APPLYING THE ACTUAL RISK TEST OF THE VIRGINIA WORKERS' COMPENSATION ACT IN CASES OF WORKPLACE VIOLENCE BETWEEN COWORKERS

Jason A. Botkins*

Employee injuries resulting from workplace violence are compensable under the Virginia Workers' Compensation Act (the "Act") only when directed at the victim as an employee or because of the employment.[1] The application of this distinction is particularly pertinent in cases involving intentional violence between coworkers in the workplace.[2] In cases of serious or fatal injury, a finding of coverage under the Act shields the employer from potentially unlimited liability in tort. The substantial financial incentive for establishing coverage may cultivate an improper focus on the motivation for the violence. An inquiry into the aggressor's motive should not supplant the general contours of the actual risk test, which is used in all coverage determinations under the Act. The nature of the victim's employment must expose the victim to an increased risk of assault and battery for resulting injuries to be covered by the Act.

I. Injuries Compensable under the Act

A. Coverage Generally

The Virginia Workers' Compensation Act covers employee injuries from accidents that arise out of and in the course of the employment.[3] An injury may be deemed an accident for the purposes of the Act despite being the result of intentional conduct by a third party.[4] As a result, injuries that are inflicted intentionally by a coworker are compensable under the Act when they arise out of and in the course of employment .[5]

* Mr. Botkins is an associate with Litten & Sipe, L.L.P. in Harrisonburg and is a member of the Virginia Association of Defense Attorneys.

1 The focus of this article is the role of motive in determining whether intentional injuries among coworkers arise out of employment for the purpose of the Virginia Workers' Compensation Act. The tangential question of how motivation can be determined is beyond the scope of this article. Likewise, coverage of injuries caused by unintentional acts of coworkers and intentional acts of nonemployees are not discussed here.

2 Crump v. American HomePatient (Va. Workers' Comp. Comm'n, filed Jan. 16, 2007) (VWC File No. 228-52-25); Gibson v. American HomePatient (Va. Workers' Comp. Comm'n, filed Jan. 16, 2006) (VWC File No. 228-52-24).

3 Va. Code Ann. § 65.2-100, *et seq.*

4 A.N. Campbell & Co. v. Messenger, 171 Va. 374, 377, 199 S.E. 511, 513 (1938).

5 *Id.*

The "in the course of" requirement focuses upon temporal elements, including "the time, place, and circumstances under which [an] accident occurs."[6] By contrast, the "arising out of" test refers to causation and requires an examination of the relationship between the employment and the cause or risk giving rise to the injury.[7] An injury must satisfy both statutory prongs of the coverage analysis to be compensable under the Act.[8]

When an injury is covered, workers' compensation benefits are the employee's sole and exclusive remedy against the employer.[9] The exclusivity provision of the Act forecloses any cause of action the employee would otherwise have at common law.[10] Compensation under the Act consists of benefits that are limited by statute in amount and duration.[11] In cases involving an employee fatality, the maximum benefits available to dependents consist of payments totaling two-thirds of the decedent's average weekly wage for 500 weeks, plus up to $10,000 in burial expenses.[12] By comparison, the employer faces unlimited damages in a potential wrongful death action.

The customary posture in contested workers' compensation cases places the employer in defense of a claim for benefits filed by an injured employee. However, this posture is sometimes reversed in cases of catastrophic workplace violence. The exclusivity provision of the Act creates a substantial financial incentive for the employer to establish coverage rather than face liability in a tort action. To this end, the employer may request a coverage determination even where the employee or the employee's dependents have rejected benefits under the Act.[13]

B. INTENTIONAL INJURY BY A COWORKER IN THE COURSE OF EMPLOYMENT

The analysis of whether an intentional injury by a coworker arises in the course of employment is usually straightforward. Intentional injuries to an employee inflicted by a coworker most often occur during the workday when the employee is expected to discharge job duties and has contact with other employees. The employer is usually implicated only because the injury was inflicted upon an employee while performing job duties in the workplace during the workday. For this reason, any resulting injuries necessarily arise in the course of

---

6 County of Chesterfield v. Johnson, 237 Va. 180, 183, 376 S.E.2d 73, 74 (1989).

7 R&T Inv. v. Johnson, 228 Va. 249, 252, 321 S.E.2d 287, 289 (1984). *See also* Graybeal v. Board of Supervisors, 216 Va. 77, 80, 216 S.E.2d 52, 54 (1976).

8 Butler v. Southern States Coop., Inc., 270 Va. 459, 465, 620 S.E.2d 768, 772 (2005).

9 VA. CODE ANN § 65.2-307(A).

10 Adams v. Alliant Technosystems, 261 Va. 594, 599, 544 S.E.2d 354, 356 (2001) (quoting Griffith v. Raven Red Ash Coal Co., 179 Va. 790, 798, 20 S.E.2d 530, 534 (1942)).

11 VA. CODE ANN.§ 65.2-500, *et seq*.

12 VA. CODE ANN. § 65.2-512(A)(1) and § 65.2-512(B).

13 *See, e.g.*, McKnight v. Virginia Int'l Terminals, 69 O.I.C. 19 (1990).

employment.[14] In many cases, the parties elect to stipulate this issue and contest only whether an intentional injury arises out of employment.[15]

C. INTENTIONAL INJURY BY A COWORKER ARISING OUT OF EMPLOYMENT

1. Generally

Virginia courts apply the actual risk test to determine whether an injury arises out of employment.[16] Under this test, the nature of the employment must include exposure to the particular danger that causes the injury.[17] The danger must be naturally connected to the nature of the employment and must relate closely to the actual work being performed by the employee.[18] In other words, the injury must be caused by an actual risk of employment to be compensable under the Act. The actual risk analysis is much more rigorous than the positional risk test, which is not followed in Virginia and requires only physical presence in the workplace at the time of injury.[19] Under Virginia law, presence in the workplace is relevant only to whether the injury arose in the course of the employment and does not complete the coverage analysis. A causal connection must be established between the injury and the conditions under which the employer requires the work to be done.[20]

Injuries from intentional conduct by a coworker do not arise out of employment when directed personally at the employee rather than as an employee or because of the employment.[21] Employee assaults motivated by personal attraction or romantic interest do not arise out of employment.[22] Likewise, injuries do not arise out of employment for an employee who is responsible for the conduct that caused the injuries, such as a fight.[23] Along the same lines, injuries to an employee goosed by friendly coworkers do not arise out of employment.[24] This distinction is properly viewed as a corollary of the actual risk test rather than a substitute analysis based entirely on the assailant's motive. The Supreme

---

[14] *See* Combs v. Virginia Elec. & Power Co., 259 Va. 503, 511, 525 S.E.2d 278, 283 (2000).

[15] *See, e.g.*, City of Richmond v. Braxton, 230 Va. 161, 162, 335 S.E.2d 259, 260 (1985); Richmond Newspapers v. Hazelwood, 249 Va. 369, 372, 457 S.E.2d 56, 57 (1995); Reamer v. National Serv. Indus., 237 Va. 466, 470, 377 S.E.2d 627, 629 (1989); R&T Inv. v. Johnson, 228 Va. 249, 252, 321 S.E.2d 287, 289 (1984); Hilton v. Martin, 275 Va. 176, 180, 654 S.E.2d 572, 574 (2008).

[16] Butler v. Southern States Coop., Inc., 270 Va. 459, 465, 620 S.E.2d 768, 772 (2005).

[17] *Combs*, 259 Va. at 510, 525 S.E.2d at 282.

[18] *See R&T Inv.*, 228 Va. at 252-53, 321 S.E.2d at 289. *See also* Bassett-Walker, Inc. v. Wyatt, 26 Va. App. 87, 93-94, 493 S.E.2d 384, 387-88 (Va. Ct. App. 1997).

[19] *Hilton*, 275 Va. at 181, 654 S.E.2d at 574.

[20] *Butler*, 270 Va. at 465, 620 S.E.2d at 772.

[21] Richmond Newspapers v. Hazelwood, 249 Va. 369, 373, 457 S.E.2d 56, 58 (1995).

[22] *Butler*, 270 Va. at 466, 620 S.E.2d at 772; City of Richmond v. Braxton, 230 Va. 161, 165, 335 S.E.2d 259, 262 (1985).

[23] Stillwell v. Lewis Tree Serv., 47 Va. App. 471, 478, 624 S.E.2d 681, 684 (Va. Ct. App. 2006) (citing Farmers Mfg. Co. v. Warfel, 144 Va. 98, 101, 131 S.E. 240, 241 (1926)).

[24] *Hazelwood*, 249 Va. at 373, 457 S.E.2d at 58.

Court of Virginia has framed the decisive inquiry as whether "the probability of assault was augmented either because of the peculiar character of the claimant's job or because of the special liability to assault associated with the environment in which he must work."[25] Thus, a finding concerning an employee's motivation for an intentional injury to a coworker is inconclusive. Instead, the operative analysis is whether a reasonable person would consider assault and battery to be a risk inherent in the nature of the victim's employment.[26]

Cases involving third-party assaults on employees provide the most useful illustrations of this distinction. For instance, an employee who functions as a funds courier is exposed to an increased risk of assault by robbery.[27] As a result, injuries that occur when such an employee is robbed while making a bank deposit for the employer arise out of the employment.[28] Likewise, an employee whose job duties require repeated trips through a dangerous area is exposed to a heightened risk of assault.[29] Thus, the resulting injuries arise out of employment when such an employee is shot while traversing between his employer's office and the building where he provides custodial services.[30]

Bizarre or derogatory evidence is sometimes introduced by the employer in an attempt to establish an intentional injury as a risk of employment. For instance, one employer trying to establish coverage has argued that injury from being goosed by coworkers is an actual risk of employment in a newsroom.[31] To that end, the employer introduced evidence that the practice of goosing was a tradition spanning decades in newsrooms across the country.[32] In sexual assault cases,[33] employers asserting coverage have introduced evidence documenting employer knowledge of prior conduct by the assailant. In one such case, the employer contended that a sexual assault arose out of employment because it "knowingly exposed all of its female employees to a safety risk" by hiring the

---

25 Plummer v. Landmark Communications, 235 Va. 78, 87, 366 S.E.2d 73, 77 (1988) (quoting *R&T Inv.*, 228 Va. at 252-53, 321 S.E.2d at 289) (internal citations omitted).

26 *R&T Inv.*, 228 Va. at 252-53, 321 S.E.2d at 289. ("[I]f the injury can be seen to have followed as a natural incident of the work and to have been contemplated *by a reasonable person* familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment[.]") (emphasis added).

27 *Id.* at 255, 321 S.E.2d at 290-91.

28 *Id.*

29 Roberson v. Whetsell, 21 Va. App. 268, 272, 463 S.E.2d 681, 683 (Va. Ct. App. 1995).

30 *Id. See also* Reamer v. National Serv. Indus., 237 Va. 466, 472, 377 S.E.2d 627, 630 (1989) (finding no evidence that employment in a furniture rental store increased the risk of rape and forcible sodomy).

31 *Hazelwood*, 249 Va. at 373, 457 S.E.2d at 58.

32 *Id.*

33 In cases of sexual assault, Va. Code Ann. § 65.2-301 provides a presumption of coverage to an employee who is sexually assaulted in the course of employment, reports the assault to the proper law enforcement authority, and can prove that the nature of the employment substantially increased the risk of the assault. However, this statute was not applied in either of the cases referenced in this paragraph. Instead, *City of Richmond v. Braxton* and *Butler v. Southern States* were decided based upon the conventional coverage analysis featured in this article and set forth in Va. Code Ann. § 65.2-300.

assailant, who had three prior criminal convictions.[34] In another sexual assault case, the City of Richmond argued that sexual assault of a female employee by her supervisor was sufficiently related to work conditions to arise out of her employment.[35] The city introduced evidence that it knew that the assailing supervisor received *Playboy* magazine at the workplace, displayed the magazine with other pornographic materials in his office, showed pornographic images to female employees, and discussed sexual topics with them.[36] Despite these novel arguments, the Supreme Court of Virginia found that none of the injuries in case arose out of employment.[37]

2. The American HomePatient Cases

As discussed above, an improper emphasis is sometimes placed upon the assailing employee's motivation in cases of intentional injuries to coworkers. One of the cases that best illustrates this misplaced emphasis involved two employees murdered by a coworker at American HomePatient, a company that provides and services home medical equipment. Bonnie Crump and Gary Gibson were employed by American HomePatient as a customer service representative and service technician, respectively.[38] In the weeks before the violence, coworker Brewer Hoover confessed a romantic infatuation with Crump and stated his belief that she was having an extramarital affair with Gibson.[39] Before the shootings, employees had reported to the general manager that Hoover was behaving in an odd and threatening manner toward Crump.[40] In spite of the reports, American HomePatient took no action to address Hoover's reported conduct.[41]

On May 16, 2007, Hoover reported to work with handguns and murdered Crump and Gibson. Hoover did not harm three other coworkers whom he encountered during the rampage.[42] In the subsequent standoff negotiations with police, Hoover stated that he was afraid of being fired and then committed suicide.[43]

Wrongful death actions were filed on behalf of the victims' estates against American HomePatient, each seeking $10 million in damages based upon theo-

---

34 Butler v. Southern States Coop., Inc., 270 Va. 459, 465-66, 620 S.E.2d 768, 772 (2005).

35 City of Richmond v. Braxton, 230 Va. 161, 162, 335 S.E.2d 259, 260 (1985).

36 *Id.*

37 *Hazelwood*, 249 Va. at 375, 457 S.E.2d at 59; *Braxton*, 230 Va. at 165, 335 S.E.2d at 262; *Butler*, 270 Va. at 466, 620 S.E.2d at 772-73.

38 Transcript at 66-68, Crump v. American HomePatient (Va. Workers' Comp. Comm'n, filed Jan. 16, 2007) (VWC File No. 228-52-25); Gibson v. American HomePatient (Va. Workers' Comp. Comm'n, filed Jan. 16, 2006) (VWC File No. 228-52-24).

39 *Id.* at 85-91.

40 Transcript of Proceedings at 122-23, Crump v. Morris (Rockingham County, hearing July 19, 2007) (No. CL06-0547); Gibson v. Morris (Rockingham County, hearing July 19, 2007) (No. CL06-0549).

41 Transcript at 152-54, *Crump* (VWC File No. 228-52-25); *Gibson* (VWC File No. 228-52-24).

42 Op. of Deputy Comm'r at 6, *Crump* (VWC File No. 228-52-25); *Gibson* (VWC File No. 228-52-24).

43 *Id.* at 5.

ries of negligent retention and failure to provide a safe workplace.[44] American HomePatient filed a demurrer and a special plea raising coverage under the Act as a bar to the proceedings.[45] American HomePatient subsequently offered benefits under the Act to the victims' dependents and sought coverage determinations for the murders from the Virginia Workers' Compensation Commission.[46] The contested issue before the circuit court and the deputy commissioner was whether the deaths arose out of the decedents' employment.[47]

In the subsequent proceedings, American HomePatient asserted repeatedly that the coverage determination was controlled entirely by the shooter's motive for the killings.[48] Under American HomePatient's rationale, the shooter's state of mind was decisive regardless of whether it was reasonable or unreasonable.[49] Thus, it was entirely irrelevant that the shooter was in no actual danger of termination.[50] Similarly, the victims' lack of authority to discipline or terminate was immaterial so long as the shooter thought otherwise.[51] American HomePatient argued that the murders arose out of employment because the shooter *believed* that he was going to be fired and *perceived* his victims as having the ability to influence that decision.[52] Contrary to the company's written job descriptions, American HomePatient characterized the victims as *de facto* supervisors who caused the shooter's fear of termination.[53]

American HomePatient's arguments attempted to substitute the shooter's state of mind as the operative perspective for the purposes of the actual risk test. The focus was directly contrary to the reasonable person viewpoint used in Virginia jurisprudence.[54] There was no evidence that the nature of the victims' employment as a service technician and customer sales representative exposed them to an increased risk of assault and battery. As a result, no causal connection was established between the conditions of the victims' employment and the murders.[55] Injuries inflicted by a coworker in retaliation for an adverse employ-

---

[44] Complaint, *Crump* (No. CL06-0547); and *Gibson* (No. CL06-0549). The complaints also included a count for negligent supervision that was dismissed upon demurrer.

[45] The court's ruling on the demurrer is reported at 73 Va. Cir. 85 (Rockingham County, decided Mar. 12, 2007).

[46] Transcript at Employer's Exhibit 10, *Crump* (VWC File No. 228-52-25); *Gibson* (VWC File No. 228-52-24).

[47] *Id.* at 2.

[48] Written Statement of Employer and Carrier at 2, *Crump* (VWC File No. 228-52-25); *Gibson* (VWC File No. 228-52-24).

[49] *Id.* at 17.

[50] *Id.* at 16.

[51] *Id.* at 18.

[52] *Id.* (emphasis added).

[53] Brief of Employer and Carrier at 6, *Crump* (VWC File No. 228-52-25); *Gibson* (VWC File No. 228-52-24).

[54] *See, e.g.*, R&T Inv. v. Johnson, 228 Va. 249, 252-53, 321 S.E.2d 287, 289 (1984).

[55] Op. of Deputy Comm'r at 6, *Crump* (VWC File No. 228-52-25); *Gibson* (VWC File No. 228-52-24).

ment decision, whether real or imaginary, were not an actual risk of employment for either of the victims.

After conducting separate hearings on the issue, the circuit court judge and deputy commissioner both found that the murders did not arise out of employment. The decisions by the circuit court and deputy commissioner allowed the wrongful death actions to proceed to trial.[56]

II. Conclusion

Motive is not outcome determinative in analyzing whether injuries resulting from violence between coworkers arise out of employment under the Act. The proper inquiry is a distillation of the actual risk test rather than a substitute analysis based solely upon the aggressor's state of mind. This interpretation of the analysis is consistent with the objective viewpoint applied in the actual risk test for coverage determinations. A misplaced emphasis upon the assailant's motive creates a red herring that distracts from the decisive coverage inquiry—whether a reasonable person would consider a risk of assault and battery to be inherent in the nature of the victim's employment. Regardless of the motive, a causal relationship must be shown between the injury and the conditions of the employment to establish coverage under the Act.

---

[56] The *Crump* case was scheduled for trial first and resulted in a jury verdict of $3.1 million against American HomePatient. Although the coverage decision and verdict were appealed, the *Crump* and *Gibson* cases were settled before an appellate disposition.