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THE REQUIREMENTS FOR A WILLFUL MISCONDUCT DEFENSE TO WORKERS' COMPENSATION CLAIMS IN VIRGINIA

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In Virginia, a willful misconduct defense can be a complete bar to a claim for benefits. While the Act sets forth the burden of proof for such a defense, this article examines the issues defendants encounter while advancing a willful misconduct defense.

A willful misconduct defense is governed by Virginia Code section 65.2-306. That statute provides that:

> A. No compensation shall be awarded to the employee or his dependents for an injury or death caused by:
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> 1. The employee's willful misconduct or intentional self-inflicted injury;
> 2. The employee's attempt to injure another;
> 3. The employee's intoxication;
> 4. The employee's willful failure or refusal to use a safety appliance or perform a duty required by statute;
> 5. The employee's willful breach of any reasonable rule or regulation adopted by the employer and brought, prior to the accident, to the knowledge of the employee; or
> 6. The employee's use of a nonprescribed controlled substance … .[1]

The defendants, as the parties asserting the defense, bear the burden of proof in proving its applicability.[2] Moreover, whether a claimant was guilty of willful misconduct is a question of fact to be resolved by the Commission.[3]

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[1] Va. Code Ann. § 65.2-306.

[2] Watford v. Colonial Williamsburg Found., 413 S.E.2d 69, 71, 13 Va. App. 501, 503 (1992).

[3] *Id.*, 13 Va. App. at 505.

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I. Legal Standard

To prevail on a willful misconduct defense, the defendants must establish that a reasonable safety rule existed; the rule was known to the employee; the rule was for the employee's benefit; and the employee intentionally undertook to perform an act forbidden by the rules that proximately caused the employee's injury.[4] It is not necessary for the defendants to show that the employee, having the rule in mind, determined to break it; it is enough to show that, knowing the rule, the employee intentionally performed the forbidden act.[5]

II. Reasonableness of a Safety Rule and Informing the Employee of the Promulgated Safety Rule

In asserting a willful misconduct defense, the defendants must establish that the rule in question is reasonable and known to the employee.[6] Whether a rule is reasonable is a question of fact to be decided by the Commission. The Commission in *Harley v. Prince William County Public* considered whether a safety rule promulgated by the employer and known to the claimant was reasonable given the totality of the circumstances.[7] The employer had adopted a rule prohibiting the claimant from lifting more than ten pounds.[8] The claimant testified that she was aware of the rule and knew she was violating the rule.[9] The Commission held, however, that based upon the scope of the claimant's job duties and the circumstances of her employment, the ten-pound rule was not a reasonable one that the claimant was able to obey.[10] Compliance with the rule would have rendered the claimant incapable of performing her assigned job duties. Such a rule is considered unreasonable, and in this context the claimant had a valid reason for her inability to obey the rule.[11]

Assuming that a rule promulgated by the employer is reasonable, an employer may rely on a workplace safety rule that has been presented to an employee either in writing or orally.[12] A defendant's failure to notify the employee of the safety rule can be fatal to the defense.[13] The Commission in *Alvarenga* considered whether a safety rule was properly communicated to the employee before the date of

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[4] Mills v. Virginia Elec. & Power Co., 90 S.E.2d 124, 127 197 Va. 547, 552 (1955).

[5] Oudom Saythong v. Phoenix Packaging Operations PA Mftrs. Ass'n Ins. Co., JCN VA00001818213 2 (Nov. 5, 2021) (citing Layne v. Crist Elec. Contractor, Inc., 64 Va. App. 342, 355 (2015); and Riverside & Dan River Cotton Mills, Inc. v. Thaxton, 161 Va. 863, 872 (1934)).

[6] Jones v. Crothall Laundry & New Hampshire Ins. Co., VWC File No. 1070-18-4 (Feb. 12, 2019) (citing Layne v. Crist Elec. Contractor, Inc., 64 Va. App. at 349–50 (quoting Owens Brockway v. Easter, 20 Va. App. 268, 271 (1995)).

[7] *See generally* Harley v. Prince William Cnty. Pub., JCN VA00001861877 (Sep. 7, 2022).

[8] *Id.* at 4.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Layne v. Crist, 64 Va. App. 342, 351 (2015).

[13] *See generally* Alvarenga v. Atlantic Craftsman *LLC*, JCN VA02000035643 (Mar. 7, 2023).

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injury. The deputy commissioner found that the testimony of the business owners established an oral safety rule communicated in its entirety to all employees.[14] On appeal, the Commission held that based on the employer's inconsistent testimony, the defendants had failed to prove by preponderance of the evidence that any safety rule was communicated to the claimant before the accident.[15] The decision was reversed on appeal.

A similar conclusion was reached in *Gristo*.[16] There, the defendants asserted a willful misconduct defense. At the time of the fall, the employee was traversing a board that had been placed as a bridge into property that was under construction.[17] The defendants stated that claimant and other employees were told several times not to use the board as a walkway.[18] The Commission held that the evidence did not preponderate to establish that it was known to the claimant.[19] The Commission further held that testimony that people were told does not prove the existence of a safety rule that was known to the claimant.[20]

Moreover, in asserting that a rule was known to the employee, the defendants must affirm that the rule was strictly enforced. An employer's failure to enforce the rule negates the defense, as the employer must demonstrate its efforts to see that its employees comply with a workplace safety rule.[21] Enforcement requires a bona fide effort on behalf of the employer to require claimant and other employees to fully comply with the rule at all times.[22] The Commission in *Gristo* considered whether there was bona fide enforcement of an alleged safety rule. The Commission held that the testimony that the use of such a board as a walkway was prohibited was not credible, given the admission that the board was repeatedly used over the course of six to eight weeks without any apparent consequences.[23]

III. The Rule Is for the Employee's Benefit and Proximate Cause

Establishing that a rule was promulgated for an employee's benefit may be relatively easy, but establishing that the act was undertaken intentionally and proximately caused the injury can be difficult. Defendants must show that the employee intentionally performed the forbidden act that proximately caused the employee's injury.[24] Whether claimant's willful misconduct was a proximate cause of the employee's accident presents issues of fact to be decided by the Commission.

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[14] *Id.* at 1.

[15] *Id.* at 4.

[16] *See generally* Gristo v. Miguels Carpentry DBA, JCN VA02000034188 (Aug. 29, 2022).

[17] *Id.* at 3.

[18] *Id.*

[19] *Id.* at 4.

[20] *Id.*

[21] Jones v. Crothall Laundry, 69 Va. App. 767, 778 823 S.E.2d 37, 42–43 (Feb. 12, 2019).

[22] *Gristo*, VWC File No. VA02000034188, at 3.

[23] *Id.* at 4.

[24] Spruill v. C.W. Wright Constr. Co., 8 Va. App. 330, 334, 381 S.E.2d 359, 360–61 (1989).

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Proximate cause is the act or omission, which in natural and continuous sequence, unbroken by an intervening cause, produces the event, and without which that event would not have occurred.[25]

The court of appeals considered in *Mizelle* whether the claimant's failure to wear a seatbelt, in violation of a well-established safety rule, was the proximate cause of his injuries.[26] On appeal, the claimant argued that the Commission erred because there was insufficient credible evidence to prove that his injuries were proximately caused by his failure to wear his seatbelt.[27] He further contended that there was no credible evidence that his injuries would have been prevented by wearing a seat belt.[28] The court of appeals held that it was uncontested that claimant was not wearing his seat belt when his accident occurred and that—when he struck a dump truck—he was ejected from his vehicle and landed on the pavement. Because the Commission found that this claimant's injuries were proximately caused by his failure to wear his seat belt, which resulted in his ejection from the truck, and that the evidence supporting that finding was uncontested and uncontroverted, the ruling would not be disturbed on appeal.[29]

The Commission and the court of appeals reached a different conclusion in *Carlton v. Smithfield Packing Co*.[30] In *Carlton*, the employee was driving his employer's truck while looking for a place to get fuel.[31] After making a wrong turn, he sought directions in a parking lot.[32] The employee unbuckled his seat belt so he could lean out the window to get directions. A cyclist then reached in and pulled the employee out of the truck. After an altercation, the truck rolled forward over the employee's left foot. The employee acknowledged that he was not wearing his seat belt when he was pulled from his truck. At the hearing, the employer argued that the claimant was barred from receiving benefits due to the claimant's willful misconduct, namely, his failure to wear a seat belt.[33] Although the claimant acknowledged that he unbuckled his seat belt when he asked for directions and did not reattach it, on these facts there was no evidence that the failure to wear the seat belt actually caused the injury.[34] The court of appeals affirmed the Commission's decision, holding that circumstances totally unrelated to the safety considerations that underpinned the employer's seat belt rule

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[25] *Crothall Laundry*, 69 Va. App. at 777, 823 S.E.2d at 42.

[26] Mizelle v. Holiday Ice, Inc. VWC File No. VA00001515696 (June 18, 2019), *aff'd* R. No. 1115-19-1 (Va. Ct. App. Mar 10, 2020).

[27] *Id.* at 5.

[28] *Id.*

[29] *Id.*

[30] Carlton v. Smithfield Packing Co., VWC File No. 179-50-84 (1998), *aff'd* 29 Va. App. 176, 510 S.E.2d 740 (1999).

[31] *Id.* at 2 (1998).

[32] *Id.*

[33] *Id.* at 6.

[34] *Id.* at 2.

proximately caused the employee's injury.[35] Therefore, the employer failed to establish a willful misconduct defense.

IV. Procedural Requirements for Asserting a Willful Misconduct Defense

The Commission has the authority to make rules for carrying out the provisions of the Act.[36] If the employer intends to rely upon a defense under section 65.2-306 of the Act, it must give the employee (and file with the Commission no less than fifteen days before the hearing) a notice of its intent to make such a defense, together with a statement of the particular act relied upon as showing willful misconduct.[37] Failure to comply with the requirements set out by the Commission may preclude a defendant from asserting the defense.

In addition, Rule 1.10 requires that the employer articulate with sufficient specificity the particular act upon which it relies so as to place the employee and Commission on notice of the factual basis of its defense.[38] A mere general allegation that the claimant was performing an unspecified prohibited activity at the time of the accident is insufficient to comply with the rule.[39] The requirement for specificity allows the claimant the opportunity to provide relevant evidence to rebut specific allegations of willful misconduct.[40] The rule also enhances administrative economy since hearings can be limited to the admission of relevant evidence.[41]

The defendants were precluded from asserting the defense in *Campbell v. Lowes of Short Pump Virginia* for failure to provide timely notice of the intent to use the defense.[42] In *Campbell*, the deputy commissioner denied the employer's request to proceed with the assertion of a willful misconduct defense. The employer's counsel conceded that a specific written notice of its defense had not been given to the claimant or the Commission but argued that it had given notice through interrogatory answers. The Commission held that this was insufficient.

On review, the employer argued that the claimant and his attorney had sufficient "actual notice" of the employer's intent to rely on the defense.[43] The Commission held that proof of "actual notice" is insufficient to satisfy Rule 1.10. The Commission further held that there is no provision for satisfaction of the rule by proof of oral notification or actual notice, and no policy or binding authority suggests otherwise.

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[35] Smithfield Packing Co. v. Carlton, 29 Va. App. 176, 183, 510 S.E.2d 740, 743 (Ct. App. 1999).

[36] Va. Code Ann. § 65.2-201(A).

[37] Va. Workers' Comp. Comm'n R. 1.10.

[38] Childress v. Lasco Bathware, VWC File No. 183-75-92 8 (June 18, 1998).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *See generally* Campbell v. Lowes of Short Pump Va., VWC File No. 201-91-57 (Aug. 10, 2001).

[43] Lowes of Short Pump Va. v. Campbell, VWC File No. 201-91-57 3 (Apr. 9, 2002).

In *Childress v. Lasco Bathware*, the employer filed notice that it intended to rely on a defense of willful misconduct.[44] The notice stated that "[p]ursuant to § 65.2-306 of the Ann. Code of Virginia defendants' [*sic*] assert that the claimant's injuries were the result of wilful [*sic*] misconduct under paragraphs (1), (4), and (5), in that at the time of the accident the claimant was performing an activity not within her normal job duties and that she had been warned by the employer not to perform."[45] At the hearing, the claimant moved to strike any defenses related to willful misconduct because the defendant failed to identify the particular act that the claimant violated as required by Rule 1.10. The Commission agreed that the employer never identified the particular act upon which it relied to constitute willful misconduct. The Commission further held that as a result of the employer's non-specific notice of a willful misconduct defense, both the claimant and the Commission were left to speculate as to the particular act or acts upon which the employer relied. The Commission further held that it is unreasonable to expect the claimant to speculate on the myriad possibilities for the allegation of misconduct; the employee should not have to prepare contingent defenses relating to every possible act of misconduct that the employer's evidence might reflect. For these reasons, the notice was insufficient.

V. Willful Misconduct versus Gross Negligence

One last element that defendants should consider is the threshold showing needed to constitute willful misconduct. Practitioners often confuse gross negligence with willful misconduct. It has been often held that negligence, regardless of how gross, will not bar recovery of workers' compensation benefits.[46] Willful misconduct requires something more than negligence. The phrase *willful* imports more than a mere exercise of the will in doing the act.[47] It imports a wrongful intention.[48]

The threshold of wrongful intention and gross negligence was considered in *Buzzo v. Woolridge Trucking, Inc*.[49] In that case, the employee was killed while transporting lumber for the employer. A deputy commissioner denied benefits, holding that the employee's willful misconduct barred compensation. The decision was appealed for a determination whether the employer met its burden to establish willful misconduct. The Commission's decision was reversed.

The court of appeals in *Buzzo* held that the facts were insufficient to support the finding of willful misconduct. It further held that proof of a violation of a statute through negligence, without more, does not support of a finding of willful misconduct.

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[44] Childress v. Lasco Bathware, VWC File No. 183-75-92 (June 18, 1998).

[45] *Id.* at 4.

[46] Spruill v. C.W. Wright Constr. Co., 8 Va. App. 330, 381 S.E.2d 359 (1989).

[47] Harbin v. Jamestown Village Joint Venture, 16 Va. App. 190, 428 S.E.2d 754 (1993).

[48] *Id.*

[49] Buzzo v. Woolridge Trucking Inc., 17 Va. App. 327, 437 S.E.2d 205 (Nov. 23, 1993).

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VI. Conclusion

Willful misconduct is a potent defense upon which defendants may rely in defending against claims for benefits under the Virginia Workers' Compensation Act. If an employee intentionally breaks a reasonable and known safety rule that is meant to protect the employee, practitioners should investigate this defense and be mindful of the procedural requirements to successfully pursue the defense under the Act.

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