of the employee wholly dependent upon his earnings for support at the time of the accident a weekly payment equal to two-thirds of his average weekly wages, but not more than 100 percent of the average weekly wage of the Commonwealth as defined in ~~§ 65.1-54~~ nor less than 25 percent of the average weekly wage as defined therein for a period of 400 weeks from the date of the injury. However, those dependents specified in subdivisions (1), (2) and (3) of ~~§ 65.1-66~~ shall be paid a weekly payment equal to two-thirds of the employee's average weekly wages, but not more than 100 percent of the average weekly wage of the Commonwealth as defined in ~~§ 65.1-54~~ nor less than 25 percent of the average weekly wage as defined therein for a period of 500 weeks from the date of the injury. In addition the dependents shall also receive burial expenses not exceeding \$3,000 and reasonable transportation expenses for the deceased not exceeding \$500. If the employee leaves dependents only partly dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid, as aforesaid, shall equal the same proportion of the weekly payments for the benefit of persons wholly dependent as the extent of partial dependency bears to total dependency. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments but shall not continue more than 400 weeks from the date of the injury except to those dependents specified in subdivisions (1), (2) and (3) of ~~§ 65.1-66~~, to whom compensation shall not continue more than 500 weeks from the date of the

jury.

Drafting note: The provisions of this section have been reorganized in proposed § 65.2-512.

65.2-512. Compensation to dependents of an employee killed; burial expenses.—A. If death from the accident within nine years, the employer shall pay, or cause to be paid, compensation in weekly payments equal to sixty-six and two-thirds percent of the employee's average weekly wages, but not more than 100 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500 nor less than twenty-five percent of the average weekly wage as defined therein:

1. To those persons presumed to be wholly dependent upon the deceased employee as set forth in § 65.2-515A1, 2, and 3, for a period of 500 weeks from the date of injury.

2. If there are no total dependents pursuant to § 65.2-515A1, 2, or 3, to those persons presumed to be wholly dependent as set forth in § 65.2-515A4, and to those determined to be wholly dependent in fact, for a period of 400 weeks from the date of injury.

3. If there are no total dependents, to partial dependents in fact, for a period of 400 weeks from the date of injury.

B. The employer shall also pay burial expenses not exceeding \$3,000 and reasonable transportation expenses for the deceased not exceeding \$500.

C. Benefits shall be divided equally among total dependents, to the exclusion of partial dependents. If there are no total dependents, benefits shall be divided among partial dependents according to the dependency of each upon the earnings of the employee at the time of the injury, in the proportion that partial dependency bears to total dependency.

D. If benefits are terminated as to any member of a class herein, that member's share shall be divided among the remaining members of the class proportionately according to their dependency.

E. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments but shall not continue for a period longer than specified in subsection A of this section.

Drafting note: Blends and rewrites §§ 65.1-65, 65.1-68 and 65.1-70. The Industrial Commission pointed out that this section does not guarantee payment of 500 weeks compensation to the persons presumed wholly dependent in paragraph 1, nor does it guarantee 400 weeks to the dependents in paragraph 2.

~~§ 65.1-65.1~~ 65.2-513. Compensation for death from coal worker's pneumoconiosis; determining whether death was due to pneumoconiosis or any chronic occupational lung disease.—Notwithstanding any other provisions in this Act, on and after July 1, 1973, or any extended date allowed for state workers' compensation laws to conform to standards imposed by the United States Department of Labor acting under provisions of Title IV, part C, section 421 (a) of Public Law 91-173 (the 1969 Federal Coal Mine Health and Safety Act) and any subsequent amendments thereto, if A. If death results from coal worker's pneumoconiosis or if the employee was totally disabled by coal worker's pneumoconiosis at the time of his death and claim for compensation is made within three years after such death the employer shall pay or cause to be paid to the surviving spouse of the deceased employee until his death or remarriage or the minor dependents of the employee until such minor dependents reach the age of eighteen (or twenty-three, so long as they remain as full-time students in a generally accredited institution of learning) or such other legal dependents as the deceased employee might have at the time of his death for the duration of such dependency, sixty-six and two-thirds percent of the employee's average weekly wage during the last three years that he worked in the coal mines, up to 100 percent of the average weekly wage of the Commonwealth as defined in § 65.1-54 65.2-500 without any specific limit as to the number of such weeks; provided, however, that any claim for compensation of an employee who was totally disabled by coal worker's pneumoconiosis at the time of his death shall be paid only to the extent required by federal law.

B. The Commission shall, by regulation duly drawn and published after notice and hearing, prescribe standards, not inconsistent with those prescribed by the Secretary of Health, Education and Welfare under the 1969 Federal Coal Mine Health and Safety Act, as amended, for determining whether the death or total disability of an employee was due to pneumoconiosis or any chronic occupational lung disease.

C. In prescribing such standards the following factors shall be included:

(1) 1. If an employee who died from a respirable (respiratory) disease was employed for ten years or more in an environment where he was injuriously exposed to such a disease there shall be a rebuttable presumption that his disease arose out of such employment, or if he became totally disabled from coal worker's pneumoconiosis or if such disease significantly contributed to his death or disability there shall be a rebuttable presumption that his death or disability was due to such disease.

(2) 2. Where there is clear evidence of exposure to an occupational lung disease, the Commission may make its determination whether compensation is payable to the dependents based on the description of the employee's symptoms, X rays, and ~~for~~ other competent medical evidence, and the opinion of experts as to whether those symptoms reasonably described the symptoms of such an occupational disease.

(3) 3. The statement as to the cause of death on a death certificate may be considered as evidence in any such cases but shall not be controlling on the Commission's findings. The Commission may also, by regulation establish standards, not inconsistent with those prescribed by the Secretary of Labor under the 1969 Federal Coal Mine Health and Safety Act as amended, for apportioning liability for benefits under this section and under § ~~65.1-56.1~~ (4) 65.2-504A4 among more than one operator, where such apportionment is appropriate; provided that no apportionment shall operate to deprive an employee of the full benefits due him under this Act. *Drafting note:* The language stricken in this section is transitional language related to Virginia's implementation of provisions of the Federal "black lung act." The language is no longer deemed essential to the operation of this section. Identical language is stricken in proposed §§ 65.2-504, 514, and 519.

§ ~~65.1-65.2~~ 65.2-514 . Special provisions for coal worker's pneumoconiosis claims for total disability and/or death.— Notwithstanding any other provisions in this Act, on and after July 1, 1973, or any extended date allowed for state workers' compensation laws to conform to standards imposed by the United States Department of Labor under the 1969 Federal Coal Mine Health and Safety Act as amended, in the case of claims for death or total disability under §§ ~~65.1-56.1~~ (4) 65.2-504A4 and/or ~~65.1-65.1~~ 65.2-513 , the following matters shall be required or effective only to the extent that they are allowed by the 1969 Federal Coal Mine Health and Safety Act as amended and the regulations issued thereunder:

(1) 1. Notice to the employer under § ~~65.1-51~~ 65.2-405 ;

(2) 2. Any limitation for the filing of a claim for benefits for death or total disability under §§ ~~65.1-52~~ and ~~65.1-87~~ 65.2-406 and 65.2-601 ;

(3) 3. Waivers as provided under § ~~65.1-53~~ 65.2-407 ;

(4) 4. Settlements agreed to, or allowed, or granted under § ~~65.1-45~~ 65.2-701 ; and

(6) 5. The right of an employer to refuse employment to an applicant or to discharge a claimant because he has or is susceptible to coal worker's pneumoconiosis.

Drafting note: The language stricken in this section is transitional language related to Virginia's implementation of provisions of the Federal "black lung act." The language is no longer deemed essential to the operation of this section. Identical language is stricken in proposed §§ 65.2-504, 513 and 519.

§ ~~65.1-66~~ 65.2-515 . Persons conclusively presumed to be wholly dependent.— A. The following persons shall be conclusively presumed to be dependents wholly dependent for support upon the deceased employee:

(1) 1. A wife upon a husband whom she had not voluntarily deserted or abandoned at the time of the accident or with whom she lived at the time of his accident, if she is then actually dependent upon him.

(2) 2. A husband upon a wife whom he had not voluntarily deserted at the time of the accident or with whom he lived at the time of her accident if he is then actually dependent upon her.

(3) 3. A child under the age of eighteen upon a parent and a child over such age if physically or mentally incapacitated from earning a livelihood or a child under the age of twenty-three if enrolled as a full-time student in any accredited educational institution.

(4) 4. Parents in destitute circumstances, provided there be no total dependents pursuant to other provisions of this section.

B. As used in this section, the term "child" shall include a stepchild, a legally adopted child, posthumous child, and an acknowledged illegitimate child, but shall not include a married child; and the term "parent" shall include stepparents and parents by adoption.

~~§ 65.1-67~~ 65.2-516 . Other cases of dependency.—In all other cases questions of dependency wholly or in part shall be determined in accordance with the facts as the facts are at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident.

~~§ 65.1-68~~ . Division when there is more than one dependent.—If there is more than one person wholly dependent, the death benefit shall be divided among them; and persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

Drafting note: The provisions of this section have been incorporated into proposed § 65.2-512.

~~§ 65.1-69~~ 65.2-517 . Termination of dependency.—For the purpose of this Act, the dependence of a widow or widower of a deceased employee shall terminate with death or remarriage, and the amount to be theretofore received by him or her shall be divided among the children or other dependents in the proportion of which they are receiving compensation, and the dependence of a child or any minor dependent, except a child or minor dependent physically or mentally incapacitated from earning a livelihood, or a full-time student, as defined in § 65.1-66 ~~(3)~~ 65.2-515 , shall terminate with the attainment of eighteen years of age.

~~§ 65.1-70~~ . Burial and transportation expenses when no dependents.— If the deceased employee leaves no dependents, the employer shall pay the burial expenses of the deceased, not to exceed \$3,000 and in addition reasonable transportation expenses for the deceased not exceeding \$500.

Drafting note: The provisions of this section have been incorporated into proposed § 65.2-512.

~~§ 65.1-71~~ 65.2-518 . Limitation upon total compensation.—The total compensation payable under this Act shall in no case exceed the result obtained by multiplying the average weekly wage of the Commonwealth as defined in § 65.1-54 65.2-500 for the applicable year by 500, except in cases of total permanent incapacity as defined in § 65.1-56 ~~(18)~~ 65.2-503 and in cases of permanent disability under § 65.1-56.1 ~~(4)~~ 65.2-504A4 and death from coal worker's pneumoconiosis under § 65.1-65.1 65.2-513 .

~~§ 65.1-71.1~~ 65.2-519 . When limitations inapplicable to injuries arising out of pneumoconiosis.— Notwithstanding any other provisions in this Act, on and after January 1, 1973, or any extended time allowed for state workers' compensation laws to comply with the standards imposed by the United States Department of Labor acting under the provisions of Title IV, part C, section 421 (a) of Public Law 91-173 (the 1969 Federal Coal Mine Health and Safety Act) and any subsequent amendments thereto, the limitations as to the maximum periods and maximum total amounts listed in §§ 65.1-54, 65.1-65 and 65.1-71 65.2-500, 65.2-512, and 65.2-518 shall not apply to injuries arising out of pneumoconiosis.

Drafting note: The language stricken in this section is transitional language related to Virginia's implementation of provisions of the Federal "black lung act." The language is no longer deemed essential to the operation of this section. Identical language is stricken in proposed §§ 65.2-504, 513, and 514.

~~§ 65.1-72~~ 65.2-520 . Voluntary payment by employer.—Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Act were not due and payable when made, may, subject to the approval of the Industrial Commission, be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

~~§ 65.1-73~~ 65.2-521 . Time of payment.—The Industrial Commission, upon application of either party, may, in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid bi-weekly, monthly or quarterly instead of weekly.

Drafting note: The addition of "bi-weekly" to the description of authorized means of paying compensation codifies existing practice.

~~§ 65.1-74~~ 65.2-522 . Lump-sum payments generally.— Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, when the parties agree and the Industrial Commission deems it to be to the best interests of the

employee or his dependents, or when it will prevent undue hardships on the employer, or his insurance carrier, without prejudicing the interests of the employee or his dependents, *liability for compensation* may be redeemed, in whole or in part, by the ~~through~~ payment by the employer of a lump sum which shall be fixed by the Commission, but in no case shall *the sum awarded* be less than a sum equal to the present value of future compensation payments commuted, computed at four ~~per centum~~ percent true discount compounded annually. The probability of the death of the injured employee or his surviving spouse shall be determined in accordance with the American Experience Tables of Mortality or their equivalent, and the probability of remarriage of the surviving spouse shall be determined in accordance with the Remarriage Tables of the Dutch Royal Insurance Institution. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded.

Drafting note: The Industrial Commission recommended that the mortality and remarriage table reference be eliminated due to difficulty in determining present value from the sources mentioned (Present Value Annuity Table set forth at § 55-269.1).

§ 65-1-75 65.2-523 . Lump-sum payments to trustees.—Whenever the Industrial Commission deems it expedient, any lump sum subject to the provisions of § 65-1-74 65.2-522 shall be paid by the employer to some suitable person or corporation appointed by the circuit ~~or corporation~~ court in the county or city wherein the accident occurred, or by such other circuit ~~or corporation~~ court as may be designated by the Industrial Commission as more compatible with the interests and convenience of the beneficiaries, as trustee or guardian, to administer the same for the benefit of the person entitled hereto in the manner provided by the Commission. The receipt of such trustee for the amount as paid shall discharge the employer or anyone else who is liable therefor.

Drafting note: Reference to “corporation court” is stricken here and elsewhere in the revision to delete an obsolete reference; there are currently no corporation courts.

§ 65-1-75-1 65.2-524 . Failure to pay compensation within two weeks after it becomes due.—If any payment is not paid within two weeks after it becomes due, there shall be added to such unpaid compensation an amount equal to twenty percent thereof ; ~~which shall be paid at the same time as, but in addition to such compensation, unless the employer is not required to make such payment when due according to the provisions of this Act .~~

Drafting note: Elimination of unnecessary language. Code § 65.2-706 provides for suspension of award upon appeal.

§ 65-1-76 65.2-525 . Who may receive payment and receipt therefor.— A. Whenever payment of compensation is made to a surviving spouse for his use, or for his use and the use of a minor child or children, the written receipt thereof of such surviving spouse shall acquit the employer.

B. Whenever payment is made to any person eighteen years of age or over, the written receipt of such person shall acquit the employer. If a minor shall be entitled to receive a sum amounting to not more than \$300 as compensation for injuries, or as a distributive share by virtue of this Act, the parent or natural guardian upon whom such minor shall be dependent for support shall be authorized and empowered to receive and receipt for such moneys to the same extent as a guardian of the person and property of such minor duly appointed by proper court and the release or discharge of such parent or natural guardian shall be a full and complete discharge of all claims or demands of such minor thereunder.

C. Whenever any payment of over \$300 is due to a minor or to a mentally incompetent adult the same shall be made to the guardian of the property of such minor or the guardian or committee of such mentally incompetent adult or, if there be none, to some suitable person or corporation appointed by the circuit ~~or corporation~~ court ~~or the judge thereof in vacation~~ as a trustee, and the receipt of such trustee shall acquit the employer.

Drafting note: Obsolete references to “corporation court” are deleted.

§ 65-1-77 65.2-526 . Payment to junior dependents in good faith.—Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer unless and until such dependent or dependents prior in right shall have given him notice of his or their claim. In case the employer is in doubt as to the respective rights of rival claimants he may apply to the Industrial Commission to decide between them.

§ 65-1-78 65.2-527 . When employee's rights exercised by guardian, trustee or committee.—If an injured employee is mentally incompetent or is under eighteen years of age at the time when any right or privilege accrues to him under this Act, his guardian, trustee or committee may in his behalf claim and exercise such right or privilege.

~~§ 65.1-79~~ 65.2-528 . Time limitations on persons under disability.—No limitation of time provided in this Act for the giving of notice or making claim under this Act shall run against person who is mentally incompetent or a minor dependent under eighteen years of age, so long as he has no guardian, trustee or committee.
note: Clarification. As stated, a statute of limitations is tolled until any minor reaches 18, unless he has a court-appointed personal representative.

~~§ 65.1-80~~ 65.2-529 . Joint service.—Whenever any employee for whose injury or death compensation is payable under this Act shall at the time of the injury be in the joint service of two or more employers subject to this Act, such employers shall contribute to the payment of such compensation in proportion to their wage liability to such employee; provided, however, that nothing in this section shall prevent any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation.

~~§ 65.1-81~~ 65.2-530 . Preferences and priorities.—All rights of compensation granted by this Act shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor.

~~§ 65.1-82~~ 65.2-531 . Assignments of compensation; exemption from creditors' claims.—A. No claim for compensation under this Act shall be assignable. All compensation and claims therefor shall be exempt from all claims of creditors, even if the compensation is used for purchase of shares in a credit union, or deposited into an account with a financial institution or other organization accepting deposits and is thereby commingled with other funds. Compensation paid under ~~§ 65.1-54~~ and ~~§ 65.1-55~~ 65.2-500 and 65.2-502 shall be subject to claims for spousal and child support subject to the same exemptions allowed for earnings in § 34-29.

B. Upon an order of garnishment, attachment or other levy addressed to a financial institution in which the principal defendant claims to have exempt funds hereunder, the principal defendant may file an answer asserting the exemption hereunder. From the time of service of such garnishment, attachment or levy, the financial institution, until further order of the court, shall hold the amount subject to such garnishment, attachment or levy, or such lesser amount or sum as it may have, which amount shall be set forth in its answer. It shall hold such amount free of any person drawing against such funds whether by check against such account or otherwise. The financial institution shall be subject to such further order or subpoena for discovery of its records, for which it shall be entitled an order or agreement for compensation for the expense of such service, and in a case deemed appropriate to the court by such an order directing deposit of funds or further security prior to such records being ordered produced.

Chapter 6.

Notice of Accident; Filing Claims; Medical Attention and Examination.

Chapter drafting note: The consolidation of §§ 65.1-85 and 65.1-86 into proposed § 65.2-600 generated significant interest during the meetings of the Special Task Force and Code Commission. The blended section lays out the established 30-day notice rule and the consequences of an employee's failure to observe it—together with the authority of the Commission to excuse noncompliance under the circumstances currently outlined in § 65.1-85. However, the current language of § 65.1-85 provides that pre-notice medical expenses and other compensation are not payable to the employee in the absence of the employer's actual knowledge of the accident, or other factors such as fraud. An initial draft of subsection C in proposed § 65.2-600 omitted reference to the pre-notice noncoverage provisions of § 65.1-85. However, the substance of these provisions were brought back in a revised subsection C that was narrowly adopted by the Code Commission following extensive discussion and debate at the Commission's November 20 meeting.

~~§ 65.1-85.~~ Notice of accident.—Every injured employee or his representative shall immediately on the occurrence of an accident or as soon thereafter as practicable give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Act prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person. But no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

Drafting note: The provisions of this section are incorporated into proposed § 65.2-600.

§ 65.1-86. Nature of notice; service.—The notice provided in § 65.1-85 shall state in ordinary language the name and address of the employee and the time, place, nature and cause of the accident and of the resulting injury or death. It shall be signed by the employee or by a person on his behalf or in the event of his death by anyone or more of his dependents or by a person in their behalf.

No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby and then only to such extent as the prejudice.

Such notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the Commonwealth or may be sent by registered letter addressed to the employer at his last known residence or place of business. *Drafting note:* The provisions of this section are incorporated into proposed § 65.2-600.

§ 65.2-600. Notice of accident.—A. Every injured employee or his representative shall immediately on the occurrence of an accident or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident.

B. The notice shall state the name and address of the employee, the time and place of the accident, and the nature and cause of the accident and the injury.

LANGUAGE CONSIDERED: C. Immediate written notice is not required if the employer, his agent or representative had knowledge of the accident or that the party required to give notice had been prevented from giving notice by reason of physical or mental incapacity or the fraud or deceit of some third person.

LANGUAGE ADOPTED BY CODE COMMISSION: C. The employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Act prior to the giving of such notice, unless it be shown that the employer, his agent or representative had knowledge of the accident or that the party required to give notice had been prevented from giving notice by reason of physical or mental incapacity or the fraud or deceit of some third person.

D. No compensation or medical benefit shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

E. No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby and then only to such extent as the prejudice.

Drafting note: "Notice" is a common issue in litigation of compensation cases. Former §§ 65.1-85 and 65.1-86 are combined here to clarify the language without changing the effect of the section as it has been interpreted by the Supreme Court in *Game Commission v. Joyce*, 147 Va. 89, 136 S.E. 651 (1927); *Maryland Casualty Co. v. Robinson*, 149 Va. 307, 141 S.E. 225 (1928), and *Clinchfield Carbocoal v. Kiser*, 139 Va. 451, 124 S.E. 172 (1924). Discussion with *ad hoc* committee raised the question as to whether there would be additional substantive change by elimination of the words "...and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Act prior to giving such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person." As discussed in the chapter note, the Code Commission, in a narrow vote, acted to retain that language in § 65.2-600 C.

§ 65.1-87 65.2-601. Time for filing claim.—The right to compensation under this Act shall be forever barred, unless a claim be filed with the Industrial Commission within two years after the accident. Death benefits payable under this Act shall be payable only if: (i) death results from the accident, (ii) a claim for benefits under the Act has been filed within two years after the accident, and (iii) the claim for such death benefits is filed within two years from the date of death.

§ 65.1-87.1 65.2-602. Tolling of statute of limitations.—In any case where an employer has received notice of an accident resulting in compensable injury to an employee as required by § 65.1-85 65.2-600, and whether or not an award has been entered, such employer nevertheless has paid compensation or wages to such employee during incapacity for work as defined in § 65.1-54 or § 65.1-55 65.2-500 or 65.2-502, resulting from such injury, and such conduct of the

Employer has operated to prejudice the rights of such employee with respect to the filing of a claim prior to expiration of a statute of limitations otherwise applicable, such statute shall be null and void for the duration of such payment. For purposes of this section, such rights of an employee shall be deemed not prejudiced if his employer has filed the first report of accident as required by § 65.1-24 65.2-900 or he has received after the accident a workers' compensation guide as set forth in § 65.1-22 65.2-201 or a notice in substantially the following form:

NOTICE TO EMPLOYEE.

"BECAUSE OF THE ACCIDENT OR INJURY YOU HAVE REPORTED, YOU MAY HAVE A WORKER'S COMPENSATION CLAIM. HOWEVER, SUCH CLAIM MAY BE LOST IF YOU DO NOT FILE IT WITH THE VIRGINIA INDUSTRIAL WORKERS' COMPENSATION COMMISSION WITHIN THE TIME LIMIT PROVIDED BY LAW. YOU MAY FIND OUT WHAT TIME LIMIT APPLIES TO YOUR INJURY BY CONTACTING THE INDUSTRIAL COMMISSION. THE FACT THAT YOUR EMPLOYER MAY BE COVERING YOUR MEDICAL EXPENSES OR CONTINUING TO PAY YOUR SALARY OR WAGES DOES NOT STOP THE TIME FROM RUNNING.

Such notice shall also include the address and telephone number which the employee may use to contact the Commission.

§ 65.1-88 65.2-603 . Duty to furnish medical attention, etc., and vocational rehabilitation; effect of refusal of employee to accept.—A. 1. As long as necessary after an accident the employer shall furnish or cause to be furnished, free of charge to the injured employee, a physician chosen by the injured employee from a panel of at least three physicians selected by the employer and such other necessary medical attention. Where such accident results in the amputation of an arm, hand, leg or foot or the enucleation of an eye or the loss of any natural teeth or loss of hearing, the employer shall furnish prosthetic or orthotic appliances, proper fitting thereof, and training in the use thereof, as the nature of the injury may require. In awards entered for incapacity for work, under this title, upon determination by the treating physician and the Commission that the same is medically necessary, the Commission may require that the employer furnish and maintain wheelchairs, bedside lifts, adjustable beds and modification of the claimant's employee's principal home consisting of ramps, handrails or any appliances prescribed by the treating physician and doorway alterations, provided that the aggregate cost of all such items and modifications required to be furnished on account of any accident shall not exceed \$25,000. The employee shall accept the attending physician, unless otherwise ordered by the Industrial Commission, and in addition, such surgical and hospital service and supplies as may be deemed necessary by the attending physician or the Industrial Commission.

2. The employer shall repair, if repairable, or replace dentures, artificial limbs or other prosthetic or orthotic devices damaged in an accident otherwise compensable under workers' compensation, and furnish proper fitting thereof.

3. The employer shall also furnish or cause to be furnished, at the direction of the Industrial Commission, reasonable and necessary vocational rehabilitation training services. In the event a dispute arises, any party may request a hearing and seek the approval of the Commission for the proposed services. Such services shall take into account the employee's pre-injury job and wage classifications; his or her age, aptitude and level of education; the likelihood of success in the new vocation; and the relative costs and benefits to be derived from such services.

B. The unjustified refusal of the employee to accept such medical service or vocational rehabilitation training when provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless, in the opinion of the Industrial Commission, the circumstances justified the refusal. In any such case the Industrial Commission may order a change in the medical or hospital service or vocational rehabilitation training.

C. If in an emergency or on account of the employer's failure to provide the medical care during the period herein specified, or for other good reasons, a physician other than provided by the employer is called to treat the injured employee, during such period, the reasonable cost of such service shall be paid by the employer if ordered so to do by the Industrial Commission.

D. As used in this section and in § 65.1-88.1 and 65.1-88.2 65.2-604 , the terms "medical attention," "medical service," "medical care," and "medical report" shall be deemed to include chiropractic service or treatment and, where appropriate, a chiropractic treatment report.

Drafting note: The added reference to "orthotic" appliances and devices in this section was recommended by one of the Task Force members, Dr. E. Claiborne Irby, who suggested that the reference would add to the section's completeness while effecting no substantive change in its

current operation.

~~§ 65.1-88.1~~ 65.2-604 . Furnishing copy of medical report.—Any physician attending an injured employee shall, upon request of the injured employee, employer or insurer, furnish a copy of any medical report to the injured employee, employer or insurer or to each of them upon request for such medical report.

~~§ 65.1-88.2. [repeal] Medical attention of unlimited duration to certain employees of political divisions and municipalities.—In any case where an employee of a political division or municipal corporation of the Commonwealth has received an injury in the performance of his or her occupational duties to the brain or spinal cord, such political division or municipal corporation may furnish medical attention of unlimited duration to such employee, notwithstanding the fact that such injury occurred prior to the effective date of the amendment to § 65.1-88, which amendment required such attention.~~

Drafting note: Language of this section is not mandatory and was deemed no longer necessary.

~~§ 65.1-88~~ 65.2-605 . Liability of employer for medical services ordered by Commission; malpractice.—The pecuniary liability of the employer for medical, surgical and hospital service herein required when ordered by the Commission shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person and the employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of ~~§ 65.1-88~~ 65.2-603 , but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident and shall be compensated for as such.

Drafting note: The Industrial Commissioners stated that the phrase stricken poses an unnecessary burden of proof and, for practical purposes, is not utilized in evaluating costs for medical services.

~~§ 65.1-90~~ 65.2-606 . Physicians for medical examination.—The Commission or any member thereof may, upon the application of either party or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination and to testify in respect thereto; provided, however, that the provisions of this section shall not apply to determination of whether an employee died of pneumoconiosis or any chronic occupational lung disease, which shall be governed by the provisions of ~~§ 65.1-65.1~~ 65.2-513 and the regulations promulgated thereunder. Such physician or surgeon shall be allowed travelling expenses and a reasonable fee to be fixed by the Commission.

The fees and expenses of such physician or surgeon shall be paid by the Commonwealth.

~~§ 65.1-91~~ 65.2-607 . Medical examination; *physician-patient privilege inapplicable*; autopsy.— A. After an injury and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. The employee shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him. No fact communicated to, or otherwise learned by, any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this Act, or any action at law brought to recover damages against any employer subject to the provisions of this Act.

B. If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this Act shall be suspended until such refusal or objection ceases and no compensation shall at any time be payable for the period of suspension unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction.

C. The employer or the Industrial Commission may in any case of death require an autopsy at the expense of the party requesting the same. Such autopsy shall be performed upon order of the Commission, and anyone obstructing or interfering with such autopsy shall be punished for contempt.

Drafting note: Restated for clarification.

Chapter 7.

Procedure in Connection with Awards.

Chapter drafting note: The changes and revisions made in Chapter 7 were essentially for the sake of clarity. However, modifications to provisions governing interest on awards pending appeal were made in proposed § 65.2-707. In addition, provisions governing an employee's obligation to report changes in earnings were modified in proposed § 65.2-712.

§ 65.1-92 65.2-700 . Jurisdiction of Commission.—All questions arising under this Act, if not settled by agreements of the parties interested therein with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided.

§ 65.1-93 65.2-701 . Agreement as to compensation; penalty.—A. If after injury or death, the member and the injured employee or his dependents reach an agreement in regard to compensation or in compromise of a claim for compensation under this Act, a memorandum of the agreement in the form prescribed by the Industrial Commission shall be filed with the Commission for approval. If approved, the agreement shall be binding, and an award of compensation entered upon such agreement shall be for all purposes enforceable by the court's decree as elsewhere provided in this Act as provided by § 65.2-710 . If not approved, the same agreement shall be void. Such agreement may be approved only when the Commission, or any member thereof, is clearly of the opinion that the best interests of the employee or his dependents will be served thereby. The approval of such agreement shall bind infant or incompetent dependents affected thereby. Any agreement entered into during the pendency of an appeal to the Court of Appeals shall be effective only with the approval of the Commission as herein provided.

B. An employer or insurance carrier which fails to file a memorandum of such agreement with the Commission within fourteen calendar days of the date of its complete written execution as indicated thereon may be subject to a fine not to exceed \$1,000 and to any other appropriate sanctions of the Commission.

C. *Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer, but rather to encourage them, so long as the amount of compensation and the time and manner of payment are approved by the Commission. A copy of such settlement agreement shall be filed with the Commission by the employer.*

Drafting note: Appropriate Code section specified. Subsection C is § 65.1-45.

§ 65.1-94 65.2-702 . Disagreement on compensation ; venue .— A. If the employer and the injured employee or his dependents fail to reach an agreement in regard to compensation under this Act, or if they have reached such an agreement which has been signed and filed with the Commission and compensation has been paid or is due in accordance therewith and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue and for a ruling thereon.

B. Immediately after such application has been received the Commission shall set the date for a hearing, which shall be held as soon as practicable, and shall notify the parties at issue of the time and place of such hearing. The hearing shall be held in the city or county where the injury occurred, or in a contiguous city or county, unless otherwise agreed to by the parties and authorized by the Industrial Commission.

§ 65.1-95 65.2-703 . Interrogatories and depositions.—Any party to a proceeding under this Act may, upon application to the Commission setting forth the materiality of the evidence to be given, serve interrogatories or cause the depositions of witnesses residing within or without the Commonwealth to be taken, the costs to be taxed as other costs by the Commission. Such depositions shall be taken after giving the notice and in the manner prescribed by law for depositions in actions at law, except that they shall be directed to the Commission, the Commissioner or the deputy commissioner before whom the proceedings may be pending.

§ 65.1-96 65.2-704 . Hearing and award by Commission.—A. The Commission or any of its members or deputies shall hear the parties at issue, their representatives and witnesses , shall decide the issues in a summary manner, and shall make an award carrying out the decision. A copy of the award shall be immediately sent sent immediately to the parties at issue.

B. Any member of the Commission who hears the parties at issue and makes an award under the provisions of subsection A of this section shall not participate in a rehearing and review of such award provided under § 65.1-97 65.2-705 . When a member is absent or is prohibited by the provisions of this subsection from sitting with the full Commission to hear a review, the chairman shall appoint one of the deputies to sit with the other Commission members.

C. Hearings convened by the Commission shall be public proceedings and, upon proper request to the Commission, may, in the discretion of the Commission, be video recorded for public broadcast at the expense of the requesting party, subject only to the same limitations and conditions as apply to court proceedings in the Commonwealth.

§ 65.1-97 65.2-705 . Rehearing on award Review of award; rehearing .—A. If an application for review is made to the Commission within twenty days from the date of the award, the full Commission, except as provided in subsection B of § 65.1-96 65.2-704 and if the first hearing was not held before the full Commission, shall review the evidence or, if deemed advisable, as soon as practicable, hear the parties at issue, their representatives and witnesses. The Commission shall make an award which, together with a statement of the findings of fact, rulings of law and other matters pertinent to the questions at issue, shall be filed with the record of the proceedings. A copy of the award shall be immediately sent sent immediately to the parties at issue.

B. ~~Rehearings~~ A rehearing convened under this section shall be a public proceedings proceeding and, upon proper request, may, in the discretion of the Commission, be video recorded for public broadcast at the expense of the requesting party, subject only to the same limitations and conditions as apply to court proceedings in the Commonwealth.

Drafting note: The catchline is revised to emphasize "Review." the Industrial Commission rules distinguish between a review of the evidence on the record and rehearing by oral argument. Revised section is consistent with current practice and Industrial Commission rule.

§ 65.1-98 65.2-706 . Conclusiveness of award; appeal.— A. The award of the Commission, as provided in § 65.1-96 65.2-704 , if not reviewed in due time, or an award of the Commission upon such review, as provided in § 65.1-97 65.2-705 , shall be conclusive and binding as to all questions of fact. No appeal shall be taken from the decision of one commissioner until a review of the case has been had before the full Commission, as provided in § 65.1-97 65.2-705 , and an award entered by it. Appeals shall lie from such award to the Court of Appeals in the manner provided in the Rules of the Supreme Court.

B. The notice of appeal shall be filed with the clerk of the Industrial Commission within thirty days from the date of such award or within thirty days after receipt of notice to be sent by registered or certified mail of such award. A copy of the notice of appeal shall be filed in the office of the clerk of the Court of Appeals as provided in the Rules of Court.

C. Cases so appealed shall be placed upon the privileged docket of the Court and be heard at the next ensuing term thereof. In case of an appeal from the decision of the Commission to the Court of Appeals, the appeal shall operate as a suspension of the award and no employer shall be required to make payment of the award involved in the appeal until the questions at issue therein shall have been fully determined in accordance with the provisions of this Act.

§ 65.1-98.1 65.2-707 . Interest on appealed award.— All awards An award entered by the Commission shall take effect as of the date thereof, and to on the date of entry. To the extent that any payments payment due thereunder are under an award is delayed beyond their its due dates date by reason of the taking an appeal to the full Commission or to the Supreme Court an appeal from such award, then such an appellate court, payments so delayed shall bear interest at the rate of ten percent per annum judgment rate as provided in § 6.1-330.54 .

Drafting note: Changes in this section are essentially for the sake of clarity. However, interest accruing on awards pending appeal was changed from a fixed rate of 10 percent to one tied to the current judgment rate under § 6.1-330.54 (currently, 8 percent).

§ 65.1-99 65.2-708 . Review of award on change in condition.—A. Upon its own motion or upon the application of any party in interest, on the ground of a change in condition, the Industrial Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Act, and shall immediately send to the parties a copy of the award. No application filed by a party alleging a change in condition shall be docketed for hearing by the Commission unless any medical reports upon which the party is relying are submitted to the Commission. No such review shall affect such award as regards any moneys paid except pursuant to §§ 65.1-100.3, 65.1-144 and 65.1-151 65.2-712, 65.2-1105, and 65.2-1205 . No such review shall be made after twenty-four months from the last day for which compensation was paid, pursuant to an award under this Act, except: (i) thirty-six months from the last day for which compensation was paid shall be allowed for the filing of claims payable under § 65.1-56 65.2-503 and certain claims under § 65.2-406B, or (ii) twenty-four months from the day that the claimant undergoes any surgical procedure compensable under § 65.1-88 65.2-603 to repair or replace a prosthesis or orthosis .

B. In those cases where no compensation has been paid, the Commission may make an award under § 65.1-56 65.2-503 within thirty-six months from the date of the accident.

C. All wages paid, for a period not exceeding twenty-four consecutive months, to an employee (i) who is physically unable to return to his pre-injury work due to a compensable

injury, and (ii) who is provided work within his capacity at a wage equal to or greater than his pre-injury wage, shall be considered compensation.

Drafting note: Section 65.1-55.1 forms the basis for presumption that an award has been entered for payment of compensation; therefore, issues involving such payments are properly considered a change in condition under § 65.1-99. § 65.1-55.1 is moved here to subsection C. Reference to § 1-52B inserted to conform to language set forth in Chapter 4.

§ ~~65.1-99.1~~ 65.2-709 . Cost of living supplements for total incapacity and dependents of deceased.— A. In the event that the combined disability benefit entitlement of a claimant or his dependents under the Virginia Workers' Compensation Act and the Federal Old-Age Survivors and Disability Insurance Act is less than eighty percent of the average monthly earnings of the claimant before disability or death, cost of living supplements shall be payable, in addition to the other benefits payable under this Act, in accordance with the provisions of this section to those recipients of awards resulting from occupational disease, accident or death occurring on or after July 1, 1975, under §§ ~~65.1-54, 65.1-56 (18), 65.1-56.1 (4), 65.1-65 and 65.1-65.1~~ 65.2-500, 65.2-503C, 65.2-504A4, 65.2-512 and 65.2-513 . B. The Industrial Commission may require the claimant to present evidence of filing for Federal Old-Age Survivors and Disability Insurance benefits in order to establish eligibility under this section and also may require the claimant to furnish the employer with the decision on his claim for such federal benefits.

C. The amounts of supplementary payments provided for herein shall be determined by using a compounding method of computation annually. The percentage of change shall be determined by reference to the increase, if any, in the United States Average Consumer Price Index for all items, as published by the Bureau of Labor Statistics of the United States Department of Labor, from its monthly average, from one calendar year to another.

D. Amounts of supplementary payments shall be determined initially as of July 1, 1976, based on the ~~percent~~ percentage increase, if any, of in the Average Consumer Price Index for all items from the calendar year 1974 to the calendar year 1975 and successively annually thereafter adjusted annually . Any change in the cost of living supplement determined as of any determination date shall become effective as of October 1 next following such determination date and as the case may be, shall be added to or subtracted from any cost of living supplements previously payable; however, compensation paid the claimant under this section shall at no time exceed the then current maximum weekly amount payable under § ~~65.1-54~~ 65.2-500 .

Drafting note: Language indexing supplementary compensation payments to changes in the consumer Price Index has been modified to delete unnecessary and obsolete references without changing the substance of the provision.

§ ~~65.1-100.1~~ Repealed by Acts 1976, c. 149.—

§ ~~65.1-100.1~~ 65.2-710 . Enforcement, etc., of orders and awards.—Orders or awards of the Commission may be recorded, enforced, and satisfied as orders or decrees of a circuit court upon certification of such order or award by the Commission. The Commission shall certify such order or award upon satisfactory evidence of noncompliance with the same.

§ ~~65.1-100.2~~ 65.2-711 . Reporting of address change by employee; suspension of payment of benefits.—So long as an employee is entitled to payment of compensation under this Act, such employee shall have a duty to disclose to the Industrial Commission his current residential address and to report any changes of address as they may occur. The failure to disclose or report such address or changes of address without reasonable justification may result in the suspension of compensation payments until the employee complies with this duty.

§ ~~65.1-100.3~~ 65.2-712 . Reporting change in earnings; recovery of payments procured by fraud, misrepresentation, or unreported change in condition.— So long as an employee receives payment of compensation under this act, such employee shall have a duty to immediately disclose to the employer , when the employer is self-insured, and or insurer in all other cases, any return to employment or increase in his earnings. Any payment to a claimant by an employer or insurer which is later determined by the Industrial Commission to have been procured by the employee by fraud, misrepresentation or failure to report any return to employment or increase in earnings may be recovered from the claimant by the employer or insurer either by way of credit taken to future compensation payments due the claimant, or by action at law against the claimant.

Drafting note: The current language in § 65.1-100.3 requires an employee receiving compensation under the Act to report any return to employment or earnings increase to both his employer and the workers' compensation insurance carrier. The Industrial Commissioners advised the Code Commission that, as a practical matter, this obligation imposed an unnecessary burden on the employee. After considerable discussion about this issue at the Code Commission's October meeting, with considerable input from interested parties, a compromise was effectively struck

that required notice to the employer, only if the employer is self-insured, and to the insurance carrier in all other cases.

~~§ 65.1-101~~ 65.2-713 . Costs.—A. If the ~~Industrial~~ Commission or any court before whom any proceedings are brought or defended by the employer or insurer under this Act shall determine that such proceedings have been brought, prosecuted or defended without reasonable grounds, it may assess against the employer or insurer who has so brought, prosecuted or defended them the whole cost of the proceedings, including a reasonable attorney's fee, to be fixed by the Commission.

B. Where the Commission finds that an employer or insurer has delayed payment without reasonable grounds, it may assess against the employer or insurer the whole cost of the proceedings, including a reasonable attorney's fee to be fixed by the Commission. In such a case where an attorney's fee is awarded against the employer or insurer, the Commission shall calculate and add to any award made to the claimant, interest at the ~~statutory rate judgment rate as set forth in § 6.1-330.54~~ , on the benefits accrued from the date the Commission determined the award should have been paid through the date of the award.

Drafting note: The change from "statutory" rate to the judgment rate of § 6.1-330.54 is made simply for clarification purposes and should have no actual effect on the operation of this provision. However, the reference to § 6.1-330.54 is consistent with the interest rate changes that were made elsewhere in the recodification.

~~§ 65.1-102~~ 65.2-714 . Fees of attorneys and physicians and hospital charges.— A. Fees of attorneys and physicians and charges of hospitals for services, whether employed by employer, employee or insurance carrier under this Act, shall be subject to the approval and award of the Commission. No physician shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the ~~Industrial~~ Commission in connection with the case.

B. If a contested claim is held to be compensable under this Act and, after a hearing on the claim on its merits or after abandonment of a defense by the employer or insurance carrier, benefits for medical services are awarded and inure to the benefit of a third party insurance carrier or health care provider, the Commission shall award to the employee's attorney a reasonable fee and other reasonable pro rata costs as are appropriate from the sum which benefits the third party insurance carrier or health care provider.

C. Payment of any obligation pursuant to this section to any third party insurance carrier or health care provider shall discharge the obligation in full. The Commission shall not reduce the amount of medical bills owed to the Commonwealth or its agencies without the written consent of the Office of the Attorney General.

Chapter 8.

Insurance and Self-Insurance.

Chapter drafting note: Changes in Chapter 8 consist mainly of section renumbering and some revisions to promote clarity. For example, the frequent references to the State Corporation Commission and its role in the regulation of worker's compensation insurance necessitated clarification as to which "Commission" was meant when referenced in a number of sections. Once positive identification was made, the appropriate "Workers' Compensation" or "State Corporation" references were inserted to precede "Commission" where needed to eliminate any possible confusion.

~~§ 65.1-103~~ 65.2-800 . Duty to insure payment of compensation; effect of insurance.—A. Every employer subject to the compensation provisions of this Act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified.

B. To ensure that all employers who are required to have workers' compensation insurance under this Act have notice of such requirement, the appropriate official of a county, city or town who licenses employers to conduct business under Chapter 37 of Title 58.1 or the State Corporation Commission who charters employers to conduct business under § 12.1-12 shall provide employers requesting such licenses or charters on and after January 1, 1989, with information concerning statutory requirements for such insurance coverage. The ~~Industrial~~ Workers' Compensation Commission shall prepare such information and distribute it to such licensing or chartering officials. The failure of the local official or the State Corporation Commission to give such notice to an employer shall not relieve the employer of the duty of acquiring insurance as required by this Act.

C. As used in this section, the words "those conducting his business" shall not be deemed to include any person whose act or acts resulting results in an injury ; loss of service or death compensable under this Act ~~do not~~ and arise arises out of and in the course of employment by an employer who is or may be liable for the payment of such compensation. In such cases, the ~~person~~ A person other than an employer or statutory employer whose acts result in such injury ; of service or death shall be deemed an "other party" within the meaning of § 65.1-41-65.2-309.

Drafting note: Rewritten for clarification.

§ 65.1-104. Repealed by Acts 1979, c. 463.—

§ 65.1-104.1 65.2-801 . Insurance or proof of financial ability to pay required.—A. Every employer subject to this Act shall secure his liability thereunder by one of the following methods:

1. Insuring and keeping insured his liability in an insurer authorized to transact the business of workers' compensation insurance in this Commonwealth,

2. Receiving a certificate pursuant to § 65.1-108 65.2-808 from the Industrial Workers' Compensation Commission authorizing such employer to be an individual self-insurer, or

3. Being a member in good standing of a group self-insurance association licensed by the State Corporation Commission.

B. An employer may be authorized by the Industrial Workers' Compensation Commission to be an individual self-insurer upon satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due as provided for in this Act. In such case the Industrial Workers' Compensation Commission may in its discretion require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred.

C. The State Treasurer shall be the custodian of securities deposited by the employer under the requirements of this section, or under § 65.1-104.2 65.2-802 , and for such services he shall receive a compensation of one tenth of one per centum percent per annum of the amount of securities deposited with him, payable by or on behalf of such employers.

§ 65.1-104.2 65.2-802 . Requirements for licensure as group self-insurance association; annual assessment.—A. Two or more employers having a common interest may be licensed by the State Corporation Commission as a group self-insurance association and permitted to enter into agreements to pool their liabilities under this Act. The members of any such group self-insurance association may also enter into agreements to pool other types of employers' liabilities for the death or disablement of, or injury to their employees.

B. The State Corporation Commission shall not license a group self-insurance association or grant authorization for an employer to become a member of such group unless it receives in such form as it requires satisfactory proof of the solvency of any such employer, the financial ability of each to meet his obligations as a member, and the ability of the group to pay or cause to be paid the compensation in the amount and manner and when due as provided for in this Act and as may be agreed upon with respect to other types of employers' liabilities which may be authorized and provided hereunder.

C. Members of a group shall execute a written agreement under which each agrees to jointly and severally assume and discharge any liability under this Act of employers party to such agreement. Agreements among the members shall be subject to approval by the State Corporation Commission; however, no such agreement nor membership in a group self-insurance association shall relieve an employer of the liabilities imposed by this Act with respect to his employees. In addition to the rights of the association under such agreements, in the event of failure of the association to enforce such rights after reasonable notice to the association, the State Corporation Commission shall have the right independently to enforce on behalf of the association the joint and several liability of its members under the Act and the liability of members for any unpaid contributions and assessments. The State Corporation Commission shall be entitled to recover its expenses and attorneys' fees.

D. Any person, firm or corporation desiring to engage in the business of providing services for a group self-insurance association shall satisfy the State Corporation Commission of its ability to perform the services necessary to fulfill the employer's obligations under this Act before it undertakes to provide such services to any group self-insurance association. The State Corporation Commission may from time to time review and alter any decision approving an

employer as a member of a group or its approval of a group or of an agency servicing a group. The State Corporation Commission may in its discretion require the deposit of an acceptable security, indemnity or bond or the purchase of such excess insurance as may be required by the circumstances.

E. The State Corporation Commission may establish reasonable requirements and standards for the approval of a group self-insurance association and the administration of such associations including, without limitation, the quality and amount of security deposits, bonds and excess insurance, the membership in any group self-insurance association, the amount of advance payments and reserves required of group self-insurance associations, the investment of such funds, the form and content of financial information to be submitted by a group self-insurance association and the frequency of such submissions, and the terms of agreements between members of a group self-insurance association. The State Corporation Commission may, after notice and hearing, embody such requirements and standards and such other requirements as may be reasonably necessary for the purposes of this section in regulations.

F. Notwithstanding any provision of this title to the contrary, each licensed group self-insurance association shall be assessed annually by the State Corporation Commission in like manner and amount to that provided by Chapter 4 of Title 38.2 and shall pay such assessment in accordance with the aforesaid provisions of law; however, for the purposes of such assessment "direct gross premium income" of a licensed group self-insurance association shall be the aggregate of the amounts determined to be subject to the tax imposed by § ~~65.1-135~~ 65.2-1006 on each employer member of such association.

G. Notwithstanding the provisions of § 49-25, neither the State Corporation Commission nor any other entity or person, as obligee under any surety bond required under this section or any regulation adopted hereunder, shall be required to institute suit against an association as a condition precedent to the surety's performance under the bond.

§ ~~65.1-104.2~~ 65.2-803 . Administrator and service company affiliation prohibited; exception.—A. No person, firm or corporation, which is engaged as an administrator for a group self-insurance association, shall be an employee, officer or director of, or have a direct or indirect financial interest in any person, firm or corporation which is engaged in the business of providing services for a group self-insurance association as a service company.

B. No person, firm or corporation, which is engaged in the business of providing services for a group self-insurance association as a service company, shall be an employee, officer or director of, or have a direct or indirect financial interest in, any person, firm or corporation which is engaged as an administrator for a group self-insurance association.

C. For purposes of this section, the term "firm" or "corporation" shall include any officer, director, or employee of any such firm or corporation.

D. This section shall not be construed to affect any contract, or extensions or renewals thereof, for services as an administrator or service company entered into by a group self-insurance association and effective prior to January 1, 1989.

§ ~~65.1-105~~ 65.2-804 . Evidence of compliance with Act; notices of cancellation of insurance.—A. 1. Every employer subject to this Act shall file with the ~~Industrial Workers' Compensation~~ Commission, in form prescribed by it, annually or as often as may be necessary, evidence of his compliance with the provisions of § ~~65.1-104.1~~ 65.2-801 and all others relating thereto. Every employer who has complied with the foregoing provision and has subsequently cancelled his insurance or his membership in a licensed group self-insurance association, as the case may be, shall immediately notify the ~~Industrial Workers' Compensation~~ Commission of such cancellation, the date thereof and the reasons therefor. Every insurance carrier or group self-insurance association shall in like manner notify the ~~Industrial Workers' Compensation~~ Commission immediately upon the cancellation of any policy issued by it or any membership agreement, whichever is applicable, under the provisions of this Act, except that a carrier or group self-insurance association need not set forth its reasons for cancellation unless requested by the ~~Industrial Workers' Compensation~~ Commission.

2. Every employer who cancels his insurance or his membership in a licensed group self-insurance association shall, prior to cancelling his insurance or his membership, give thirty days' written notice to his employees covered. Every employer who receives the notice required under subsection B of this section shall immediately forward a copy to his employees covered. Where the employer is a mine owner or operator the notice or copy of notice required to be given by this subsection shall also be given to the Chief Mine Inspector. The provisions of this subsection shall not apply with respect to a cancellation incident to a change of insurance or

membership where no lapse of coverage occurs.

B. No policy of insurance hereafter issued under the provisions of this Act, nor any membership agreement in a group self-insurance association, shall be cancelled by the insurer giving such policy or by the group self-insurance association cancelling such membership, ~~whenever is applicable~~, except on thirty days' notice to the employer and the ~~Industrial Workers' Compensation Commission~~, unless the employer has obtained other insurance and the ~~Industrial Workers' Compensation Commission~~ is notified of that fact by the insurer assuming the risk, or unless said cancellation is for nonpayment of premiums; then ten days' notice shall be given the employer and ~~Industrial the Workers' Compensation Commission~~.

~~§ 65.1-106~~ 65.2-805 . Penalty for violation of preceding section.— A. If such employer ~~refuses and neglects~~ fails to comply with the provisions of ~~§ 65.1-105~~ 65.2-804 he shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars, and he shall be liable during continuance of such ~~refusal or neglect~~ failure to any employee either for compensation under this Act or at law in a suit instituted by the employee against such employer to recover damages for personal injury or death by accident, and in any such suit such employer shall not be permitted to defend upon any of the following grounds:

- ~~(1)~~ 1. That the employee was negligent;
- ~~(2)~~ 2. That the injury was caused by the negligence of a fellow employee; or
- ~~(3)~~ 3. That the employee had assumed the risk of the injury.

B. The fine herein provided may be assessed by the Commission in an open hearing with the right of review and appeal as in other cases. Upon a finding by the Commission of such ~~refusal or neglect~~ failure to comply, and after fifteen days' written notice thereof sent by certified mail to the employer, if such ~~refusal or neglect~~ failure continues, the Commission may order the employer to cease and desist all business transactions and operations until found by the Commission to be in compliance with the provisions of this chapter.

Drafting note: It was suggested that practical enforcement of violations is better served with language which reads "fails" or "failure" rather than "refuses and neglects."

~~§ 65.1-106.1~~ 65.2-806 . Criminal penalties.—In addition to the fine assessed pursuant to ~~§ 65.1-106~~ 65.2-805 , any employer who knowingly and intentionally fails to comply with the provisions of ~~§ 65.1-105~~ 65.2-804 shall be guilty of a Class 2 misdemeanor.

Venue for the prosecution hereof *when there is an injury* shall lie in the county or city wherein the injury occurred.

Drafting note: It was suggested that an employer may knowingly and intentionally fail to comply with the provisions of ~~§ 65.1-105~~ (proposed ~~§ 65.2-804~~) whether or not an injury occurs. If there is an injury, it is appropriate to have venue at the place where the injury occurred. If there is no injury, then the general venue statute for criminal cases would be appropriate. This change is advisable so that the injured party and local witnesses would be readily available at hearing. If an employee, for technical reasons, is found not to have an injury compensable under the Act, the language of the statute before insertion could serve to prevent application of the penalty.

~~§ 65.1-107~~ 65.2-807 . Cost of insurance may not be deducted from wages.—It shall not be lawful for any employer to deduct from the wages of any of his employees any part of the cost of insurance as provided for in ~~§ 65.1-104.1~~ 65.2-801 to insure liability, or to require or permit any of his employees to contribute in any manner toward such cost of insurance. For any violation of the provisions of this section an employer shall be subject to a fine of not exceeding \$100 for each offense and shall refund to the individual employee the amount or amounts deducted or contributed. The fine herein provided may be assessed and the refund ordered by the ~~Industrial Workers' Compensation Commission~~ in an open hearing with the right of review and appeal as in other cases.

~~§ 65.1-108~~ 65.2-808 . Self-insurance certificate.—Whenever an employer has complied with the provisions of ~~§ 65.1-104.1~~ 65.2-801 , relating to self-insurance, the ~~Industrial Workers' Compensation Commission~~ shall issue to such employer a certificate which shall remain in force for a period fixed by the Commission. But the Commission may upon at least thirty days' notice and hearing to the employer revoke the certificate upon satisfactory evidence for such revocation having been presented. At any time after such revocation the Commission may grant a new certificate to the employer upon his petition.

~~§ 65.1-109~~ 65.2-809 . Constructive notice to, jurisdiction of, and awards, etc., binding upon insurer.—All policies insuring the payment of compensation under this Act must contain clauses

to the effect (i) that as between the employer and the insurer notice to or knowledge of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge ; as the case may be on the part of the insurer, (ii) that jurisdiction of the insured for the purposes of this Act shall be jurisdiction of the insurer, and (iii) that the insurer shall in all things be bound by and subject to the awards, judgments or decrees rendered against such insured employer.

Drafting note: Restated for clarification.

§ ~~65.1-110~~ 65.2-810 . How formal notice may be given.—Whenever by this Act or the terms of any policy contract ~~any officer is required to give any notice is required to be given by an~~ employer to any insurance carrier, the same may be given by delivery or by mailing by registered letter properly addressed and stamped to the principal office or chief agent of such insurance carrier within this Commonwealth or to its home office, or to the secretary, general agent or chief officer thereof in the United States.

Drafting note: Eliminates need for determination of specific officer required to give notice.

§ ~~65.1-111~~ 65.2-811 . Liability of insurer.—No policy of insurance against liability arising under this Act shall be issued unless it contains the agreement of the insurer that it will promptly pay the person entitled to the same all benefits conferred by this Act and all installments of the compensation that may be awarded or agreed upon and that the obligation shall not be affected by any default of the insured after the injury or by any default in giving notice required by such policy or otherwise. Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation, enforceable in his name.

§ ~~65.1-112~~ 65.2-812 . Subrogation of insurance carrier to employer's rights; compromise.—When any employer is insured against liability for compensation with an insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability of the employer therefor, it shall be subrogated to all the rights and duties of the employer and may enforce any such rights in its own name or in the name of the injured employee or his or her personal representative; provided, however, nothing herein shall be construed as conferring upon the insurance carriers any other or further rights than those existing in the employer at the time of the injury to his employee, anything in the policy of insurance to the contrary notwithstanding. No compromise settlement shall be made by the insurance carrier in the exercise of such right of subrogation without the approval of the ~~Industrial Workers' Compensation~~ Commission and the injured employee or the personal representative or dependents of the deceased employee being first ~~had and~~ obtained.

§ ~~65.1-113~~ 65.2-813 . Insurance deemed subject to Act; approval of forms.—Every policy for the insurance of the compensation herein provided or against liability therefor shall be deemed to be made subject to the provisions of this Act. No corporation, association or organization shall enter into any such policy of insurance unless its form shall have been approved by the ~~Industrial Workers' Compensation~~ Commission.

§ ~~65.1-113.1~~ 65.2-814 . Insurer to furnish written evidence of coverage on request.—Upon request of its insured, every insurer against liability arising under this title shall furnish to such insured within five working days of receipt of said request, a certificate or other writing evidencing the effective coverage afforded such insured. Any insurer violating the provisions of this section shall be punished by a fine of \$500.

§ ~~65.1-113.2~~ 65.2-815 . Group self-insurance association required to furnish written evidence of membership.—Upon request of any member employer, a group self-insurance association shall furnish to such employer a certificate of membership or other written evidence of membership.

§ ~~65.1-114~~ 65.2-816 . Act not applicable to boiler, etc., insurance.—This Act shall not apply to policies of insurance against loss from explosion of boilers or fly wheels or other similar single catastrophe hazards.

§ ~~65.1-117~~ 65.2-817 . Rates; cooperation between State Corporation Commission and ~~Industrial Workers' Compensation~~ Commission.—Authority is hereby conferred upon the State Corporation Commission to make such arrangements with the ~~Industrial Workers' Compensation~~ Commission as may be agreeable to the ~~Industrial Workers' Compensation~~ Commission, for collecting, compiling, preserving and publishing statistical and other data in connection with the work of regulating ~~workmen's~~ workers' compensation insurance rates and for the division of the expenses thereof, to the end that duplication of work and expenditures may be avoided. Whenever it deems proper, with the consent of the ~~Industrial Workers' Compensation~~ Commission, the State Corporation Commission may appoint members of the ~~Industrial Workers' Compensation~~ Commission, or its employees, as special agents of the State Corporation Commission to take testimony and make reports with reference to any matter involving questions of ~~workmen's~~

workers' compensation insurance rates.

~~§ 65.1-117.1~~ 65.2-818 . Minimum standards of service for insurers.—The State Corporation Commission in cooperation with the Industrial Workers' Compensation Commission shall establish minimum standards of service for insurers writing workers' compensation policies in this Commonwealth, including but not limited to the servicing of such policies, the establishment of offices within the Commonwealth, and the payment of compensation.

~~§ 65.1-118~~ 65.2-819 . Penalty for violation of certain provisions.—Any person or persons who shall in this Commonwealth (i) act or assume to act as agent for any such insurance carrier whose authority to do business in this Commonwealth has been suspended, while such suspension remains in force, or (ii) ~~shall neglect or refuse~~ fail to comply with requirements or standards imposed under any of the provisions of §§ ~~65.1-117~~ and ~~65.1-117.1~~ 65.2-817 and 65.2-818 , or of Chapter 10 (§ ~~65.1-120~~ 65.2-1000, et seq.) of this title ; ~~obligatory upon such person or persons, or who shall~~ (iii) willfully make a false or fraudulent statement of the business or condition of any such insurance carrier, or a false or fraudulent return as therein provided, shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than \$100 nor more than \$1,000 or by imprisonment for not less than ten nor more than ninety days, or both such fine and imprisonment, in the discretion of the court or jury trying the case.

Drafting note: Restated for clarification. "Fail" language replaces "neglect or refuse" and "requirements or standards imposed" by specific statutory sections is added.

~~§ 65.1-119~~ 65.2-820 . Application to State Corporation Commission for assignment of risk; insurer assigned risk to issue policy.—Every employer subject to the provisions of this article who has been unable to obtain a workers' compensation insurance policy shall have the right to apply to the State Corporation Commission to have his risk assigned to an insurance carrier licensed to write and writing workers' compensation insurance in this Commonwealth. The insurance carrier, whether stock, mutual, reciprocal or interinsurer or other type or form of organization, to whom any such risk is assigned shall issue a policy of workers' compensation insurance which will enable such employer to meet the requirements of this article.

~~§ 65.1-120~~ 65.2-821 . State Corporation Commission to make rules and regulations, and establish rating schedules and rates.— A. The State Corporation Commission may make reasonable rules and regulations for the assignment of risks to insurance carriers. It shall establish such rate classifications, rating schedules, rates, rules and regulations to be used by insurance carriers issuing assigned risk workers' compensation policies in accordance with this chapter as appear to it to be proper.

B. In the establishment of rate classifications, rating schedules, rates, rules and regulations, it shall be guided by such principles and practices as have been established under its statutory authority to regulate workers' compensation insurance rates and it may act in conformity with its statutory discretionary authority in such matters.

Drafting note: Language added for clarification.

~~§ 65.1-121~~ 65.2-822 . Action by State Corporation Commission upon application.—The State Corporation Commission may, if in its judgment it deems such action to be justified after reviewing all information pertaining to the applicant or policyholder available from its records, the records of the Industrial Workers' Compensation Commission or from other sources:

- (1) 1. Refuse to assign an application;
 - (2) 2. Approve the rejection of an application by an insurance carrier;
 - (3) 3. Approve the cancellation of a workers' compensation policy by an insurance carrier;
- or

- (4) 4. Refuse to approve the renewal or the reassignment of an expiring policy.

Drafting note: Language added for clarification.

~~§ 65.1-122~~ 65.2-823 . Information filed with State Corporation Commission by insurance carrier to be confidential.—Any and all information filed with the State Corporation Commission by an insurance carrier in connection with an assigned risk shall be confidential and solely for the information of the State Corporation Commission and its staff and shall not be disclosed to any person, including an applicant, policyholder and any other insurance carrier.

Drafting note: Language added for clarification.

~~§ 65.1-123~~ 65.2-824 . Disclosures not required of State Corporation Commission; liability for acts or omissions.— A. The State Corporation Commission shall not be required to disclose to

any person, including the applicant or policyholder, its reasons for:

- (1) 1. Refusing to assign an application;
 - (2) 2. Approving the rejection of an application by an insurance carrier;
 - (3) 3. Approving the cancellation of a workers' compensation policy by an insurance carrier;
- or
- (4) 4. Refusing to approve the renewal or the reassignment of an expiring policy.

B. The *State Corporation Commission* shall not nor shall anyone acting for it be held liable for any act or omission in connection with the administration of the duties imposed upon it by the provisions of this chapter, except upon proof of actual malfeasance.
Drafting note: Language added for clarification.

Chapter 9. Reports and Records.

Chapter drafting note: The most significant modification in Chapter 9 involved the revision of § 65.1-124 as proposed § 65.2-900. Section 65.1-124 requires employers to report all job-related injuries or deaths to the Commission within 10 days of their occurrence. However, the Commission has long permitted minor injuries involving less than \$500 in medical expenses or less than one week of missed work to be reported to the Commission on a monthly basis. Thus, the last sentence in subsection B of proposed § 65.2-900 simply conforms the statute to existing practice. In addition, the report of medical costs on the accident report currently required in the second paragraph of current § 65.1-124 is omitted in proposed § 65.2-900 at the suggestion of the Industrial Commission who advised the Code Commission that these expenses are reported on other forms.

§ 65.1-124. Records and reports of accidents.—Every employer shall hereafter keep a record of all injuries, fatal or otherwise received by his employees in the course of their employment on blanks approved by the Commission. Within ten days after the occurrence and knowledge thereof as provided in § 65.1-85, of an injury to an employee, a report thereof shall be made in triplicate in writing and mailed to the Industrial Commission and two copies turned over to the Department of Labor and Industry on blanks to be procured from the Commission for this purpose.

The accident reports shall contain the name, nature and location of the business of the employer and the name, age, sex and wages and occupation of the injured employee, and shall state the date and hour of the accident causing the injury and the nature and cause of the injury, together with the medical cost and such other information as may be required by the Commission.

Drafting note: The provisions of this section have been incorporated into proposed § 65.2-900.

§ 65.2-900. Records and reports of accidents.—A. Every employer shall keep a record of all injuries or deaths of its employees which occur in the course of employment. Within ten days after the occurrence of such injury or death, and knowledge of injury as provided in § 65.2-600, a written report of the injury or death shall be made in duplicate and transmitted to the Commission by the employer or its representative. The Commission shall provide forms and instructions for reporting as required by this section. The Commission shall provide the Department of Labor and Industry with a copy of the report.

B. The accident report shall contain the name, nature and location of the business of the employer and the name, age, sex and wages and occupation of the injured employee, and shall state the date and hour of the accident causing the injury and the nature and cause of the injury, together with such other information as may be required by the Commission. Provided, however, that those injuries deemed minor by the Commission shall be reported on forms and in the manner prescribed by the Commission.

Drafting note: See comments in the Chapter note.

§ 65.1-125. Reports of termination or extension beyond sixty days of disability.—Upon the termination of the disability of the employee, or if the disability extends beyond a period of sixty days then also at the expiration of such period, the employer shall make a supplementary report to the Commission on blanks to be procured from the Commission for the purpose.
[repealed]

Drafting note: The Industrial Commission observed that § 65.1-125 preceded lifetime medical benefits and that it was a basis for making reports on cases where disability extended beyond sixty days. There is currently no apparent need for this section.

§ 65.1-126 65.2-901 . Report of number of employees, hours of work, etc.— Every employer shall upon request of the Commission report the number of its employees, hours of their labor and number of days of operation of business.

§ 65.1-127 65.2-902 . Failure to make required reports.—Any employer who ~~refuses or~~ ~~lets~~ fails to make any report required by ~~this chapter~~ *the Commission pursuant to this Act* shall be liable for a penalty of not more than \$250 for each ~~refusal or neglect failure~~ . The fine herein provided may be assessed by the Commission in an open hearing with the right of review and appeal as in other cases. In the event the employer has transmitted the report to the insurance carrier or *third party administrator* for transmission by such insurance carrier to the Industrial Commission, the insurance carrier or *third party administrator* ~~willfully neglecting or~~ failing to transmit the report shall be liable for the penalty.

Drafting note: Most of the revisions in this section were made for the sake of clarity. However, the references added to third-party administrators are intended to reflect their presence in the handling of claims at the behest of self-insured employers. Their mention in this section was recommended by Don W. LeMond, Director of the Commonwealth's Department of General Services's Division of Risk Management.

§ 65.1-128 65.2-903 . Records not public.—The records of the Commission, insofar as they refer to accidents, injuries and settlements, shall not be open to the public but only to the parties satisfying the Commission of their interest in such records and their right to inspect them.

Chapter 10.

Administrative Fund and Tax Therefor.

Chapter drafting note: The changes in Chapter 10 are principally section renumbering and changes for the sake of clarity.

§ 65.1-129 65.2-1000 . Tax for administrative fund.—For the purpose of paying the salaries and necessary expenses of the *Industrial Workers' Compensation* Commission and its assistants and employees in administering and carrying out the provisions of this Act, an administrative fund shall be created and maintained in the following manner:

1. Every person, partnership, association, corporation, whether organized under the laws of this or any other state or country, company, mutual company or association, the parties to any interindemnity contract or reciprocal plan or scheme, and every other insurance carrier, insuring employers in this Commonwealth against liability for personal injuries to their employees or death caused thereby, under the provisions of this Act, shall, as hereinafter provided, pay a tax upon the premiums received, whether in cash or notes, in this Commonwealth or on account of business done in this Commonwealth, for such insurance in this Commonwealth, at the rate of two and one-half percent of the amount of such premiums.

2. However, premiums received for insuring liability which exists concurrently under this Act and the Federal Coal Mine Health and Safety Act of 1969, as amended, shall be modified in accordance with an equitable premium modification plan approved by the Commission. Such tax shall be in lieu of all other taxes on such premiums, except as provided in §§ 65.1-130 and 65.1-147 65.2-1101 and 65.2-1201 , and shall be assessed and collected as hereinafter provided. But such insurance carriers shall be credited with all cancelled or returned premiums, actually refunded during the year on such insurance, and with premiums on reinsurance assumed.

§ 65.1-130 65.2-1001 . Returns.— A. Every such insurance carrier shall, for the twelve months ending December thirty-first, of each year, make a return verified by the affidavits of its president and secretary, or other chief officers or agents, to the *Industrial Workers' Compensation* Commission stating the amount of such premiums and credits during the period covered by such return.

B. The State Corporation Commission shall have access at all times to the records so filed with the *Industrial Workers' Compensation* Commission by such insurance carriers and may require such additional information as the said State Corporation Commission deems necessary for the performance of the duties herein conferred upon it.

§ 65.1-131 65.2-1002 . Payment of tax.—Every insurance carrier required to make such return shall file the same with the *Industrial Workers' Compensation* Commission within thirty days after the close of the period covered thereby and shall at the same time pay into the state treasury a tax of \$2.50 on each \$100 of such premiums ascertained as provided in § 65.1-129 65.2-1000 , less returned premiums and reinsurance assumed.

§ 65.1-132 65.2-1003 . Failure to file return.—If any such insurance carrier shall fail or

refuse to make the return required by this Act, the State Corporation Commission shall assess the tax against such insurance carrier at the rate herein provided for, on such amount of premiums as it may deem just, and the proceedings thereon shall be the same as if the return had been made.

~~§ 65.1-133~~ 65.2-1004 . Withdrawal from business or failure to pay tax.—If any such insurance carrier shall withdraw from business in this Commonwealth before the tax shall fall due, as herein provided, or shall fail or neglect to pay such tax, the Comptroller shall at once proceed to collect the same and may employ such legal process as may be necessary for that purpose, and when so collected he shall pay the same into the state treasury. The suit may be brought by the Comptroller, in his official capacity, in any court of this Commonwealth having jurisdiction. A reasonable attorney's fee may be taxed as costs therein and process may issue to any county of the Commonwealth and may be served as in civil actions, or in the case of an unincorporated association, partnership, interindemnity contract or other plan or scheme, upon any agent of the parties thereto upon whom process may be served under the laws of this Commonwealth.

~~§ 65.1-134~~ 65.2-1005 . Tax exclusive of other taxes.—Any insurance carrier liable to pay a tax upon premiums under this Act shall not be liable to pay any other or further tax upon such premiums, or on account thereof, under any other law of this Commonwealth, except as provided in §§ ~~65.1-139 and 65.1-147~~ 65.2-1101 and 65.2-1201 .

~~§ 65.1-135~~ 65.2-1006 . Payroll reports of self-insurers and tax thereon.— A. Every employer carrying his own risk under the provisions of ~~§ 65.1-144.1~~ 65.2-801 and every employer member of a licensed group self-insurance association shall, under oath, report to the Industrial Workers' Compensation Commission his payroll subject to the provisions of this Act. Such report shall be made in form prescribed by the Commission and at the time herein provided for premium reports by an insurer.

B. The Commission shall assess against such payroll a maintenance fund tax computed by taking two and one-half percent: (i) of the basic premiums chargeable against the same or most similar industry or business, taken from the manual insurance rate for compensation then in force in this Commonwealth; (ii) in its discretion, of such premiums modified in accordance with an experience rating determined by the records of the Commission; or, (iii) in the case of self-insurers covered under the Federal Longshoremen's and Harbor Worker's Compensation Act, of such premiums chargeable under an equitable premium modification plan approved by the Commission; or, (iv) in case of self-insurers who are concurrently covered by the Virginia Workers' Compensation Act and the Federal Coal Mine Health and Safety Act of 1969, as amended, of such premiums chargeable under an equitable premium modification plan approved by the Commission. Such tax shall be paid as provided in ~~§ 65.1-131~~ 65.2-1002 and, if not so paid, the same shall be collected by the Comptroller in the manner provided in ~~§ 65.1-133~~ 65.2-1004 .

C. The State Corporation Commission shall at all times have access to the reports herein required to be made to the Industrial Workers' Compensation Commission by self-insurers for the purpose of performing the duties imposed upon the said State Corporation Commission under this Act.

~~§ 65.1-136~~ 65.2-1007 . Disposition of fund.—Upon receiving the payments required by ~~§ 65.1-131~~ 65.2-1002 , the Comptroller shall place the whole thereof to the credit of the fund for the administration of this Act. Such fund shall not be used for any other purpose, except as hereinafter expressly provided. The Industrial Workers' Compensation Commission shall administer the fund to carry out the provisions of this Act and shall disburse the same as hereinafter directed. If the receipts shall exceed the expenditures for any year and a surplus accrue in the fund in excess of one year's budgeted expenditures, the Commission shall authorize a credit for the ensuing years as provided by ~~§ 65.1-137~~ 65.2-1008 . No portion of the fund or any surplus accruing therein shall be paid into the general fund of the state treasury, nor shall the fund be administered, handled or disbursed except as provided in this section. All claims for salaries or expenses, when approved by a majority of the members of the Commission, shall be presented to the Comptroller and audited by him under the provisions of Chapter 14 (§ 2.1-173 et seq.) of Title 2.1, and he shall draw his disbursement warrants therefor on the State Treasurer; provided, however, that any claim for two thousand dollars or less may be approved by the chairman or his designee. All such claims shall show to whom and for what service, material or other things or reason such amounts are to be paid and shall be accompanied by voucher, checks or receipts covering the same, except as to items of less than one dollar.

~~§ 65.1-137~~ 65.2-1008 . When fund in excess of requirement.—If it be ascertained that the tax collected exceeds the total chargeable against the maintenance fund under the provisions of this

Act, the Industrial Workers' Compensation Commission shall authorize a corresponding credit upon the collection for any year or make refunds of taxes collected in such amounts as are necessary to maintain a fund balance not exceeding one year's budgeted expenditures.

Chapter 11. Second Injury Fund.

Chapter drafting note: The changes in Chapter 11 are principally section renumbering and changes for the sake of clarity.

~~§ 65.1-138~~ 65.2-1100 . Fund created.—There is hereby created a fund to be known as the "Second Injury Fund" to be administered, maintained and disbursed by the Industrial Commission as hereinafter provided.

~~§ 65.1-139~~ 65.2-1101 . Funding.— A. For the purpose of providing funds for compensation for disability as hereinafter defined, medical treatment and vocational rehabilitative services, a tax of one quarter of one per centum shall be assessed, collected and paid into the state treasury by the same persons and in the same manner as set forth in Chapter 10 (~~§ 65.1-129~~ 65.2-1000, et seq.) of Title 65.1 of this Code this title .

B. This tax shall be in addition to the tax for the Industrial Commission administrative fund and shall be held by the Comptroller of the Commonwealth solely for the payment of awards against such fund.

C. In any fiscal year in which the Second Injury Fund has to its credit a sum in excess of \$250,000, the tax shall be suspended for the ensuing fiscal years and its collection not resumed until the balance in the fund is reduced below \$125,000.

~~§ 65.1-140~~ 65.2-1102 . Disability defined.—For the purpose of this chapter, disability shall mean: (a) the partial or total loss or loss of use of an arm, hand, leg, foot, eye, finger, toe, or any combination of two or more thereof in an industrial accident, and (b) actual incapacity for work at the claimant's average weekly wage.

~~§ 65.1-141.~~ Repealed by Acts 1980, c. 500.—

~~§ 65.1-141.1~~ 65.2-1103 . When awards entered.—The Industrial Commission shall enter awards against the Second Injury Fund in favor of an employer or carrier only upon a finding that: ~~(a)~~ (i) The employee has prior loss or loss of use, supported by medical evidence, of not less than twenty per centum percent of one or more of the members set out in ~~§ 65.1-140~~ 65.2-1102 ; ~~(b)~~ (ii) the employee has suffered in an industrial accident an additional loss or loss of use of any one of the members set out in ~~§ 65.1-140~~ 65.2-1102 of not less than twenty per centum percent ; ~~(c)~~ (iii) the combination of both impairments has rendered the employee totally or partially disabled as defined in ~~§ 65.1-140~~ 65.2-1102 ; ~~(d)~~ (iv) the carrier or employer has paid the compensation due under ~~§§ 65.1-54 and 65.1-55~~ 65.2-500 and 65.2-502 , and the permanent partial disability due under ~~§ 65.1-56~~ 65.2-503 and the medical treatment under ~~§ 65.1-88~~ 65.2-511 ; and ~~(e)~~ (v) the employee is entitled to further compensation for disability which has been paid by the employer or carrier.

~~§ 65.1-142.~~ Repealed by Acts 1980, c. 500.—

~~§ 65.1-142.1~~ 65.2-1104 . Award for compensation, medical treatment and vocational rehabilitation.—Upon a determination by the Commission that an employer or carrier has paid compensation, medical expenses or vocational rehabilitation services on behalf of an employee under circumstances as set forth under ~~§ 65.1-141.1~~ 65.2-1103 and if notice of a claim against the Second Injury Fund was given prior to payment of the benefits, the Commission shall enter an award from the Second Injury Fund in favor of such employer or carrier for: ~~(a)~~ (i) reimbursement on a pro rata basis of the compensation paid for further disability as set forth in ~~§ 65.1-141.1~~ ~~(e)~~ 65.2-1103 (v) , such prorating to be computed according to the number of weeks each impairment is allowed under the schedule in ~~§ 65.1-56~~ 65.2-503 ; ~~(b)~~ (ii) reimbursement of reasonable medical expenses on the same basis as set forth in ~~(a)~~ (i) of this section, provided the second injury is to the same previously impaired member but such reimbursement shall not exceed \$7,500; and ~~(c)~~ (iii) reimbursement of reasonable vocational rehabilitation training service on the same basis as set forth in ~~(a)~~ (i) of this section but said reimbursement not to exceed \$7,500.

~~§ 65.1-143.~~ Repealed by Acts 1980, c. 500.—

~~§ 65.1-144~~ 65.2-1105 . Payments by fraud, mistake or improper processing of claim; recovery.—Any payment to the employer or carrier pursuant to this chapter which is later

determined by the Industrial Commission to have been procured through fraud, mistake or the improper processing of the claim by the carrier, shall be recovered from the employer or carrier and credited to the Second Injury Fund. Any subrogation recoveries or other recoveries from a third party or other source shall be shared by the employer or carrier and the Second Injury Fund on a pro rata basis after deducting all reasonable expenses in obtaining the recovery.

~~§ 65.1-145~~ 65.2-1106 . Claims and hearings.—Claims against the Second Injury Fund and any hearings on the merits of such claims shall be within the time limits and in the manner otherwise provided for workers' compensation claims. All claims against the Second Injury Fund shall be defended by the Attorney General.

Chapter 12.

Uninsured Employer's Fund.

Chapter drafting note: The changes in Chapter 12 are principally section renumbering and changes for the sake of clarity. However, in proposed § 65.2-1204 (§ 65.1-152), the Commission is permitted to refer all claims that the Uninsured Employer's Fund has against employers to the Attorney General for collection. The current language of § 65.1-152 places the collection burden on the Industrial Commission. The Industrial Commissioners suggested that it was inappropriate for the Commission, on one hand, to adjudicate claims involving the Uninsured Employer's Fund, and then function as a collector for the Fund, on the other.

~~§ 65.1-146~~ 65.2-1200 . Fund created.—There is hereby created a fund to be known as the "Uninsured Employer's Fund" to be administered, maintained and disbursed by the Industrial Commission as hereinafter provided.

~~§ 65.1-147~~ 65.2-1201 . Financing; tax.—A. For the purpose of providing funds for compensation benefits awarded against any uninsured or self-insured employer under any provision of this chapter:

1. ~~Beginning January 1, 1987,~~ a A tax not to exceed one-fourth of one percent shall be assessed, collected and paid into the state treasury by the same persons and in the same manner as set forth in Chapter 10 (~~§ 65.1-129~~ 65.2-1000, et seq.) of this title; and

2. Beginning January 1, 1995, in lieu of the tax described in subdivision 1 of this subsection a tax not to exceed one-eighth of one percent shall be assessed, collected and paid into the state treasury by the same persons and in the same manner as set forth in Chapter 10 (~~§ 65.1-129~~ 65.2-1000, et seq.) of this title.

B. This tax shall be in addition to the tax for the Industrial Workers' Compensation Commission Administrative Fund and the tax for the Second Injury Fund and shall be held by the Comptroller of the Commonwealth solely for the payment of awards against such fund.

C. At the end of any calendar year in which the Uninsured Employers' Fund has to its credit a sum in excess of the next year's budgeted expenditures, the tax shall be suspended for the ensuing calendar year.

~~§ 65.1-148~~ 65.2-1202 . Defense of claims against fund by Attorney General.— Upon being notified by the Industrial Commission that a claim is pending before it against an employer who has not complied with the provisions of ~~§ 65.1-104.1~~ 65.2-801 , the Attorney General, or his designee, may, in his discretion, appear before the Industrial Commission and defend any claim against the Uninsured Employer's Fund. A decision on the part of the Attorney General not to appear shall be made only after consultation with the Industrial Commission. With the leave of the Commission, the Attorney General may enter an appearance in a claim at any stage of the proceedings if he determines that the position of the Fund needs to be protected.

~~§ 65.1-149~~ 65.2-1203 . Awards.—A. After an award has been entered against an employer for compensation benefits under any provision of this chapter, and upon a finding that the employer has failed to comply with the provisions of ~~§ 65.1-104.1~~ 65.2-801 , or that a self-insured employer or its surety as required by ~~§ 65.1-104.1~~ 65.2-801 , is unable to satisfy an award in whole or in part, the Commission shall order the award, or any unpaid balance, to be paid from the Uninsured Employer's Fund.

B. For the purposes of this chapter, an employer who is a former member of a group self-insurance association whose license has been terminated by the State Corporation Commission and whose security deposit with the State Treasurer or surety coverage has been exhausted shall be deemed to be an uninsured employer not in compliance with ~~§ 65.1-104.1~~ 65.2-801 . For all such uninsured employers, the Attorney General, or his designee, shall enforce

e right of subrogation and recoupment as provided in § ~~65.1-150~~ 65.2-1204 .

§ ~~65.1-150~~ 65.2-1204 . Subrogation and recoupment.—The Industrial Commission shall, upon payment of a claim from the Uninsured Employer's Fund, be subrogated to any right to recover against the injured employee or his personal representative or any other person may have against his employer or any other party for such injury or death.

The Industrial Commission shall, on behalf of the Uninsured Employer's Fund, exhaust all remedies at law against the uninsured employer of the claimant to collect the amount of the award made to the claimant refer any unsatisfied claim against an uninsured employer to the Attorney General for collection .

Drafting note: The Industrial Commission is the organization that adjudicates claims against uninsured employers. It was suggested that the Industrial Commission should not be the titled plaintiff in an action against an employer for collection of monies expended by the Uninsured Employer's Fund. At present, these cases, by agreement between the Commission and the Attorney General, are referred to the Attorney General for collection and the plaintiff is the Uninsured Employer's Fund. The Court of Appeals in *Kim v. Sportswear*, Record No. 0094-89-4 (June 12, 1990) refers to the prospective constitutional problem involved here (see comments on pp. 13-14 of the *Kim* opinion).

§ ~~65.1-151~~ 65.2-1205 . Notification of change in earnings; change in award.— The burden shall be upon the claimant to immediately notify the Industrial Commission in writing of any increase or decrease in his earnings. After ten days' notice to the claimant and the Attorney General, the Commission may, upon its own motion or upon the motion of any party in interest, modify or terminate an award as conditions may require.

§ ~~65.1-152~~ 65.2-1206 . Payments procured by fraud, mistake or unreported change in condition; recovery.—Any payment to a claimant pursuant to this chapter which is later determined by the Industrial Commission to have been procured by fraud, mistake or an unreported change in condition, shall be recovered from the claimant and credited to the Uninsured Employer's Fund.

Chapter 13.

Peer Review of Medical Costs.

Chapter drafting note: The changes in Chapter 13 are principally section renumbering and changes for the sake of clarity. However, a change occurs in proposed § 65.2-1305 (current § ~~65.1-158~~) where, if adopted, the employee's treating physician would be permitted, along with the Commission, employers, and insurance carriers, to make referrals to a regional peer review committee.

§ ~~65.1-153~~ 65.2-1300 . Definitions.—As used in this chapter:

1. "Utilization review" means the initial evaluation of appropriateness, in terms of the level, quality and duration of health care and health services provided a patient based on medically accepted standards. Such evaluation shall be accomplished by means of a system which identifies any utilization of medical services above the usual range of utilization for such services based on medically accepted standards;

2. "Peer review" means an evaluation and determination by a regional peer review committee of the appropriateness of the level, quality, duration and cost of health care and health services provided a patient based on medically accepted standards;

3. "Physician" means any person licensed to practice medicine or osteopathy in this Commonwealth pursuant to Chapter 12 (§ 54-273 et seq.) of Title 54;

4. "Hospital" means any facility in which the primary function is the provision of diagnosis, of treatment and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including hospitals known by varying nomenclature or designation such as sanatoriums, sanitariums and general, acute, short-term, long-term and outpatient hospitals;

5. "Health systems area" means those cities, counties and towns in the Commonwealth that are included within the jurisdiction of the health systems agency for that portion of the Commonwealth, as established by the U.S. Department of Health and Welfare pursuant to United States Public Law 93-641; provided, however, that Scott County, Washington County and the City of Bristol, Virginia shall be deemed to be a part of Health Services Area III as established by the U.S. Department of Health and Welfare.

§ ~~65.1-154~~ 65.2-1301 . Statewide Coordinating Committee.— A. There shall be a Statewide

Coordinating Committee composed of nine residents of the Commonwealth appointed by the Speaker of the House of Delegates and the Committee on Privileges and Elections of the Senate of Virginia. Five of the Committee members shall be physicians who have patients whose costs of treatment are reimbursed in whole or in part pursuant to this title; each physician member shall be appointed from and represent a different health systems area. One member shall be a representative of employers in the Commonwealth, one member shall be a representative of employees in the Commonwealth, one member shall be a representative of the Virginia Hospital Association and one member shall be a representative of insurance carriers that provide workers' compensation insurance in the Commonwealth. The physician members of the Committee may be appointed from nominations submitted by The Medical Society of Virginia. The chairman of the Statewide Coordinating Committee shall be a physician member of and selected by the Committee.

B. Of the members first appointed to the Statewide Coordinating Committee, three members shall be appointed for a term of one year, three members shall be appointed for a term of two years and the remaining members shall be appointed for a term of three years. Thereafter, appointments shall be made for terms of three years or the unexpired portions thereof. A vacancy other than by expiration of term shall be filled for the unexpired term by the Speaker of the House of Delegates and the Committee on Privileges and Elections of the Senate. No person shall be eligible to serve more than two consecutive three-year terms.

§ 65.1-155 65.2-1302 . Compensation and expenses of members of Statewide Coordinating Committee and regional peer review committees; expenses of Committee.—Each member of the Statewide Coordinating Committee and regional peer review committees shall receive fifty dollars for each day actually employed in the discharge of his official duties, together with all necessary expenses incurred. The compensation and expenses of the members and the necessary expenses of the Committee shall be paid out of the state treasury upon the warrants of the Comptroller.

§ 65.1-156 65.2-1303 . Regional peer review committees.—The Statewide Coordinating Committee shall establish a regional peer review committee in each health systems area. Each regional peer review committee shall be composed of five physicians appointed by the Statewide Coordinating Committee from nominations submitted by The Medical Society of Virginia. Each committee member shall practice in the health systems area and have patients the costs of whose treatment is reimbursed in whole or in part pursuant to this title. The term of each member of each regional peer review committee shall be established by the Statewide Coordinating Committee.

§ 65.1-157 65.2-1304 . Utilization review program.—The Statewide Coordinating Committee shall develop a utilization review program for services rendered by physicians that are paid for in whole or in part pursuant to this title. Each regional peer review committee shall have responsibility for implementing the utilization review program in its health systems area.

§ 65.1-158 65.2-1305 . Peer review program.—The Statewide Coordinating Committee shall develop a peer review program for services rendered by physicians that are paid for in whole or in part pursuant to this title. The peer review program shall provide for peer review of services rendered by physicians. Each regional peer review committee shall have the responsibility for implementing the peer review program in its health systems area. Referrals may be made to the regional peer review committee pursuant to the utilization review program or, by the Industrial Commission, a treating physician or any insurance company providing coverage for the cost of any services paid for in whole or in part pursuant to this chapter or any employer.

Drafting note: Under current language, a claimant's treating physician apparently may not initiate a review of medical costs. It was suggested that these physicians require inclusion to make the program complete.

§ 65.1-159 65.2-1306 . Corrective action.— A. If it is determined that a physician improperly overutilized or otherwise rendered or ordered inappropriate medical treatment or services, or that the cost or duration of such treatment or services was inappropriate, the regional peer review committee shall, in accordance with the standard set forth in § 65.1-89 65.2-605 , adjust the amount of reimbursement to which the physician is entitled pursuant to this title and, if the physician already has been paid, shall require such physician to repay any excess amount that was paid to him for rendering or ordering such treatment or services.

B. Any such determination by any regional peer review ~~commission~~ Committee shall be reviewable by the Industrial Commission, which shall have exclusive jurisdiction to effect any such review. Any review by the Industrial Commission shall be pursuant to § 65.1-102 65.2-712 . To be entitled to review by the Industrial Commission, the physician must deliver to the

Industrial Commission written notice of his request for review, which notice must be received within thirty days after notice of the decision of the regional peer review committee is received by the physician.

By accepting payment pursuant to this title, (i) any physician, any hospital and any employee shall be deemed to have consented to the submitting of all records concerning treatment of the employee to the Industrial Commission, to the Statewide Coordinating Committee, to any regional peer review committee, or to any agent of any such committee, and (ii) any physician shall be deemed to agree to comply with any decision of the regional peer review committee, subject to his right to have the decision reviewed by the Industrial Commission.

§ ~~65.1-160~~ 65.2-1307 . Immunity of Committee members from liability.—Every member of the Statewide Coordinating Committee and every member of a regional peer review committee, and every agent of each such committee, shall be immune from civil liability for any act, decision, omission or utterance done or made in performance of his duties while serving as a member of such committee so long as such act, decision, omission or utterance is not done or made in bad faith or with malicious intent.

~~65.1-161~~ 65.2-1308 . Privileged communications.—The provisions of Chapter 21 (§ 2.1-340 et seq.) of Title 2.1 shall not be applicable to the Statewide Coordinating Committee or any regional peer review committee. The proceedings, minutes, records and reports of the Statewide Coordinating Committee and each regional peer review committee, together with all communications, both oral and written, originating in or provided to any such committees are privileged communications which shall not be disclosed or obtained by legal discovery proceedings unless a circuit court, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure of such proceedings, minutes, records, reports or communications.

§ ~~65.1-162~~ 65.2-1309 . Employment of Committee staff; contracts for services; rules and regulations.—Subject to the approval of the Industrial Commission, the Statewide Coordinating Committee shall have the authority to employ a staff and to contract with any organization in order to operate the utilization review program in any health systems area. Subject to the approval of the Industrial Commission, the Committee shall have the authority to adopt and amend such rules and regulations as may be necessary to implement the utilization review and peer review programs provided for in this chapter.

§ ~~65.1-163~~ 65.2-1310 . Funding.—The cost of developing and administering the utilization review program and the peer review program shall be paid pursuant to § ~~65.1-136~~ 65.2-1007 .

(This title is effective July 1, 1990.)

(This chapter is effective July 1, 1990.)

APPENDIX II

Comparative Table

Current Sections

Proposed Sections

65.1-1	65.2-100
65.1-2	65.2-101
65.1-2.1	65.2-101
65.1-3	65.2-101
65.1-4	65.2-101
65.1-4.1	65.2-101
	65.2-402
65.1-4.1:1	65.2-101
65.1-4.2	65.2-101
65.1-4.3	65.2-101
65.1-4.4	65.2-101
65.1-4.5	65.2-101
65.1-4.6	65.2-101
65.1-5	65.2-101
65.1-6	65.2-101
65.1-7	65.2-101
65.1-8	65.2-101
65.1-9	repealed
65.1-10	65.2-200
65.1-11	65.2-201
65.1-12	65.2-203
65.1-13	65.2-203
65.1-14	repealed
65.1-15	65.2-204
65.1-16	65.2-204
65.1-17	65.2-204
65.1-18	65.2-201
65.1-19	65.2-202
65.1-20	65.2-202
65.1-21	65.2-202
65.1-22	65.2-201
65.1-23	65.2-300
65.1-23.1	65.2-301
65.1-24	repealed by Acts 1973, C. 542
65.1-25	65.2-300
65.1-26	65.2-300
65.1-27	65.2-101
65.1-28	65.2-101
65.1-29	65.2-302
65.1-30	65.2-302
65.1-31	65.2-302
65.1-32	65.2-303
65.1-33	65.2-304
65.1-34	65.2-303
65.1-35	65.2-305
65.1-36	repealed
65.1-37	65.2-300
65.1-38	65.2-306
65.1-39	repealed

65.1-40
65.1-40.1
65.1-41
65.1-42
65.1-43
65.1-44
65.1-45
65.1-46
65.1-46.1
65.1-47
65.1-47.1
65.1-48
65.1-49
65.1-50
65.1-51
65.1-52
65.1-53
65.1-54
65.2-54.1
65.2-55
65.1-55.1
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65.1-58
65.1-59
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65.1-73
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65.1-75
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65.1-76
65.1-77
65.1-78
65.1-79
65.1-80
65.1-81
65.1-82
65.1-83

65.2-307
65.2-308
65.2-309
65.2-310
65.2-311
65.2-300
65.2-701
65.2-400
65.2-401
repealed by Acts 1970, C. 470
65.2-402
repealed by Acts 1970, C. 470
65.2-403
65.2-404
65.2-405
65.2-406
65.2-407
65.2-500
65.2-501
65.2-502
65.2-708
65.2-503
65.2-504
repealed by Acts 1983, C. 288
65.2-505
65.2-506
65.2-507
65.2-508
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65.2-528
65.2-529
65.2-530
65.2-531
repealed by Acts 1970, C. 470

65.1-84	repealed by Acts 1970, C. 470
65.1-85	65.2-600
65.1-86	65.2-600
65.1-87	65.2-601
65.1-87.1	65.2-602
65.1-88	65.2-603
65.1-88.1	65.2-604
65.1-88.2	repealed
65.1-89	65.2-605
65.1-90	65.2-606
65.1-91	65.2-607
65.1-92	65.2-700
65.1-93	65.2-701
65.1-94	65.2-702
65.1-95	65.2-703
65.1-96	65.2-704
65.1-97	65.2-705
65.1-98	65.2-706
65.1-98.1	65.2-707
65.1-99	65.2-708
65.1-99.1	65.2-707
65.1-100	repealed by Acts 1976, C. 149
65.1-100.1	65.2-708
65.1-100.2	65.2-709
65.1-100.3	65.2-710
65.1-101	65.2-711
65.1-102	65.2-712
65.1-103	65.2-800
65.1-104	repealed by Acts 1979, C. 463
65.1-104.1	65.2-801
65.1-104.2	65.2-802
65.1-104.3	65.2-803
65.1-105	65.2-804
65.1-106	65.2-805
65.1-106.1	65.2-806
65.1-107	65.2-807
65.1-108	65.2-808
65.1-109	65.2-809
65.1-110	65.2-810
65.1-111	65.2-811
65.1-112	65.2-812
65.1-113	65.2-813
65.1-113.1	65.2-814
65.1-113.2	65.2-815
65.1-114	65.2-816
65.1-115	repealed by Acts 1979, C. 463
65.1-116	repealed by Acts 1979, C. 463
65.1-117	65.2-817
65.1-117.1	65.2-818
65.1-118	65.2-819
65.1-119	65.2-820
65.1-120	65.2-821
65.1-121	65.2-822
65.1-122	65.2-823

65.1-123
65.1-124
65.1-125
65.1-126
65.1-127
65.1-128
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65.1-147
65.1-148
65.1-149
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65.1-152
65.1-153
65.1-154
65.1-155
65.1-156
65.1-157
65.1-158
65.1-159
65.1-160
65.1-161
65.1-162
65.1-163

65.2-824
65.2-900
repealed
65.2-901
65.2-902
65.2-903
65.2-1000
65.2-1001
65.2-1002
65.2-1003
65.2-1004
65.2-1005
65.2-1006
65.2-1007
65.2-1008
65.2-1100
65.2-1101
65.2-1102
65.2-1103
repealed by Acts 1980, C. 599
65.1-1104
repealed by Acts 1980, C. 599
65.2-1105
65.2-1106
65.2-1200
65.2-1201
65.2-1202
65.2-1203
65.2-1204
65.2-1205
65.2-1206
65.2-1300
65.2-1301
65.2-1302
65.2-1303
65.2-1304
65.2-1305
65.2-1306
65.2-1307
65.2-1308
65.2-1309
65.2-1310

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Comparative Table

Proposed Sections

Current Sections

65.2-100
65.2-101

65.1-1
65.1-2
65.1-2.1
65.1-3
65.1-4
65.1-4.1
65.1-4.1:1
65.1-4.2
65.1-4.3
65.1-4.4
65.1-4.5
65.1-4.6
65.1-5
65.1-6
65.1-7
65.1-8

65.2-200
65.2-201

65.1-27
65.1-28
65.1-10
65.1-11
65.1-18
65.1-22

65.2-202

65.1-19
65.1-20
65.1-21

65.2-203

65.1-12
65.1-13

65.2-204

65.1-15
65.1-16
65.1-17

65.2-300

65.1-23
65.1-25
65.1-26
65.1-37
65.1-44

65.2-301
65.2-302

65.1-23.1
65.1-29
65.1-30

65.2-303

65.1-32
65.1-34

65.2-304
65.2-305

65.1-33
65.1-35

65.2-306
65.2-307

65.1-38
65.1-40

65.2-308
65.2-309

65.1-40.1
65.1-41

65.2-310

65.1-42

65.2-311
65.2-400
65.2-401
65.1-402

65.2-403
65.2-404

65.2-405
65.2-406
65.2-407
65.2-500
65.2-501
65.2-502
65.2-503
65.2-504
65.2-505
65.2-506
65.2-507
65.2-508
65.2-509
65.2-510
65.2-511
65.2-512

65.2-513
65.2-514
65.2-515
65.2-516
65.2-517
65.2-518
65.2-519
65.2-520
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65.2-523
65.2-524
65.2-525
65.2-526
65.2-527
65.2-528
65.2-529
65.2-530
65.2-531
65.2-600

65.2-601
65.2-602
65.2-603
65.2-604
65.2-605
65.2-606
65.2-607

65.1-43
65.1-46
65.1-46.1
65.1-4.1
65.1-42
65.1-49
65.1-50
65.1-52
65.1-51
65.1-52
65.1-53
65.1-54
65.1-56
65.1-55
65.1-56
65.1-56.1
65.1-58
65.1-59
65.1-60
65.1-61
65.1-62
65.1-63
65.1-64
65.1-65
65.1-68
65.1-70
65.1-65.1
65.1-65.2
65.1-66
65.1-67
65.1-69
65.1-71
65.1-71.1
65.1-72
65.1-73
65.1-74
65.1-75
65.1-75.1
65.1-76
65.1-77
65.1-78
65.1-79
65.1-80
65.1-81
65.1-82
65.1-85
65.1-86
65.1-87
65.1-87.1
65.1-88
65.1-88.1
65.1-89
65.1-90
65.1-91

65.2-700
65.2-701
65.2-702
65.2-703
65.2-704
65.2-705
65.2-706
65.2-707
65.2-708

65.2-709
65.2-710
65.2-711
65.2-712
65.2-713
65.2-714
65.2-800
65.2-801
65.2-802
65.2-803
65.2-804
65.2-805
65.2-806
65.2-807
65.2-808
65.2-809
65.2-810
65.2-811
65.2-812
65.2-813
65.2-814
65.2-815
65.2-816
65.2-817
65.2-818
65.2-819
65.2-820
65.2-821
65.2-822
65.2-823
65.2-824
65.2-900
65.2-901
65.2-902
65.2-903
65.2-1000
65.2-1001
65.2-1002
65.2-1003
65.2-1004
65.2-1005
65.2-1006
65.2-1007

65.1-92
65.1-45
65.1-93
65.1-94
65.1-95
65.1-96
65.1-97
65.1-98
65.1-98.1
65.1-55.1
65.1-99
65.1-99.1
65.1-100.1
65.1-100.2
65.1-100.3
65.1-101
65.1-102
65.1-103
65.1-104.1
65.1-104.2
65.1-104.3
65.1-105
65.1-106
65.1-106.1
65.1-107
65.1-108
65.1-109
65.1-110
65.1-111
65.1-112
65.1-113
65.1-113.1
65.1-113.2
65.1-114
65.1-117
65.1-117.1
65.1-117.1
65.1-119
65.1-120
65.1-121
65.1-122
65.1-123
65.1-124
65.1-126
65.1-127
65.1-128
65.1-129
65.1-130
65.1-131
65.1-132
65.1-133
65.1-134
65.1-135
65.1-136

65.2-1008
65.2-1100
65.2-1101
65.2-1102
65.2-1103
65.2-1104
65.2-1105
65.2-1106
65.2-1200
65.2-1201
65.2-1202
65.2-1203
65.2-1204
65.2-1205
65.2-1206
65.2-1300
65.2-1301
65.2-1302
65.2-1303
65.2-1304
65.2-1305
65.2-1306
65.2-1307
65.2-1308
65.2-1309
65.2-1310

65.1-137
65.1-138
65.1-139
65.1-140
65.1-141.1
65.1-142.1
65.1-144
65.1-145
65.1-146
65.1-147
65.1-148
65.1-149
65.1-150
65.1-151
65.1-152
65.1-153
65.1-154
65.1-155
65.1-156
65.1-157
65.1-158
65.1-159
65.1-160
65.1-161
65.1-162
65.1-163

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APPENDIX III

HOUSE JOINT RESOLUTION NO. 18

Requesting the Virginia Code Commission to revise and recodify Title 65.1 of the Code of Virginia, pertaining to Workers' Compensation.

Agreed to by the House of Delegates, February 5, 1990

Agreed to by the Senate, February 27, 1990

WHEREAS, Title 65.1 of the Code of Virginia, which consists of the Workers' Compensation Act, has undergone many changes since the 1968 revision of Title 65; and

WHEREAS, the numerous changes have made this title legally ambiguous and structurally obscure; and

WHEREAS, a substantial body of case law from the Virginia Supreme Court and Court of Appeals and pertinent decisions from the Industrial Commission should be reviewed for possible incorporation into the Workers' Compensation Act; and

WHEREAS, these changes and conditions necessitate a revision of Title 65.1, and it is within the purview of the Virginia Code Commission to make such revision; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia Code Commission is requested to study Title 65.1 of the Code of Virginia and report its findings in the form of revisions of such title to the Governor and the General Assembly of Virginia. All agencies of the Commonwealth shall assist the Commission in its study as necessary.

The Commission shall complete its work and submit its findings and recommendations as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Industrial Commission of Virginia

Commissioner William E. O'Neill, Chairman

Commissioner Charles G. James

Commissioner Robert P. Joyner

Chief Deputy Commissioner Lawrence D. Tarr

Ms. Lynn M. Hussell, Confidential Secretary
to Commissioner O'Neill

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Susan L. Urosfky, Department of Rehabilitative Services, Commonwealth
of Virginia