VAN BUREN v. AUGUSTA COUNTY - WHAT'S ALL THE FUSS ABOUT?

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Introduction

It is fair to say that the Court of Appeals' decision in *Van Buren v. Augusta County*, 66 Va. App. 441, 787 S.E.2d 532 (2016), has caused enduring consternation in the workers' compensation defense bar. The decision should not be controversial, for it stems directly from longstanding and previously applied legal principles.

Basic Principles

I

In *Aistrop v. Blue Diamond Coal Co., Inc.*, 181 Va. 287, 24 S.E.2d 546 (1943), a wrongful death action, the plaintiff alleged that "poisonous fumes and gases . . . entered the . . . lungs of plaintiff's intestate which after a lapse of time and continued exposure to said gases and fumes resulted in a weakening of [his] body . . . [and ultimately death]." *Id.* at 290, 24 S.E.2d at 547. The defendant demurred on the ground that the Workers' Compensation Act provided the plaintiff's sole remedy, and the trial court sustained the demurrer. *Id.* at 291, 24 S.E.2d at 547. The Supreme Court's reasoning in support of its reversal includes this discussion:

> "'[I]njury of gradual growth, . . . not the result of some particular piece of work done or condition encountered on a definite occasion, but 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.'"
>
> . . . .
>
> There is no allegation as to the length of the "lapse of time" or the duration of the "continued exposure" to which the decedent was subjected. Nor does the notice of motion for judgment allege the duration of the period during which the decedent was being "gradually" suffocated and poisoned. Under the allegation the continued exposure and gradual suffocation could have taken place on a single day, or it may have extended

> over a considerable period of time. In other words, the allegation is broad enough to cover an event which may be actionable at law or one which which may be compensable under the provisions of the workmen's compensation law.

Id. at 293, 295, 24 S.E.2d at 548, 549 (citation omitted).

II

"Our decisions have always required proof of an 'accident, identifiable incident, or sudden precipitating event.' Such events are inevitably 'bounded with rigid temporal precision.'" *Morris v. Morris*, 238 Va. 578, 588, 385 S.E.2d 858, 864 (1989) (emphasis added; citation omitted).

Previous "Identifiable Incident" Cases

I

In *Southern Express v. Green*, 257 Va. 181, 509 S.E.2d 836 (1999), the claimant suffered chilblains after working in a walk-in cooler for more than four hours. *Id.* at 183-84, 509 S.E.2d at 837. Both the Commission and the Court of Appeals found for the claimant. *Id.* at 185, 509 S.E.2d at 838. On further appeal, the Supreme Court agreed that the claimant had established an injury by accident. *Id.* at 188-89, 509 S.E.2d at 840. The high court then addressed the employer's reliance on *Morris*:

> The only remaining question, the one that Southern Express does challenge, is whether exposure to cold temperature in a cooler for approximately four hours during a shift of work constitutes an identifiable event or incident. Citing *Morris*, Southern Express argues that such a four-hour exposure to the cold is not an event "bounded by rigid temporal precision." 238 Va. at 589, 385 S.E.2d at 864. Rather, Southern Express asserts that Green's injury resulted from repetitive trauma, continuing physical stress, or a cumulative event. We do not agree.
>
> The evidence in this case shows that Green's chilblains were not an "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 . . . ." *Aistrop*, 181 Va. at 293, 24 S.E.2d at 548. (Emphasis added). Instead, the chilblains were "the result of some particular piece of work done or condition encountered on a definite occasion . . . ." *Id.* In other words, Green's chilblains resulted from a single exposure to cold temperature on a definite occasion during the performance of a specific piece of work, i.e., an "identifiable incident." *Morris*, 238 Va. at 589, 385 S.E.2d at 865. It was not caused by repeated exposures over a period of months or years.

S. Express, 238 Va. at 189, 509 S.E.2d at 840-41.

II

In *Virginia Equipment Development v. Hinebaugh*, R. No. 0928-01-1 (Va. Ct. App. Feb. 12, 2002), the claimant, "in a bent position, had been breaking into a catch basin with a two-pound maul (sledgehammer) for two to three hours." *Id.* at 2. He testified, "'I got up from beating it and went over to grab a pipe and as I started to walk towards the ditch to get the pipe, I got a real tingling and a numbness in my back. . . . [B]efore I could get to the pipe, my back went out.'" *Id.* The Court of Appeals affirmed the Commission's finding for the claimant as follows:

> Claimant did not gradually develop this back pain. He suddenly felt the "jolt" after standing up and beginning to walk, after swinging a two-pound hammer in a bent-over position for several hours on March 31, 2000. The injury resulted from this single identifiable incident "on a definite occasion during the performance of a specific piece of work." *Southern Express*, 257 Va. at 189, 509 S.E.2d at 841.

Hinebaugh at 8.

III

In *Hoffman v. Carter*, 50 Va. App. 199, 648 S.E.2d 318 (2007), the claimant (Carter) "was performing demolition work on plaster walls inside a house." *Id.* at 206, 648 S.E.2d at 322. Despite efforts to ventilate the work area,

> "it got really cloudy in [the house] from the dust," because "the stuff was really thick in the air." Although respiratory masks were available, Carter chose not to wear one. After working three to four hours, Carter noticed "a lot of dust and stuff in [his] nostrils[,]" and he began "coughing the stuff up pretty much." The following day, Carter continued "coughing up [ ] milky phlegm[,]" and left work at 1:00 p.m.

Id.

The claimant in *Hoffman* developed a respiratory ailment following his exposure to dust. *Id.*, 50 Va. App. at 207-08, 648 S.E.2d at 322. The Commission found that he had suffered an injury by accident. *Id.* at 209, 648 S.E.2d at 323. On appeal, the Court of Appeals described the state of the law as follows:

> The Act requires proof of "an identifiable incident or sudden precipitating event [that results] in an obvious sudden mechanical or structural change in the body." *Morris v. Morris*, 238 Va. 578, 589, 385 S.E.2d 858, 865 (1989). In contrast, "a gradually incurred injury is not an injury by accident within the meaning of the Act." *Dollar General Store v. Cridlin*, 22 Va. App. 171, 175, 468 S.E.2d 152, 154 (1996) (citing *Middlekauff v. Allstate Ins. Co.*, 247 Va. 150, 154, 439 S.E.2d 394, 397 (1994)). "Though an injury by accident must be 'bounded with rigid temporal precision,' . . . an injury need not occur within a specific number of seconds or minutes . . . but instead, must occur within a 'reasonably definite time.'" *Id.* (quoting *Brown v. Caporaletti*, 12 Va. App. 242, 243-44, 402 S.E.2d 709, 710 (1991) (internal quotation marks omitted)).

Hoffman, 50 Va. App. at 212-13, 648 S.E.2d at 325. Citing and discussing *Southern Express*, the Court of Appeals affirmed the Commission's finding in favor of the claimant:

> In the present case, Carter testified that he worked three to four hours when he noticed "a lot of dust and stuff in [his] nostrils[,]" and he began "coughing the stuff up pretty much." He continued coughing and left work early the next day, and went to a physician at the first available opportunity. Therefore, we hold that the evidence is sufficient to support a

> finding that Carter's exposure to plaster dust was "bounded by rigid temporal precision," and thus constituted "an identifiable incident."

Hoffman at 213-14, 648 S.E.2d at 325.

IV

In *Family Dollar Stores, Inc., v. Presgraves*, R. No. 0814-10-4 (Va. Ct. App. Dec. 21, 2010), the Court of Appeals reasoned as follows in upholding the Commission's decision in favor of the claimant:

> In this case, the evidence shows that the event, which precipitated Presgraves's injuries, was the cranking of a handle for ten to thirty minutes, which is not an activity that was normal, repetitive work required by his position. The evidence further shows that the cervical spine and lumbar spine injuries were not an "'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 . . .,'" but was " 'the result of some particular piece of work done or condition encountered on a definite occasion.'" *Southern Express*, 257 Va. at 189, 509 S.E.2d at 841 (emphasis in original) (quoting *Aistrop v. Blue Diamond Coal Co.*, 181 Va. 287, 293, 24 S.E.2d 546, 548 (1943)). Presgraves's injuries were not caused by gradual growth or repetitive acts, but resulted from the single event of cranking the handle on a definite occasion during the performance of the specific piece of work such that it was an identifiable incident. The causative event occurred within the course of ten to thirty minutes, which the commission properly determined was a reasonably definite time period.

Presgraves, R. No. 0814-10-4, at 6.

V

In *Preston v. DBHDS/Central Virginia Training Center*, VWC File No. VA00000-443721 (Aug. 14, 2014), the claimant, a CNA,

> consistently related her back injury to assisting a 200-300 lb. patient wearing a leg cast onto and off of an x-ray table on April 18, 2011. . . . The claimant considered the task difficult, requiring all of her strength. The claimant also moved the man off the x-ray table, repeating the process.

> According to the claimant's testimony, the whole process. . . . lasted five to ten minutes.

Id. at 2. The claimant "'repeatedly reported that she did not experience pain in her back until the next morning.'" *Id.* at 2.

The Deputy Commissioner found for the claimant in *Preston*. *Id.*, VWC File No. VA00000443721, at 2. On review, one of the employer's defenses was the absence of sudden or mechanical changes in the claimant's body. *Id.* at 1. In upholding the Deputy Commissioner's finding, the Commission among other things stated as follows: "[The claimant's] doctor testified that a delayed onset of symptoms is consistent with this type of injury, and classified the injury as a sudden mechanical or structural change, opining that the injury stemmed from the April 18, 2011 incident, and occurred in a defined time period. As such, claimant has satisfied her burden of proof." *Id.* at 3.

VI

In *Carpenter v. Augusta Correction Ctr.*, VWC File No. VA00000869715 (Aug. 25, 2014), the claimant was a correctional officer who suffered an injury to her hand and wrist. *Id.* at 1. She "'began to experience pain while shooting multiple rounds in rapid succession over a brief period of time.'" *Id.* at 2. At one point during her testimony the claimant stated that she was injured "'exactly on the 25 yard line'" and then promptly named the place of injury as the 15 yard line. *Id.* at 3. On cross-examination, she "stated that the injury started at the 15 yard line because her hand hurt and she misfired at the 25 yard distance. The claimant explained that she suffered severe pain when she removed her holster after finishing the drill." *Id.* A supervisor "stated that he asked the claimant when the injury happened, and she responded that she did not know." *Id.* at 4.

The Deputy Commissioner in *Carpenter* found that "'[a]lthough the claimant could not state the exact 9 mm round which caused the onset of pain, requiring her to do so would yield a ridiculous result.'" *Id.*, VWC File No. VA00000869715, at 2. The Commission's reasoning in upholding this finding includes the following: "This is not a case where the claimant fired a Glock handgun for several hours and vaguely described a gradual or unknown beginning of symptoms. We agree that the claimant sufficiently identified the onset of her symptoms." *Id.* at 5.[1]

How the Court of Appeals Reached Its Decision in *Van Buren*

Robert Van Buren, Sr., worked as a firefighter. *Van Buren*, 66 Va. App. at 444, 787 S.E.2d at 533. His injury arose from the rescue of "an elderly man who had fallen in the shower. The man weighed approximately 400 pounds and had broken his leg during the fall. When Van Buren arrived, the man was crumpled awkwardly in the shower, his broken limb crushed under the weight of his body." *Id.*

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[1] Although it is not expressly a "specific piece of work" case, *R & R Construction Corp. v. Hill*, 25 Va. App. 376, 488 S.E.2d 663 (1997), deserves mention here. In *Hill*, the claimant was injured when he moved "five to seven five-gallon paint buckets from one location to another within a storage shed." *Id.* at 378, 488 S.E.2d at 664. The Commission found for the claimant. *Id.* The employer argued on appeal that the "claimant's injury was gradually incurred over the course of moving several paint buckets and was not the result of a 'sudden precipitating event.'" *Id.* at 379, 488 S.E.2d at 664. The Court of Appeals reasoned as follows in rejecting this argument:

> [A]n injury or injuries may be caused by one or several "sudden [or immediate] events" that cause the mechanical changes to occur in the body. . . . The fact that the claimant did not or could not identify precisely which bucket or buckets he was lifting when the disc or discs herniated does not constitute a failure to prove that an immediate or sudden event or events caused the discs to herniate.

Id. at 379-80, 488 S.E.2d at 664-65.

Over a 45-minute period Van Buren and other rescuers "used a combination of improvisation, brute strength, and equipment to rescue the injured man." *Van Buren*, 66 Va. App. at 444, 787 S.E.2d at 533. Van Buren and one other rescuer first lifted the injured man using a sheet as a sling under his arms. *Id.* Thereafter Van Buren and other rescuers used towels and then a flat, flexible stretcher to slide the injured man down a hallway to a wheeled stretcher that they used for the final leg to the ambulance. *Id.* at 444-45, 787 S.E.2d at 533-34.

Van Buren became aware of pain in his arm immediately after placing the injured man in the ambulance. *Van Buren*, 66 Va. App. at 445, 787 S.E.2d at 534. "Van Buren testified that he had not initially noticed the pain because the injured man was 'hollering' and because of 'the adrenaline with the call and everything.'" *Id.* Van Buren prevailed before the Deputy Commissioner but lost on review. *Id.* at 446, 787 S.E.2d at 534.

The Court of Appeals first rejected the notion that Van Buren's injury had occurred before July 25, 2014, the date he claimed he was injured. *Van Buren*, 66 Va. App. at 449, 787 S.E.2d at 535.

With the date-of-injury issue out of the way, the Court of Appeals described its task as follows: "That leaves us to review the Commission's legal interpretation of the evidence, the application of the law to that evidence, and the meaning of the relevant statutes. We undertake this review *de novo*." *Van Buren*, 66 Va. App. at 449, 787 S.E.2d at 536.

The Court of Appeals noted that

> The only requirement at issue here is . . . whether Van Buren's injury was caused, statutorily, "by an accident." To prove that an injury occurred by accident, an injured party must show "(1) an identifiable incident; (2) that

> occurs at some reasonably definite time; (3) an obvious sudden mechanical or structural change in the body; and (4) a causal connection between the incident and the bodily change."

Van Buren, 66 Va. App. at 449, 787 S.E.2d at 536 (citation omitted).

The Court of Appeals rejected the Commission's finding that *Morris* controlled Van Buren's case. *Van Buren*, 66 Va. App. at 450, 787 S.E.2d at 536. It discussed the facts in the three consolidated cases that *Morris* addressed and then distinguished Van Buren's case point-by-point:

- The Court of Appeals first found that Van Buren had not engaged in repetitive activity leading up to his injury:

> Van Buren, unlike the claimants in *Morris*, was not engaged in repetitive activity. Installing multiple overhead ceiling panels, unloading and installing seven steel doors, and lifting ninety-six cartons full of fiberglass: any injury resulting from these activities might be attributable to "repetitive trauma," a category of injury not covered by the Workers' Compensation Act. Van Buren, by contrast, was engaged in a variety of actions that involved lifting, holding, twisting, pulling, pushing, grabbing, and bending.

Van Buren, 66 Va. App. at 452, 787 S.E.2d at 537.

- The Court of Appeals next found that Van Buren's injury had not resulted from cumulative events: "Van Buren's injury was not the result of 'cumulative events,' because the forty-five-minute period during which Van Buren aided the injured man provided the necessary rigidity of temporal precision to constitute one 'event.'" *Van Buren*, 66 Va. App. at 452, 787 S.E.2d at 537.

- The Court of Appeals next found that unequivocal medical evidence connected Van Buren's injury to the July 25, 2014, incident:

> [U]nlike the complainants in *Morris*, Van Buren saw a physician who diagnosed his injury as resulting directly from work undertaken on a date

> certain, during a specific event. Dr. LaGrua concluded "to a reasonable degree of medical probability," that Van Buren suffered a cervical herniation "as a result of the twisting, lifting, awkward movements and exertion required to extract the gentleman from the shower, into the bathroom, down the hall, onto the gurney and into the ambulance." This unequivocal medical link between the work performed and the injury sustained distinguishes Van Buren's injury from each of the injuries suffered in *Morris*. As such, we conclude that Van Buren's injury occurred at a reasonably definite time.

Van Buren, 66 Va. App. at 452-53, 787 S.E.2d at 537 (footnote omitted).

The Court of Appeals stated that "Our conclusion is further supported by cases decided since *Morris*." *Van Buren*, 66 Va. App. at 453, 787 S.E.2d at 537. Following a discussion of *Hill*, *Southern Express*, and *Hoffman*, *Van Buren*, 66 Va. App. at 453-55, 787 S.E.2d at 538-39, the Court of Appeals summed up its finding as follows:

> We find the entire rescue undertaken by Van Buren was one "piece of work," and the entire forty-five-minute period was one event, not numerous discrete events. We find that this event was an "identifiable incident" and that Van Buren's disc herniation was a "sudden mechanical or structural change in the body." *Hoffman*, 50 Va. App. at 212, 648 S.E.2d at 325[.] Finally, we find "a causal connection between the incident and the bodily change." *Id.* We agree with the deputy commissioner that, "to require [Van Buren] to pinpoint the exact moment of the onset of pain during an adrenaline[-]fueled rescue attempt would yield a ridiculous and unjust result."

Van Buren, 66 Va. App. at 455-56, 787 S.E.2d at 539 (citation omitted).

"Identifiable Incident" Cases Since *Van Buren*

I

The Court of Appeals added the following footnote to its discussion of the medical evidence that connected Van Buren's injury to the July 25, 2014, incident:

> It would also be wrong to discount the adrenaline Van Buren mentioned. By necessity, firefighters act in the face of dangerous and fast-

> moving situations where life and safety, of both firefighters and those they serve, are in jeopardy. Adrenaline is not only a natural consequence of such work; it is a physical state that often inures to the benefit of all involved (firefighters, the entities employing them, and the citizens they serve). Van Buren acted in the face of an emergency, with an elderly man in extreme pain. To the extent adrenaline masked the exact moment of the onset of pain resulting from an injury incurred in such a scenario, public policy favors treatment of the entire forty-five-minute rescue as the "reasonably definite time" within which the injury occurred.

Van Buren, 66 Va. App. at 453 n.5, 787 S.E.2d at 547 n.5.

In March of this year an unpublished decision of the Court of Appeals called *Van Buren's* reach into question as follows:

> Most importantly, though, this Court, in finding that the claimant in *Van Buren* had suffered an "injury by accident" agreed with the deputy commissioner in that "to require [claimant] to pinpoint the exact moment of the onset of pain during an adrenaline[-]fueled rescue attempt would yield a ridiculous and unjust result." Moreover, *Van Buren* carves out a so-called first responder exception to the rule. Thus, it is inapplicable to the present case.
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> . . . .
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> . . . [T]he claimant in *Van Buren* was involved an adrenaline-fueled rescue attempt, in which the claimant could not possibly pinpoint an exact moment for his injury. Here, appellant was not involved in a similar situation, but rather, doing his daily work, most of which was done on his knees.

Kim v. Roto Rooter Servs. Co., R. No. 1053-16-4, at 6, 7 (Va. Ct. App. Mar. 7, 2017).

In July of this year the Court of Appeals expressly rejected *Kim's* position via a published opinion. In *Riverside Regional Jail Authority v. Dugger*, 68 Va. App. ___, ___ S.E.2d ___, R. No. 0153-17-2 (July 25, 2017), the claimant, a correctional officer, noticed pain in her right knee as she was walking away after a four-hour training session on "'defensive tactics.'" *Id.* at ___, ___ S.E.2d at ___, R. No. 0153-17-2, at 1-2. The

Commission relied on *Kohn v. Marquis*, 288 Va. 142, 762 S.E.2d 755 (2014), and *Van Buren* in ruling for the claimant. *Dugger v. Riverside Regional Jail Auth.*, VWC File No. VA00001117636, at 5-9 (Jan. 3, 2017). The Court of Appeals' affirmance includes this discussion:

> Employer argues that *Van Buren* created a "first responder exception," to the "rigid temporal precision" requirement of *Morris*, and that Dugger cannot claim the exception because she was not under the influence of an adrenaline rush. Employer cites to an unpublished case, *Kim v. Roto Rooter Servs. Co.*, No. 1053-16-4, 2017 Va. App. LEXIS 61 (Va. Ct. App. Mar. 7, 2017), in support of that contention. *Kim* states that "Van Buren carves out a so-called first responder exception to the rule" that a claimant must show a precise and identifiable incident during which the injury occurred. *Id.* at *9. However, we disagree with that dicta, which is based on an incorrect assumption that the "[m]ost important[]" aspect of our holding in *Van Buren* was that Van Buren could not pinpoint exact time of his injury due to an adrenaline rush. *Id.* To the contrary, this Court's reference to Van Buren's adrenaline rush was not the controlling factor, and was secondary to the findings that: (1) the forty-five-minute rescue "was an 'identifiable incident' and that Van Buren's disc herniation was a 'sudden mechanical or structural change in the body;'" (2) there was a causal connection between the rescue and the injury; (3) the injury was sufficiently bound with temporal precision; and (4) his movements during the rescue were not repetitive in nature. *See Van Buren*, 66 Va. App. at 455-56, 787 S.E.2d at 539. Thus, we expressly hold that *Van Buren* did not create a "first responder exception," but rather clarified that, under some circumstances, such as those present in *Van Buren*, *Kohn*, and in this case, a claimant need not be able to pinpoint the exact moment of injury in order for it to be compensable as an "injury by accident" under the Act.

Dugger, 68 Va. App. at ___, ___ S.E.2d at ___, R. No. 0153-17-2, at 10-11 (2017).

II

Besides Dugger, the Commission has recently ruled for two other claimants using "identifiable incident" analysis.

In *Yowell v. Peoplease Corp.*, VWC File No. VA00001115032 (Jan. 10, 2017), the claimant, a mechanic, had no cuts or scabs on his arms when at around 10:00 a.m. he began working under a tractor-trailer "in 'tight quarters'"; he also had no such injuries when he stopped for lunch and then returned to work "around 12:40 p.m. or 1 p.m." *Id.* at 2-3. The claimant stopped for a break "around 1:30 p.m. and while he remained 'kind of on [his] knees,' another mechanic, . . . pointed out that his arm was bleeding. The claimant then noted that he was bleeding from his elbow and had a 'little, half-inch, like cut there.'" *Id.* at 3 (citations omitted). The claimant's medical evidence included this statement: "[T]his treatment for his right elbow is directly related [ ] to a work injury he sustained in September of 2015 . . . . The wound on his right elbow got infected and 24 hours after the injury he went to the emergency room due to increased redness, swelling and drainage from the wound." *Id.* at 4.

The Commission relied on *Southern Express* (not *Van Buren*) to affirm the Deputy Commissioner's finding for the claimant in *Yowell*:

> The preponderance of the evidence shows the claimant sustained the cut to his right elbow within a limited, discrete time period while he was working on the transmission underneath the tractor trailer after lunch. This specific activity, working on the transmission after lunch, rather than an accumulation of various work, caused the claimant's injury. The claimant's injury was not an "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 . . . [but was] the result of some particular piece of work done or condition encountered on a definite occasion . . . ." *See S. Express v. Green*, 257 Va. 181, 189, 509 S.E.2d 836, 841 (1999) (quoting *Aistrop v. Blue Diamond Coal Co.*, 181 Va. 287, 293, 24 S.E.2d 546, 548 (1943)).

Yowell, VWC File No. VA00001115032, at 6.

In *Perry v. City of Manassas*, VWC File No. VA00000647660 (Mar. 29, 2017), the claimant "'engaged in approximately 4 to 4 1/2 hours of scuba diving training within an indoor pool as part of her employment as a City of Manassas Police Officer.'" *Id.* at 2 (quoting Deputy Commissioner's opinion) The medical evidence showed that she had suffered ear trauma during this training. *Id.* at 2. The Commission affirmed the Deputy Commissioner's ruling for the claimant as follows:

> The claimant's injury was not the result of cumulative trauma. As the Deputy Commissioner found, it was "during a single, in-pool, training session during which time she was instructed on how to float, ascend, and descend while utilizing her scuba equipment." (Op. 9.) This event was a single piece of work, just as in *Green*. Exposure to cold temperatures for four hours, under a legal analysis, is qualitatively indistinguishable from encountering the dangers of pressure disequilibrium while diving for four hours. *See Byrd v. Stonega Coke & Coal Co.*, 182 Va. 212, 28 S.E.2d 725 (1944); *Van Buren, Sr. v. Augusta Cnty.*, 66 Va. App. 441, 455, 787 S.E.2d 532, 539 (2016) (entire rescue by firefighter was one "piece of work"). *Cf. Va. Dep't of State Police v. Rose*, VWC File No. 223-22-40 (Mar. 30, 2006) (two-hour firearm training; employee failed to prove identifiable incident resulted in hearing loss).

Perry, VWC File No. VA00000647660, at 5.

Closing Thoughts

The Supreme Court's 1943 decision in *Aistrop* acknowledges the possibility of an "identifiable incident" lasting a whole day:

> There is no allegation as to the length of the "lapse of time" or the duration of the "continued exposure" to which the decedent was subjected. Nor does the notice of motion for judgment allege the duration of the period during which the decedent was being "gradually" suffocated and poisoned. Under the allegation the continued exposure and gradual suffocation could have taken place **on a single day**, or it may have extended over **a considerable period of time**. In other words, the allegation is broad enough to cover an event which may be actionable at law or one

> which which may be compensable under the provisions of the workmen's compensation law.

Id., 181 Va. at 295, 24 S.E.2d at 549 (emphasis added).

The Supreme Court's 1999 decision in *Southern Express* relies on *Aistrop's* reasoning, and *Van Buren* in turn relies on *Southern Express*. Nevertheless, it has been argued that the teaching of *Southern Express* (and *Hoffman* as well) does not extend beyond the realm of injuries from "environmental exposure." The law makes no such distinction. Indeed, *Aistrop* addresses an injury from environmental exposure, and *Aistrop's* teaching is a key component of *Morris's* reasoning. *See id.*, 238 Va. at 585-86, 385 S.E.2d at 862-63. More to the point, *Morris* expressly describes *Aistrop's* environmental-exposure nature, *Morris* at 585, 385 S.E.2d at 862, yet relies on *Aistrop's* reasoning to decide the three non-environmental-exposure cases at issue in *Morris*. Thus, attempts to cabin *Southern Express* and *Hoffman* as environmental-exposure cases are unavailing.

In summary, there is nothing novel in the Court of Appeals' decision in *Van Buren*. To the contrary, the decision is merely the result of the application of legal principles that are venerable yet also vibrant. The Court of Appeals' recent decision in *Dugger* is further confirmation of this fact.