

Virginia Workers' Compensation Commission's Likely Evaluation of Compensability for Coronavirus (COVID-19) Claims



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Five Potential Pathways to Compensability

1. Injury by Accident;
2. Occupational Disease - Virginia Code §65.2-400;
3. Ordinary Disease of Life - Virginia Code §65.2-401;
4. Respiratory Disease Presumption - Virginia Code §65-2-402(A); and,
5. Infectious Disease Presumption - Virginia Code §65-2-402.1.

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Injury By Accident

Claims: Not likely.

Possible Rare Exception: Needle Stick

Standard: Injury by accident and obvious sudden mechanical or structural change in the body.

Burden: Preponderance of the evidence.

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Occupational Disease - Va. Code §65.2-400

Claims: Not likely.

Standard: Set forth in Virginia Code §65-2-400.
Does not cover diseases to which the general public is exposed.

Burden: Preponderance of the evidence.

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Ordinary Disease Of Life - Va. Code §65.2-401

Claims: Likely.

Standard: Set forth in Virginia Code §65.2-401.

1. That the disease exists and arose out of and in the course of employment as provided in §65.2-400 with respect to occupational diseases and did not result from causes outside of employment; and,
2. That one of the following exists:
 - a) It follows as an incident of occupational disease as defined in this title; or
 - b) It is an infectious or contagious disease contracted in a hospital or laboratory or nursing home as defined in §32.1-123, or while otherwise engaged in the direct delivery of those volunteer emergency rescue personnel and those volunteer emergency rescue personnel referred to in §65.2-101; or
 - c) It is characteristic of the employment and was caused by conditions peculiar to such employment.

Burden: Clear and convincing evidence (not a mere probability).

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Potential Defense Argument

- Cannot establish by clear and convincing evidence that it “did not result from causes outside of the employment”, or that it “arose out of and in the course of the employment.”
- Known documented exposure likely to be important consideration

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Illustrative Cases - Virginia Code §65.2-401

- Lindenfeld v. City of Richmond Sheriff's Office, Record No.: 0790-97-2 (November 4, 1997) (tuberculosis not compensable).
- Central State Hospital/Commonwealth of Virginia v. Beckner, Record No.: 1720-07-2 (March 25, 2008) (MRSA compensable).
- Genie Co. v. Hammer, 32 Va. App. 257 (2000) (eczema not compensable).
- Trana v. Virginia Commonwealth University/Commonwealth of Virginia, JCN: VA00000994316 (August 30, 2016) (asthma not compensable).
- Price-Jones v. Sentara Healthcare, JCN: VA00000996405 (January 27, 2016) (mold allergy not compensable).

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Illustrative Cases - Virginia Code §65.2-401

- Tibebu v. Carlson Holdings, Inc., JCN: VA0001234845 (August 4, 2017) (asthma/reactive airway diseases compensable).
- Breeding v. Department of Motor Vehicles, VWCC No.: 231-24-98 (May 11, 2009) (respiratory complaints not compensable).
- Bullock v. Carpenter Co., JCN: VA02000031201 (October 18, 2019) (contact dermatitis not compensable).
- Creasy v. MeadWestvaco Corp., VWCC No.: 223-37-23 (April 5, 2006) (dermatitis compensable).
- Trestle v. City of Suffolk, VWCC No.: 171-94-57 (May 1, 1997) (pneumonia and respiratory symptoms compensable).
- Bath v. Olinger, Record No.: 1203-16-14 (2016) (reactive airway disease compensable).

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Illustrative Cases - Virginia Code §65.2-401

- Holbrook v. Phoebes Physicians, P.C., VWCC No.: 210-58-69
(February 14, 2004) (Hepatitis C not compensable).
- Rains-Salvador v. Valley Contracting, LLC, JCN: VA020000144147
(January 7, 2015) (salmonella not compensable).
- Fairchild v. Therma-Tru Corp., JCN: VA00000066146
(August 14, 2012) (asthma not compensable).
- Hameldar v. Cargill Turkey Production, LLC, JCN: VA00000459282
(November 20, 2012) (asthma not compensable).
- Allison v. Clean Quest Kirby By Techran, Inc., VWCC No.: 203-68-58
(December 28, 2001) (allergic rhinitis not compensable).

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Illustrative Cases - Virginia Code §65.2-401

- Morton v. Dial, Inc., VWCC No.: 213-93-61
(April 5, 2004) (bacterial meningitis not compensable).
- Beaty v. Banta Book Group, VWCC No.: 188-30-75
(March 16, 1999) (Hepatitis C not compensable).
- Alston v. Care Advantage, Inc., VWCC No.: VA0000156765
(March 21, 2011) (MRSA not compensable).
- Kane-Ashworth v. Medshare of Central Virginia, VWCC No.: 185-78-22
(July 17, 2000) (TB not compensable).
- Bradley v. James Madison University, JCN's VA00000549091,
VA02000016484 (November 13, 2014) (asthma not compensable).

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Respiratory Disease Presumption - Va. Code §65-2-402(A)

Claims: Likely.

Standard: Rebuttable presumption covered for:

1. A “respiratory disease.”
2. Resulting in death or resulting in total or partial disability.
3. To a protected class: firefighter or Department of Emergency Management hazardous materials officer.
4. Found free of respiratory disease in pre-employment, if performed.
5. No years of service requirements.
6. No documented exposure required.

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To rebut presumption, employer must establish by preponderance of the evidence:

- Respiratory disease not caused by work; and
- There was a non-work-related cause of respiratory disease.

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Potential Defense Argument

- Coronavirus is not a “respiratory disease”
not all persons exhibit respiratory symptoms
or the presumption has been rebutted.

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Illustrative Case Law

- City of Norfolk v. Lilliard, 15 Va. App. 424 (1992)
- Bass v. City of Richmond, 258 Va. 103 (1999)
- Woody v. Henrico County Division of Fire, Record No.: 1254-02-4 (2002)
- Tomes v. James City (County of) Fire, Record No.: 2450-01-4 (2002)

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Infectious Disease Presumption - Va. Code §65-2-402.1

Claims: Likely – But will likely fail.

Standard: Set forth in Virginia Code § 65-2-402.1.
Rebuttable presumption covered for:

1. “Hepatitis, meningococcal meningitis, tuberculosis or HIV causing the death of, or any health condition or impairment resulting in total or partial disability”.
2. 15 protected categories of first responders.
3. Documented occupational exposure to blood or bodily fluids required.
4. Statute appears to have been drafted to only cover the specified diseases.
5. Ambiguity in statute with phrase “any health condition or impairment” may be asserted.
6. No years of service requirement.

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To rebut, employer must establish by preponderance of the evidence:

1. Disease not caused by work; and
2. There was a non-work-related cause of disease.

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Key Take-Aways

1. Claims resulting in respiratory symptoms to firefighters and Department of Emergency Management hazardous materials officers will trigger Virginia Code §65.2-402(A) presumption and will be very difficult to rebut.
2. The remaining asserted claims likely analyzed under Virginia Code §65.2-401 and will be very fact-specific. Compensability decision driven mostly by three key factors:
 - a) medical opinions expressed;
 - b) known exposure(s) in and away from work; and,
 - c) whether healthcare¹ employee under Code §65.2-401(2)(1)

1. Hospital, lab, nursing home, sanitarium, emergency rescue personnel, and direct delivery of healthcare.

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Adjuster Defense Tips

1. Ensure Positive Coronavirus Diagnosis as Opposed to Mere Symptoms.
2. Get Recorded Statement Promptly
 - a) Establish out-of-work exposures, if possible.
 - b) Travel to known hot spots.
3. Is there a Definitive Medical Opinion of Causation?

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Questions?

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Employer Civil Liability for Third Party Claims?

- Possible civil liability if the claim is brought by a “stranger” to the employment.
- Must demonstrate the employer’s (or an agent’s) negligence caused the third party to contract the virus.

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Burden of Proof

- The “reasonable person/business”
- Must prove by a preponderance of the evidence that the virus was contracted as a result of the negligence of the employer.

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Key Take-Aways

- Employers complying with the CDC recommendations with no known infected personnel are likely not to be found negligent.
- Causation would likely be difficult to prove in the absence of known infected employees.

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Working From Home (WFH) Risks?

- Many are transitioning to working from home for the first time.
- Injuries at home can create compensable claims.
- Must prove the injury arose out and in the course of employment.

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Employers should provide proper guidance to employees transitioning to WFH

- Provide clear communication regarding the timeline of the policy.
- Encourage employees to designate a discrete office within the home (reduce the number of places where an injury could occur).
- Emphasize this is not “flex scheduling.”
Work should still be done within business hours.
- Avoid out-of-home travel except as authorized (avoid road risks).
- Specify job duties and expectations in writing (clearly define what is in course of employment).
- These elements should be made into a clear WFH Policy within the employee handbook.

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Marketing obligations: What effect does COVID-19 have on an injured worker's duty to market?

- COVID-19 will likely limit or possibly eliminate an injured worker's duty to market (while social distancing Orders are in effect)
- Executive Order 55 (2020) Stay at Home Order due to COVID-19

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May only leave home for the following:

- Obtaining food, beverages, goods, or services as permitted in Executive Order 53;
- Seeking medical attention, essential social services, governmental services, assistance from law enforcement, or emergency services;
- Taking care of other individuals, animals, or visiting the home of a family member;
- Traveling required by court order or to facilitate child custody, visitation, or child care;

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May only leave home for the following:

- Engaging in outdoor activity, including exercise, provided individuals comply with social distancing requirements;
- Traveling to and from one's residence, place of worship, or work;
- Traveling to and from an educational institution;
- Volunteering with organizations that provide charitable or social services; and
- Leaving one's residence due to a reasonable fear for health or safety, at the direction of law enforcement, or at the direction of another government agency.

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Practical Take-Aways of Marketing During COVID-19:

- Looking for work is not specifically allowed, but the restrictions will likely place practical limitations on marketing.
- Online marketing may be the best option and should only be limited by job availability.
- While employment is down some segments are seeing a spike in demand.
- There is no prohibition against marketing as of now, but we should understand the practical limitations during this time.

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Paid sick leave while under an Award for Indemnity Benefits?:

- Families First Coronavirus Response Act (FFCRA) signed into law March 19, 2020
- Includes the Emergency Paid Sick Leave Act (EPSLA)
- Employers with 500 or fewer employees must provide paid sick leave.

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Can employers receive a credit when paying sick leave and Workers' Compensation benefits?

- Yes!
- The purpose of the Workers' Compensation Act is to compensate injured workers for lost wages, not to enrich them unjustly. *See Harris v. Diamond Constr. Co., 184 Va. 711, 717 (1946).*
- An injured employee may not be awarded a double recovery for a compensable injury; and an employer may not be required to pay twice for an employee's injury. *See B.P. Solar & Ace Am. Ins. Co. v. Jones, 49 Va. App. 322 (2007).*

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The employer should seek a credit, based on the claimant's double recovery where the injured worker is:

- Under an award of temporary total disability benefits; OR
- Totally disabled as a result of COVID-19, caused by a risk of the employment.

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The employer should immediately cease voluntary indemnity payments and seek credit at hearing where the employee is:

- Not under an award, but entitled to benefits for total disability, during the period where any paid sick leave payments are being issued; OR
- Partially disabled and not under an award, the employer should cease any voluntary indemnity payments while the claimant is totally disabled by COVID-19.

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The employer should file and Application for Hearing and Suspend Benefits where the employee is:

- Partially disabled but under an award for temporary total disability; OR
- Partially disabled and under an award for TPD.

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Questions?

Thank you!

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September 17, 2020



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