

SUING THE EMPLOYER IN SPITE OF THE WORKERS' COMPENSATION ACT
By J. Gregory Webb

Hardly a day goes by when a Plaintiff's lawyer does not speak with an injured citizen. On most of these occasions, when the attorney learns that the injured person was hurt on the job, the conversation's life expectancy takes a steep nosedive. A tort action is quickly eliminated from consideration and the once promising case gets referred to a workers' compensation attorney.

The latter circumstance, however, does not always have to be the case, because, as explained below, there are some instances when the employer can be sued in tort for a workplace injury. And, while this is not necessarily a new revelation, it may be a forgotten one. The ability to sue one's employer in tort for certain types of injuries has existed for decades, and a recent Virginia Supreme Court case breathed new life into this old and infrequently used means of obtaining a recovery for a work-related injury. This article will discuss this rare and challenging way to successfully sue an employer in tort for an injury suffered during the course of one's employment.

Common Law Tort Actions Against Employers from *Airstrop* (1943) to
Adams (2001)

Over the years, the Virginia Workers' Compensation Actⁱ (the "Act") has been the bane of many a Virginia plaintiff's attorney. The Act has barred employees from suing their employer in tort for personal injuries received on account of an "injury by

accident arising out of and in the course of the employment or occupational disease."ⁱⁱ The workers' compensation bar has, for the most part, been strictly interpreted by Virginia courts and the Virginia Workers' Compensation Commission.

The Act was initially passed in 1918 to address public policy concerns about workers being injured and killed on the job. The theory behind the Act was, and is, to have a "no-fault system of compensation designed to serve the public good, [to] avoid lengthy litigation and [to] protect the interests of employers and employees."ⁱⁱⁱ The Act is intended to keep the processes and procedures as summary and simple as possible, and to avoid the expenses and/or delay of litigation.^{iv} The Act is supposed to allow employees to receive benefits for accidental injuries arising out of and in the course of employment regardless of the fault of the employee or the employer. The Virginia Supreme Court has stated that the Act

places upon industry as an expense of the business of pecuniary loss, measured by the compensation provided in the statute, attendant upon all accidents to employees within the hazards of industry. It extends the employer's liability to all accidental personal injuries 'arising out of and in the course of the employment,' the expense of which is added to the cost of production. The employer surrenders his right of defense on the ground of contributory negligence and the common-law doctrines of the assumption of risk. . . . The employee surrenders his right to a trial by jury and agrees to accept an arbitrary amount fixed by statute in lieu of full compensation for the injuries sustained. He gains a wider security. The issue of negligence or non-negligence of the employer and the fellow servants is eliminated. Long, costly and delayed

litigation is avoided. A smaller but speedier recovery is guaranteed.^v

The intent of the Act notwithstanding, there has been much litigation since 1918 in an attempt to determine when a workplace injury by accident, or occupational disease, has occurred. As a general rule, the Court has interpreted the exclusive remedy provision very broadly in favor of eliminating tort remedies for work-related injuries.

An "injury by accident" is an "identifiable incident or sudden precipitating event [that results] in an obvious sudden mechanical or structural change in the body."^{vi} Thus, injuries resulting from repetitive or cumulative trauma are not "injuries by accident" within the meaning of the Act.^{vii} The Virginia Supreme Court has also held that injuries resulting from cumulative or repetitive trauma are not "diseases" within the meaning of the Act.^{viii}

Until March of 1996, the Virginia Workers' Compensation Commission (the "Commission") and the Court of Appeals held that job-related physical impairments resulting from cumulative trauma (typically carpal tunnel syndrome) were occupational diseases within the meaning of the Act. Therefore, these diseases were being found to be compensable. The case of The Stenrich Group, et al. v. Jemmott, 251 Va. 186, 467 S.E.2d 795 (1996), changed all of this.

In Jemmott, the Virginia Supreme Court reviewed three cumulative trauma cases^{ix} and found that the Court of Appeals had "erred in finding that a job-related physical impairment resulting from cumulative trauma caused by repetitive motion is a disease withing the contemplation of the Workers' Compensation Act. . . ."x Thus, the Supreme Court made it abundantly clear that repetitive trauma cases were no longer to be covered by the Act. The court went so far as to state that "if there lingers any doubt . . . we now remove the doubt by saying that job-related impairments resulting from cumulative trauma . . . are, as a matter of law, not compensable under the present provisions of the Act."^{xi}

Jemmott, however, did not end the story. On July 1, 1997, an amendment to § 65.2-400 of the Code became effective. This amendment made carpal tunnel syndrome and hearing loss "ordinary diseases of life as defined in § 65.2-401." The latter had the effect of allowing carpal tunnel syndrome and hearing loss to be compensable if the employee could prove that the disease was occupationally related. Proving the latter was, and is, a steep hurdle, but it can be done if the employee-claimant can show, **by clear and convincing evidence**, that the disease was "caused by conditions peculiar to [one's] employment."^{xii} Not only is this a heavy burden, but, in a number of states, it is an unnecessary one because these states actually compensate workers who suffer

work-related cumulative trauma injuries.^{xiii}

Prior to the passage of the carpal tunnel syndrome/hearing loss amendment to §§ 65.2-400 and -401, there was an indisputable window between March 1, 1996, and July 1, 1997, when carpal tunnel syndrome and hearing loss were not covered under the Act. It was under this backdrop that the case of Harry Adams, et al. v. Alliant Techsystems, Inc., et al.^{xiv} began.

Adams v. Alliant Techsystems

The Adams case involves three hundred and forty-two (342) plaintiffs who either were working, or had worked, at the Radford Army Ammunition Plant ("Arsenal") in Radford, Virginia. These plaintiffs sought damages against Hercules, Inc. ("Hercules") and Alliant Techsystems, Inc. ("Alliant") for "hearing loss allegedly caused by exposure to unsafe, hazardous, and excessive noise levels while working for the defendants at the Arsenal."^{xv} Hercules had operated the Arsenal until 1995, at which point Alliant took over the operation of the plant.

The plaintiffs filed suit in the United States District Court for the Western District of Virginia alleging negligence causes of action against the defendants. The plaintiffs alleged that their respective diagnoses occurred during the "window" between March 1, 1996 and July 1, 1997, where they had no coverage under the

Workers' Compensation Act. The defendants asserted, *inter alia*, the defense that the negligence actions were barred under the Act. The issue was certified to the Virginia Supreme Court by the Western District.

The Virginia Supreme Court, in its analysis, cited a line of cases where it had previously held that "injury of gradual growth, . . . caused by the cumulative effect of many acts done or many exposures to conditions prevalent in the work, no one of which can be identified as the cause of the harm, is definitely excluded from compensation."^{xvi} The Jemmott Court further noted that "despite many opportunities and the passage of what has now been over 50 years, the legislature has made no change in the Airstrop rule with respect to injuries gradually incurred."^{xvii} Therefore, from Airstrop in 1943 to Jemmott in 1996, the Court consistently found that gradually incurred injuries, or cumulative trauma, were not compensable under the Act.^{xviii} Thus, prior to July 1, 1997, when the carpal tunnel syndrome and hearing loss amendment to the Act became effective, there was no coverage under the Act for cumulative trauma injuries, notwithstanding rulings by the Commission and the Virginia Court of Appeals prior to March 1, 1996 to the contrary.

Suing One's Employer in Tort for Work-Related Personal Injury
after *Adams*

Because there was no coverage for cumulative trauma under the Act prior to July 1, 1997, a worker with such an injury had only one remedy left: a tort action. That is precisely what the plaintiffs in Adams alleged and argued, and that is precisely what the Court found in its answer to the certified issues. The Court found that the workers' "common law rights of action for damages for [their] injury is not impaired by the Act."^{xix} The Court went on to cite Griffith v. Raven Red Ash Coal Co.,^{xx} for the proposition that:

[o]ur conclusion is that the Workmen's Compensation Act is exclusive in so far as it covers the field of industrial accidents, but no further. To the extent that the field is not touched by the statute, we think that the legislature intended that the employee's common-law remedies against his employer are to be preserved unimpaired.^{xxi}

Adams has confirmed an employee's ability to sue his or her employer in tort for certain, specific types of injuries. Many practitioners quickly rule out tort actions against an employer as being barred by the Act. In most cases, this is a good assumption to make. However, as Adams effectively illuminates, there is some wiggle room for certain types of "injuries". While carpal tunnel syndrome and hearing loss cases are now (after July 1, 1997) within the purview of the Act, there are a host of other cumulative trauma type injuries that are not similarly covered, therefore these latter injuries may expose an employer to a common law action for damages.

For example, injuries to the shoulder (rotator cuff), back, wrist and elbow (tendinitis), and just about any other injury that did not occur as an "identifiable incident or sudden precipitating event" could give rise to a tort action. The Act itself states that these injuries are not covered, therefore, a common law remedy should and must be available to the injured worker. Furthermore, the Act erects no bar preventing an employee from pursuing common law remedies against his or her employer.^{xxii}

If the Act barred all possible tort actions for any type of injury (however loosely one wanted to define "injury") that occurred in the workplace, then there would be a significant number of injured workers who would be left without any possible remedy. Surely, this is not what the legislature intended for its constituents.

For example, in the Adams case, if the defendant employers had their way, the 342 injured plaintiffs in that case would have no remedy available to them whatsoever. Under the prevailing law of the Adams case, there was no coverage for occupationally-related hearing loss (prior to July 1, 1997), and, according to defendants Alliant and Hercules, the plaintiffs were barred under the Act from pursuing a common law claim. If the latter were the case, then the plaintiffs' would have absolutely no remedy, and the defendant employers would have had the best of both worlds (i.e., complete immunity!).

Fortunately, the Virginia Supreme Court issued a sound and well-reasoned opinion in Adams. The opinion is consistent with previous Virginia Supreme Court holdings where the injury received was not within the confines of the Act. Furthermore, the door appears to be open (how wide is yet to be determined) for employers to be sued in tort for cumulative trauma or gradually incurred injuries.^{xxiii} Practitioners of all kinds, especially plaintiffs' and workers' compensation attorneys, should be ever mindful of the law in this area, or they risk losing an opportunity to obtain a remedy for a deserving worker who has been wrongfully and negligently injured on the job.^{xxiv}

The political ramifications on employers of getting sued successfully in tort for cumulative trauma injuries, where the employer or its carrier denied coverage under the Act, may be interesting to observe. It may make employers more likely to accept as compensable questionable or marginal workplace injuries, choosing the more acceptable and predictable damages awarded under the Act rather than running the risk of having a jury render a large damage award. Ultimately, the worker will benefit either way. The above might prompt change in the legislature allowing for provable, work-related cumulative trauma injuries to be compensable. The latter would be a desirable result because there are many workers who are denied workers' compensation benefits each year because their injury is gradually incurred. This is so

despite the fact that a physician has opined that the injury is work related.

The Act is supposed to provide a fixed system of compensation, regardless of the fault of either the worker or the employer. As currently drafted and enforced, the Act falls far short for many injured employees falling into the cumulative trauma class. The Adams case may go a long way towards correcting that grave imbalance.

ENDNOTES

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- i. VIRGINIA CODE ANN. § 65.2-100 et seq.
- ii. VIRGINIA CODE ANN. § 65.2-101.
- iii. LAWRENCE J. PASCAL, *VIRGINIA WORKERS COMPENSATION LAW AND PRACTICE* 3 (2d ed. 1993).
- iv. Id. at 4.
- v. Id. at 5, quoting Feitig v. Chalkley, 185 Va. 96, 38 S.E.2d 73 (1946).
- vi. Morris v. Morris, 238 Va. 578, 589, 385 S.E.2d 858, 865 (1989).
- vii. Id.
- viii. See, Stenrich Group v. Jemmott, 251 Va. 186, 467 S.E.2d 795 (1996).
- ix. Two carpal tunnel cases and one "trigger thumbs" (tenosynovitis) case.
- x. Id. at 186, 467 S.E.2d at 795.
- xi. Id. at 199, 467 S.E.2d at ____.
- xii. VIRGINIA CODE ANN. § 65.2-401.
- xiii. See, e.g., 82 Am. Jur. 2d *Workers' Compensation* § 250 (finding the following to be some of the states that compensate cumulative trauma type injuries to some extent: California, Illinois, Indiana, Maryland, Missouri, New Mexico, New York, Oklahoma, Ohio).
- xiv. Harry Adams, et al. v. Alliant Techsystems, Inc., et al., 261 Va. 594, 544 S.E.2d 354 (2001).
- xv. Id. at 596, 544 S.E.2d at 354.
- xvi. Id. at 597 quoting Airstrop v. Blue Diamond Coal Co., 181 Va. 287, 24 S.E.2d 546 (1943).

xvii. Id. at 598, 544 S.E.2d at ____.

xviii. Id. This is so despite the fact that the Virginia Workers' Compensation Commission and the Virginia Court of Appeals were ruling differently in many cases prior to March 1, 1996.

xix. Id. at 599, 544 S.E.2d at ____.

xx. 179 Va. 790, 798, 20 S.E.2d 530, 534 (1942).

xxi. Id. (emphasis added).

xxii. See, e.g., Williams v. Garraghty, 249 Va. 224, 445 S.E.2d 209 (1995)(holding that a plaintiff's humiliation, mental distress, and pain and suffering claims against his employer were gradually incurred, therefore plaintiff's common law claims were not barred under the Act); Lichtman v. Knouf, 248 Va. 138, 445 S.E.2d 114 (1994)(holding that a psychological, cumulative trauma injury incurred at work by an employee was not compensable under the Act and therefore presented a viable common law claim); Middlekauff v. Allstate Ins. Co., 247 Va. 150, 439 S.E.2d 394 (1994)(holding that a cumulative, emotional distress claim incurred at work was not covered under the Act and therefore was actionable in tort); Griffith v. Raven Red Ash Coal Co., 179 Va. 790, 20 S.E.2d 530 (1942)(holding that the employee had recourse to a common law claim for damages where his injury did not fall within the purview of the Act).

xxiii. Other than carpal tunnel syndrome and hearing loss.

xxiv. This, of course, assumes that the injured worker can prove, to a reasonable degree of medical certainty, that the injury was caused by work. At common law, as under the Act, the employee must still prove causation, which, in most cases, will require a physician's opinion that the injury was caused by his or her exposure to occupational hazards.