

LD4709180

## HOUSE BILL NO. 2569

Offered January 23, 1995

*A BILL to amend and reenact § 65.1-101, as it is currently effective and as it may become effective, and §§ 65.2-500, 65.2-502, 65.2-503, 65.2-504, 65.2-512 and 65.2-513 of the Code of Virginia, relating to workers' compensation; average weekly wage.*

Patrons—Croshaw, Abbitt, Albo, Behm, Bloxom, Hamilton, Hargrove, Katzen, McDonnell, Nelms, Newman, Nixon, Parrish, Purkey, Shuler, Tata and Watkins; Senator: Chichester

Referred to Committee on Labor and Commerce

**Be it enacted by the General Assembly of Virginia:**

**1. That § 65.1-101, as it is currently effective and as it may become effective, and §§ 65.2-500, 65.2-502, 65.2-503, 65.2-504, 65.2-512 and 65.2-513 of the Code of Virginia are amended and reenacted as follows:**

§ 65.2-101. Definitions.

As used in this title:

"Award" means the grant or denial of benefits or other relief under this title or any rule adopted pursuant thereto.

"Average weekly wage" means:

A. 1. The earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury, divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days during such period, although not in the same week, then the earnings for the remainder of the fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. When the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided that results fair and just to both parties will be thereby obtained. When, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

2. When for exceptional reasons the foregoing would be unfair either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

B. Whenever allowances of any character made to an employee in lieu of wages are a specified part of the wage contract, they shall be deemed a part of his earnings. For the purpose of this title, the average weekly wage of the members of the Virginia National Guard and the Virginia State Defense Force, registered members on duty or in training of the United States Civil Defense Corps of this Commonwealth, and forest wardens shall be deemed to be such amount as will entitle them to the maximum compensation payable under this title; however, any award entered under the provisions of this title on behalf of members of the National Guard or their dependents, or registered members on duty or in training of the United States Civil Defense Corps of this Commonwealth or their dependents, shall be subject to credit for benefits paid them under existing or future federal law on account of injury or occupational disease covered by the provisions of this title.

C. Whenever volunteer firefighters, volunteer lifesaving or volunteer rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, and auxiliary or reserve deputy sheriffs are deemed employees under this title, their average weekly wage shall be deemed sufficient to produce the minimum compensation provided by this title for injured workers or their dependents.

D. The average weekly wage of persons, other than those covered in subdivision C of this definition, who respond to a hazardous materials incident at the request of the Department of Emergency Services shall be based upon the earnings of such persons from their primary employers.

E. Each August 15, the Chairman of the Workers' Compensation Commission shall publish tables of the average weekly wage after being reduced by any deduction for federal or state taxes, or both, and for the Federal Insurance Contributions Act, to be effective the following October 1. Such tables shall be conclusive for the purpose of determining eighty percent of the average weekly wages of an injured employee after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the Federal Insurance Contributions Act made during the period of calculation for the

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60 *employee's average weekly wage for purposes of §§ 65.2-500, 65.2-502, 65.2-503, 65.2-504, 65.2-512*  
61 *and 65.2-513.*

62 "Change in condition" means a change in physical condition of the employee as well as any change  
63 in the conditions under which compensation was awarded, suspended, or terminated which would affect  
64 the right to, amount of, or duration of compensation.

65 "Commission" means the Virginia Workers' Compensation Commission as well as its former  
66 designation as the Virginia Industrial Commission.

67 "Employee" means:

68 A. 1. Every person, including a minor, in the service of another under any contract of hire or  
69 apprenticeship, written or implied, except (i) one whose employment is not in the usual course of the  
70 trade, business, occupation or profession of the employer or (ii) as otherwise provided in subsection B  
71 of this definition.

72 2. Any apprentice, trainee, or retrainee who is regularly employed while receiving training or  
73 instruction outside of regular working hours and off the job, so long as the training or instruction is  
74 related to his employment and is authorized by his employer.

75 3. Members of the Virginia National Guard, whether on duty in a paid or unpaid status or when  
76 performing voluntary service to their unit in a nonduty status at the request of their commander.

77 Income benefits for members of the National Guard shall be terminated when they are able to return  
78 to their customary civilian employment or self-employment. If they are neither employed nor  
79 self-employed, those benefits shall terminate when they are able to return to their military duties. If a  
80 member of the National Guard who is fit to return to his customary civilian employment or  
81 self-employment remains unable to perform his military duties and thereby suffers loss of military pay  
82 which he would otherwise have earned, he shall be entitled to one day of income benefits for each unit  
83 training assembly or day of paid training which he is unable to attend.

84 4. Members of the Virginia State Defense Force.

85 5. Registered members of the United States Civil Defense Corps of this Commonwealth, whether on  
86 duty or in training.

87 6. Except as provided in subsection B of this definition, all officers and employees of the  
88 Commonwealth, including forest wardens, judges, clerks, deputy clerks and employees of juvenile and  
89 domestic relations district courts and general district courts, who shall be deemed employees of the  
90 Commonwealth.

91 7. Except as provided in subsection B of this definition, all officers and employees of a municipal  
92 corporation or political subdivision of the Commonwealth.

93 8. Except as provided in subsection B of this definition, every executive officer, including president,  
94 vice president, secretary, treasurer or other officer, elected or appointed in accordance with the charter  
95 and bylaws of a corporation, municipal or otherwise.

96 9. Policemen and firefighters, sheriffs and their deputies, town sergeants and their deputies, county  
97 and city commissioners of the revenue, county and city treasurers, attorneys for the Commonwealth, and  
98 clerks of circuit courts and their deputies, officers and employees, who shall be deemed employees of  
99 the respective cities, counties and towns in which their services are employed and by whom their  
100 salaries are paid or in which their compensation is earnable.

101 10. Members of the governing body of any county, city or town in the Commonwealth, whenever  
102 coverage under this title is extended to such members by resolution or ordinance duly adopted.

103 11. Volunteers, officers and employees of any commission or board of any authority created or  
104 controlled by a local governing body, or any local agency or public service corporation owned, operated  
105 or controlled by such local governing body, whenever coverage under this title is authorized by  
106 resolution or ordinance duly adopted by the governing board of any county, city, town, or any political  
107 subdivision thereof.

108 12. Except as provided in subsection B of this definition, volunteer firefighters, volunteer lifesaving  
109 or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police and auxiliary  
110 or reserve deputy sheriffs, who shall be deemed employees of (i) the political subdivision or state  
111 institution of higher education in which the principal office of such volunteer fire company, volunteer  
112 lifesaving or rescue squad, volunteer law-enforcement chaplains, auxiliary or reserve police force or  
113 auxiliary or reserve deputy sheriff force is located if the governing body of such political subdivision or  
114 state institution of higher education has adopted a resolution acknowledging such volunteer firefighters,  
115 volunteer lifesaving or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve  
116 police or auxiliary or reserve deputy sheriffs as employees for the purposes of this title or (ii) in the  
117 case of volunteer firefighters or volunteer lifesaving or rescue squad members, the companies or squads  
118 for which volunteer services are provided whenever such companies or squads elect to be included as an  
119 employer under this title.

120 13. Volunteer firefighters, volunteer lifesaving or rescue squad members, volunteer law-enforcement  
121 chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs and any other persons who

respond to a hazardous materials incident upon request of the Department of Emergency Services pursuant to a plan or agreement developed under § 44-146.35 or § 44-146.36, who shall be deemed employees of the Department of Emergency Services for the purposes of this title.

14. Any sole proprietor or all partners of a business electing to be included as an employee under the workers' compensation coverage of such business if the insurer is notified of this election. Any sole proprietor or the partners shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this title.

When any partner or proprietor is entitled to receive coverage under this title, such person shall be subject to all provisions of this title as if he were an employee; however, the notices required under §§ 65.2-405 and 65.2-600 of this title shall be given to the insurance carrier, and the panel of physicians required under § 65.2-603 shall be selected by the insurance carrier.

15. The independent contractor of any employer subject to this title at the election of such employer provided (i) the independent contractor agrees to such inclusion and (ii) unless the employer is self-insured, the employer's insurer agrees in writing to such inclusion. All or part of the cost of the insurance coverage of the independent contractor may be borne by the independent contractor.

When any independent contractor is entitled to receive coverage under this section, such person shall be subject to all provisions of this title as if he were an employee, provided that the notices required under §§ 65.2-405 and 65.2-600 are given either to the employer or its insurance carrier.

However, nothing in this title shall be construed to make the employees of any independent contractor the employees of the person or corporation employing or contracting with such independent contractor.

16. The legal representative, dependents and any other persons to whom compensation may be payable when any person covered as an employee under this title shall be deceased.

17. Jail officers and jail superintendents employed by regional jails or jail farm boards or authorities, whether created pursuant to Article 3.1 (§ 53.1-95.2 et seq.) or Article 5 (§ 53.1-105 et seq.) of Chapter 3 of Title 53.1, or an act of assembly.

B. "Employee" shall not mean:

1. Officers and employees of the Commonwealth who are elected by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate. This exception shall not apply to any "state employee" as defined in § 51.1-101 nor to Supreme Court Justices, judges of the Court of Appeals, judges of the circuit or district courts, members of the Workers' Compensation Commission and the State Corporation Commission, or the Superintendent of State Police.

2. Officers and employees of municipal corporations and political subdivisions of the Commonwealth who are elected by the people or by the governing bodies, and who act in purely administrative capacities and are to serve for a definite term of office.

3. Any person who is a licensed real estate salesperson, or a licensed real estate broker associated with a real estate broker, if (i) substantially all of the salesperson's or associated broker's remuneration is derived from real estate commissions, (ii) the services of the salesperson or associated broker are performed under a written contract specifying that the salesperson is an independent contractor, and (iii) such contract includes a provision that the salesperson or associated broker will not be treated as an employee for federal income tax purposes.

4. Any taxicab or executive sedan driver, provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act.

5. Casual employees.

6. Domestic servants.

7. Farm and horticultural laborers, unless the employer regularly has in service more than two full-time employees.

8. Employees of any person, firm or private corporation, including any public service corporation, that has regularly in service less than three employees in the same business within this Commonwealth, unless such employees and their employers voluntarily elect to be bound by this title. However, this exemption shall not apply to the operators of underground coal mines or their employees. An executive officer who is not paid salary or wages on a regular basis at an agreed upon amount and who rejects coverage under this title pursuant to § 65.2-300 shall not be included as an employee for purposes of this subdivision.

9. Employees of any common carrier by railroad engaging in commerce between any of the several states or territories or between the District of Columbia and any of the states or territories and any foreign nation or nations, and any person suffering injury or death while he is employed by such carrier in such commerce. This title shall not be construed to lessen the liability of any such common carrier or to diminish or take away in any respect any right that any person so employed, or the personal representative, kindred or relation, or dependent of such person, may have under the act of Congress relating to the liability of common carriers by railroad to their employees in certain cases, approved

183 April 22, 1908, or under §§ 8.01-57 through 8.01-62 or § 56-441.

184 10. Employees of common carriers by railroad who are engaged in intrastate trade or commerce.  
185 However, this title shall not be construed to lessen the liability of such common carriers or take away or  
186 diminish any right that any employee or, in case of his death, the personal representative of such  
187 employee of such common carrier may have under §§ 8.01-57 through 8.01-61 or § 56-441.

188 11. Except as provided in subsection A of this definition, a member of a volunteer fire-fighting,  
189 lifesaving or rescue squad when engaged in activities related principally to participation as a member of  
190 such squad whether or not the volunteer continues to receive compensation from his employer for time  
191 away from the job.

192 12. Except as otherwise provided in this title, noncompensated employees and noncompensated  
193 directors of corporations exempt from taxation pursuant to § 501 (c) (3) of Title 26 of the United States  
194 Code (Internal Revenue Code of 1954).

195 B. "Employer" includes (i) any person, the Commonwealth or any political subdivision thereof and  
196 any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal  
197 representative of a deceased employer, using the service of another for pay and (ii) any volunteer fire  
198 company or volunteer lifesaving or rescue squad electing to be included and maintaining coverage as an  
199 employer under this title. If the employer is insured, it includes his insurer so far as applicable.

200 "Executive officer" means the president, vice president, secretary, treasurer or other officer, elected or  
201 appointed in accordance with the charter and bylaws of a corporation. However, such term does not  
202 include noncompensated officers of corporations exempt from taxation pursuant to § 501 (c) (3) of Title  
203 26 of the United States Code (Internal Revenue Code of 1954).

204 "Filed" means hand delivered to the Commission's office in Richmond or any regional office  
205 maintained by the Commission; sent by telegraph, electronic mail or facsimile transmission; or posted at  
206 any post office of the United States Postal Service by certified or registered mail. Filing by first-class  
207 mail, telegraph, electronic mail or facsimile transmission shall be deemed completed only when the  
208 application actually reaches a Commission office.

209 "Injury" means only injury by accident arising out of and in the course of the employment or  
210 occupational disease as defined in Chapter 4 (§ 65.2-400 et seq.) of this title and does not include a  
211 disease in any form, except when it results naturally and unavoidably from either of the foregoing  
212 causes.

213 § 65.2-101. (Delayed effective date) Definitions.

214 As used in this title:

215 "Award" means the grant or denial of benefits or other relief under this title or any rule adopted  
216 pursuant thereto.

217 "Average weekly wage" means:

218 A. 1. The earnings of the injured employee in the employment in which he was working at the time  
219 of the injury during the period of fifty-two weeks immediately preceding the date of the injury, divided  
220 by fifty-two; but if the injured employee lost more than seven consecutive calendar days during such  
221 period, although not in the same week, then the earnings for the remainder of the fifty-two weeks shall  
222 be divided by the number of weeks remaining after the time so lost has been deducted. When the  
223 employment prior to the injury extended over a period of less than fifty-two weeks, the method of  
224 dividing the earnings during that period by the number of weeks and parts thereof during which the  
225 employee earned wages shall be followed, provided that results fair and just to both parties will be  
226 thereby obtained. When, by reason of a shortness of time during which the employee has been in the  
227 employment of his employer or the casual nature or terms of his employment, it is impractical to  
228 compute the average weekly wages as above defined, regard shall be had to the average weekly amount  
229 which during the fifty-two weeks previous to the injury was being earned by a person of the same grade  
230 and character employed in the same class of employment in the same locality or community.

231 2. When for exceptional reasons the foregoing would be unfair either to the employer or employee,  
232 such other method of computing average weekly wages may be resorted to as will most nearly  
233 approximate the amount which the injured employee would be earning were it not for the injury.

234 B. Whenever allowances of any character made to an employee in lieu of wages are a specified part  
235 of the wage contract, they shall be deemed a part of his earnings. For the purpose of this title, the  
236 average weekly wage of the members of the Virginia National Guard and the Virginia State Defense  
237 Force, registered members on duty or in training of the United States Civil Defense Corps of this  
238 Commonwealth, and forest wardens shall be deemed to be such amount as will entitle them to the  
239 maximum compensation payable under this title; however, any award entered under the provisions of  
240 this title on behalf of members of the National Guard or their dependents, or registered members on  
241 duty or in training of the United States Civil Defense Corps of this Commonwealth or their dependents,  
242 shall be subject to credit for benefits paid them under existing or future federal law on account of injury  
243 or occupational disease covered by the provisions of this title.

244 C. Whenever volunteer firefighters, volunteer lifesaving or volunteer rescue squad members,

volunteer law-enforcement chaplains, auxiliary or reserve police, and auxiliary or reserve deputy sheriffs are deemed employees under this title, their average weekly wage shall be deemed sufficient to produce the minimum compensation provided by this title for injured workers or their dependents.

D. The average weekly wage of persons, other than those covered in subdivision C of this definition, who respond to a hazardous materials incident at the request of the Department of Emergency Services shall be based upon the earnings of such persons from their primary employers.

*E. Each August 15, the Chairman of the Workers' Compensation Commission shall publish tables of the average weekly wage after being reduced by any deduction for federal or state taxes, or both, and for the Federal Insurance Contributions Act, to be effective the following October 1. Such tables shall be conclusive for the purpose of determining eighty percent of the average weekly wages of an injured employee after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the Federal Insurance Contributions Act made during the period of calculation for the employee's average weekly wage for purposes of §§ 65.2-500, 65.2-502, 65.2-503, 65.2-504, 65.2-512 and 65.2-513.*

"Change in condition" means a change in physical condition of the employee as well as any change in the conditions under which compensation was awarded, suspended, or terminated which would affect the right to, amount of, or duration of compensation.

"Commission" means the Virginia Workers' Compensation Commission as well as its former designation as the Virginia Industrial Commission.

"Employee" means:

A. 1. Every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except (i) one whose employment is not in the usual course of the trade, business, occupation or profession of the employer or (ii) as otherwise provided in subsection B of this definition.

2. Any apprentice, trainee, or retrainee who is regularly employed while receiving training or instruction outside of regular working hours and off the job, so long as the training or instruction is related to his employment and is authorized by his employer.

3. Members of the Virginia National Guard, whether on duty in a paid or unpaid status or when performing voluntary service to their unit in a nonduty status at the request of their commander.

Income benefits for members of the National Guard shall be terminated when they are able to return to their customary civilian employment or self-employment. If they are neither employed nor self-employed, those benefits shall terminate when they are able to return to their military duties. If a member of the National Guard who is fit to return to his customary civilian employment or self-employment remains unable to perform his military duties and thereby suffers loss of military pay which he would otherwise have earned, he shall be entitled to one day of income benefits for each unit training assembly or day of paid training which he is unable to attend.

4. Members of the Virginia State Defense Force.

5. Registered members of the United States Civil Defense Corps of this Commonwealth, whether on duty or in training.

6. Except as provided in subsection B of this definition, all officers and employees of the Commonwealth, including forest wardens, judges, clerks, deputy clerks and employees of family courts and general district courts, who shall be deemed employees of the Commonwealth.

7. Except as provided in subsection B of this definition, all officers and employees of a municipal corporation or political subdivision of the Commonwealth.

8. Except as provided in subsection B of this definition, every executive officer, including president, vice president, secretary, treasurer or other officer, elected or appointed in accordance with the charter and bylaws of a corporation, municipal or otherwise.

9. Policemen and firefighters, sheriffs and their deputies, town sergeants and their deputies, county and city commissioners of the revenue, county and city treasurers, attorneys for the Commonwealth, and clerks of circuit courts and their deputies, officers and employees, who shall be deemed employees of the respective cities, counties and towns in which their services are employed and by whom their salaries are paid or in which their compensation is earnable.

10. Members of the governing body of any county, city or town in the Commonwealth, whenever coverage under this title is extended to such members by resolution or ordinance duly adopted.

11. Volunteers, officers and employees of any commission or board of any authority created or controlled by a local governing body, or any local agency or public service corporation owned, operated or controlled by such local governing body, whenever coverage under this title is authorized by resolution or ordinance duly adopted by the governing board of any county, city, town, or any political subdivision thereof.

12. Except as provided in subsection B of this definition, volunteer firefighters, volunteer lifesaving or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police and auxiliary

306 or reserve deputy sheriffs, who shall be deemed employees of (i) the political subdivision or state  
307 institution of higher education in which the principal office of such volunteer fire company, volunteer  
308 lifesaving or rescue squad, volunteer law-enforcement chaplains, auxiliary or reserve police force or  
309 auxiliary or reserve deputy sheriff force is located if the governing body of such political subdivision or  
310 state institution of higher education has adopted a resolution acknowledging such volunteer firefighters,  
311 volunteer lifesaving or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve  
312 police or auxiliary or reserve deputy sheriffs as employees for the purposes of this title or (ii) in the  
313 case of volunteer firefighters or volunteer lifesaving or rescue squad members, the companies or squads  
314 for which volunteer services are provided whenever such companies or squads elect to be included as an  
315 employer under this title.

316 13. Volunteer firefighters, volunteer lifesaving or rescue squad members, volunteer law-enforcement  
317 chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs and any other persons who  
318 respond to a hazardous materials incident upon request of the Department of Emergency Services  
319 pursuant to a plan or agreement developed under § 44-146.35 or § 44-146.36, who shall be deemed  
320 employees of the Department of Emergency Services for the purposes of this title.

321 14. Any sole proprietor or all partners of a business electing to be included as an employee under the  
322 workers' compensation coverage of such business if the insurer is notified of this election. Any sole  
323 proprietor or the partners shall, upon such election, be entitled to employee benefits and be subject to  
324 employee responsibilities prescribed in this title.

325 When any partner or proprietor is entitled to receive coverage under this title, such person shall be  
326 subject to all provisions of this title as if he were an employee; however, the notices required under  
327 §§ 65.2-405 and 65.2-600 of this title shall be given to the insurance carrier, and the panel of physicians  
328 required under § 65.2-603 shall be selected by the insurance carrier.

329 15. The independent contractor of any employer subject to this title at the election of such employer  
330 provided (i) the independent contractor agrees to such inclusion and (ii) unless the employer is  
331 self-insured, the employer's insurer agrees in writing to such inclusion. All or part of the cost of the  
332 insurance coverage of the independent contractor may be borne by the independent contractor.

333 When any independent contractor is entitled to receive coverage under this section, such person shall  
334 be subject to all provisions of this title as if he were an employee, provided that the notices required  
335 under §§ 65.2-405 and 65.2-600 are given either to the employer or its insurance carrier.

336 However, nothing in this title shall be construed to make the employees of any independent  
337 contractor the employees of the person or corporation employing or contracting with such independent  
338 contractor.

339 16. The legal representative, dependents and any other persons to whom compensation may be  
340 payable when any person covered as an employee under this title shall be deceased.

341 17. Jail officers and jail superintendents employed by regional jails or jail farm boards or authorities,  
342 whether created pursuant to Article 3.1 (§ 53.1-95.2 et seq.) or Article 5 (§ 53.1-105 et seq.) of Chapter  
343 3 of Title 53.1, or an act of assembly.

344 B. "Employee" shall not mean:

345 1. Officers and employees of the Commonwealth who are elected by the General Assembly, or  
346 appointed by the Governor, either with or without the confirmation of the Senate. This exception shall  
347 not apply to any "state employee" as defined in § 51.1-124.3 nor to Supreme Court Justices, judges of  
348 the Court of Appeals, judges of the circuit or district courts, members of the Workers' Compensation  
349 Commission and the State Corporation Commission, or the Superintendent of State Police.

350 2. Officers and employees of municipal corporations and political subdivisions of the Commonwealth  
351 who are elected by the people or by the governing bodies, and who act in purely administrative  
352 capacities and are to serve for a definite term of office.

353 3. Any person who is a licensed real estate salesperson, or a licensed real estate broker associated  
354 with a real estate broker, if (i) substantially all of the salesperson's or associated broker's remuneration is  
355 derived from real estate commissions, (ii) the services of the salesperson or associated broker are  
356 performed under a written contract specifying that the salesperson is an independent contractor, and (iii)  
357 such contract includes a provision that the salesperson or associated broker will not be treated as an  
358 employee for federal income tax purposes.

359 4. Any taxicab or executive sedan driver, provided the Commission is furnished evidence that such  
360 individual is excluded from taxation by the Federal Unemployment Tax Act.

361 5. Casual employees.

362 6. Domestic servants.

363 7. Farm and horticultural laborers, unless the employer regularly has in service more than two  
364 full-time employees.

365 8. Employees of any person, firm or private corporation, including any public service corporation,  
366 that has regularly in service less than three employees in the same business within this Commonwealth,  
367 unless such employees and their employers voluntarily elect to be bound by this title. However, this

exemption shall not apply to the operators of underground coal mines or their employees. An executive officer who is not paid salary or wages on a regular basis at an agreed upon amount and who rejects coverage under this title pursuant to § 65.2-300 shall not be included as an employee for purposes of this subdivision.

9. Employees of any common carrier by railroad engaging in commerce between any of the several states or territories or between the District of Columbia and any of the states or territories and any foreign nation or nations, and any person suffering injury or death while he is employed by such carrier in such commerce. This title shall not be construed to lessen the liability of any such common carrier or to diminish or take away in any respect any right that any person so employed, or the personal representative, kindred or relation, or dependent of such person, may have under the act of Congress relating to the liability of common carriers by railroad to their employees in certain cases, approved April 22, 1908, or under §§ 8.01-57 through 8.01-62 or § 56-441.

10. Employees of common carriers by railroad who are engaged in intrastate trade or commerce. However, this title shall not be construed to lessen the liability of such common carriers or take away or diminish any right that any employee or, in case of his death, the personal representative of such employee of such common carrier may have under §§ 8.01-57 through 8.01-61 or § 56-441.

11. Except as provided in subsection A of this definition, a member of a volunteer fire-fighting, lifesaving or rescue squad when engaged in activities related principally to participation as a member of such squad whether or not the volunteer continues to receive compensation from his employer for time away from the job.

12. Except as otherwise provided in this title, noncompensated employees and noncompensated directors of corporations exempt from taxation pursuant to § 501 (c) (3) of Title 26 of the United States Code (Internal Revenue Code of 1954).

"Employer" includes (i) any person, the Commonwealth or any political subdivision thereof and any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay and (ii) any volunteer fire company or volunteer lifesaving or rescue squad electing to be included and maintaining coverage as an employer under this title. If the employer is insured, it includes his insurer so far as applicable.

"Executive officer" means the president, vice president, secretary, treasurer or other officer, elected or appointed in accordance with the charter and bylaws of a corporation. However, such term does not include noncompensated officers of corporations exempt from taxation pursuant to § 501 (c) (3) of Title 26 of the United States Code (Internal Revenue Code of 1954).

"Filed" means hand delivered to the Commission's office in Richmond or any regional office maintained by the Commission; sent by telegraph, electronic mail or facsimile transmission; or posted at any post office of the United States Postal Service by certified or registered mail. Filing by first-class mail, telegraph, electronic mail or facsimile transmission shall be deemed completed only when the application actually reaches a Commission office.

"Injury" means only injury by accident arising out of and in the course of the employment or occupational disease as defined in Chapter 4 (§ 65.2-400 et seq.) of this title and does not include a disease in any form, except when it results naturally and unavoidably from either of the foregoing causes.

§ 65.2-500. Compensation for total incapacity; computation of average wage.

A. When the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total incapacity, a weekly compensation equal to ~~66 2/3~~ *eighty* percent of his average weekly wages, with a minimum not less than ~~25~~ *twenty-five* percent and a maximum of not more than 100 percent of the average weekly wage of the Commonwealth as defined herein. In any event, income benefits shall not exceed the average weekly wage of the injured employee. Any farm employer who continues to furnish benefits while the employee is incapacitated shall be given credit for the value of such benefits so furnished when computing the compensation due the employee.

B. For the purpose of this section the average wage in the Commonwealth shall be determined by the Commission as follows: On or before January 1 of each year, the total wages, excluding wages of United States government employees, reported on contribution reports to the Virginia Employment Commission for the twelve-month period ending the preceding June 30 shall be divided by the average monthly number of insured workers (determined by dividing the total insured workers reported for that twelve-month period by twelve). The average annual wage thus obtained shall be divided by fifty-two and the average weekly wage thus determined rounded to the nearest dollar. The average weekly wage as so determined shall be applicable for the full period during which income benefits are payable, when the date of occurrence of injury or of disablement in the case of disease falls within the year commencing with the July 1 following the date of determination.

C. The minimum or the maximum weekly income benefits shall not be changed for any year unless

the computation herein provided results in an increase or decrease of two dollars or more, raised to the next even dollar in the level of the minimum or the maximum weekly income benefits.

D. In no case shall the period covered by such compensation be greater than 500 weeks, nor shall the total amount of all compensation exceed the result obtained by multiplying the average weekly wage of the Commonwealth as defined herein for the applicable year by 500, except that weekly compensation on account of total and permanent incapacity as defined by § 65.2-503 C shall continue for the lifetime of the injured employee without limit as to total amount.

§ 65.2-502. Compensation for partial incapacity.

Except as otherwise provided in § 65.2-503, when the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such incapacity a weekly compensation equal to ~~66 2/3~~ *eighty* percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than 100 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500. In no case shall the period covered by such compensation be greater than 500 weeks. In case the partial incapacity begins after a period of total incapacity, the latter period shall be deducted from the maximum period herein allowed for partial incapacity.

§ 65.2-503. Permanent loss.

A. Compensation for permanent partial and permanent total loss and disfigurement shall be awarded as provided in this section.

B. The following losses shall be compensated for the period specified at the rate of ~~66 2/3~~ *eighty* percent of the average weekly wage:

Loss	Compensation Period
1. Thumb	60 weeks.
2. First finger (index finger)	35 weeks.
3. Second finger	30 weeks.
4. Third finger	20 weeks.
5. Fourth finger (little finger)	15 weeks.
6. First phalanx of the thumb or any finger	one-half compensation for loss of entire thumb or finger.

The loss of more than one phalanx of a thumb or finger is deemed the loss of the entire thumb or finger. Amounts received for loss of more than one finger shall not exceed compensation provided for the loss of a hand.

7. Great toe	30 weeks.
8. A toe other than a great toe	10 weeks.
9. First phalanx of any toe	one-half compensation for loss of entire toe.

The loss of more than one phalanx of a toe is deemed the loss of the entire toe.

10. Hand	150 weeks.
11. Arm	200 weeks.
12. Foot	125 weeks.
13. Leg	175 weeks.
14. Permanent total loss of the vision of an eye	100 weeks.
15. Permanent total loss of hearing of an ear	50 weeks.
16. Severely marked disfigurement of the body resulting from an injury not otherwise compensated by this section	not exceeding 60 weeks.
17. Pneumoconiosis, including but not limited to	



488	silicosis and asbestosis, medically	
489	determined to be in the	
490	a. First stage	50 weeks.
491	b. Second stage	100 weeks.
492	c. Third stage	300 weeks.
493	18. Byssinosis	50 weeks.

494  
495 C. Compensation shall be awarded pursuant to § 65.2-500 for permanent and total incapacity when  
496 there is:

497 1. Loss of both hands, both arms, both feet, both legs, both eyes, or any two thereof in the same  
498 accident;

499 2. Injury for all practical purposes resulting in total paralysis, as determined by the Commission  
500 based on medical evidence; or

501 3. Injury to the brain which is so severe as to render the employee permanently unemployable in  
502 gainful employment.

503 D. In construing this section, the permanent loss of the use of a member shall be equivalent to the  
504 loss of such member, and for the permanent partial loss or loss of use of a member, compensation may  
505 be proportionately awarded. Compensation shall also be awarded proportionately for partial loss of  
506 vision or hearing.

507 E. Except as provided in subsection C and subdivision F 2 of this section, the weekly compensation  
508 payments referred to in this section shall all be subject to the same limitations as to maximum and  
509 minimum as set out in § 65.2-500.

510 F. 1. Compensation awarded pursuant to this section shall be in addition to all other compensation  
511 and shall be payable after payments for temporary total incapacity pursuant to § 65.2-500.

512 2. Compensation pursuant to this section may be paid simultaneously with payments for partial  
513 incapacity pursuant to § 65.2-502.

514 § 65.2-504. Compensation for disability from coal worker's pneumoconiosis; insurance of coal  
515 operator.

516 A. An employee eligible for an award for coal worker's pneumoconiosis benefits shall be  
517 compensated according to the following schedule:

518 1. For first stage coal worker's pneumoconiosis medically determined from radiographic evidence and  
519 classified under International Labour Office Classification of Radiographs of the Pneumoconioses (1980)  
520 where there is no present impairment for work, ~~66 2/3~~*eighty* percent of the average weekly wage during  
521 the three years prior to the filing date, for fifty weeks, up to 100 percent of the average weekly wage of  
522 the Commonwealth as defined in § 65.2-500.

523 2. For second stage coal worker's pneumoconiosis medically determined from radiographic evidence  
524 and classified under International Labour Office Classification of Radiographs of the Pneumoconioses  
525 (1980) where there is no present impairment for work, ~~66 2/3~~*eighty* percent of the average weekly  
526 wages for 100 weeks, up to 100 percent of the average weekly wage of the Commonwealth as defined  
527 in § 65.2-500.

528 3. For third stage coal worker's pneumoconiosis medically determined from radiographic evidence  
529 and classified under International Labour Office Classification of Radiographs of the Pneumoconioses  
530 (1980) and involving progressive massive fibrosis or medically classified as being A, B or C under the  
531 International Labour Office (hereafter referred to as I.L.O.) classifications but where there is no apparent  
532 impairment for work, ~~66 2/3~~*eighty* percent of the average weekly wages, for 300 weeks, up to 100  
533 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500.

534 4. For coal worker's pneumoconiosis medically determined to be A, B or C under the I.L.O.  
535 classifications or which involves progressive massive fibrosis, or for any stage of coal worker's  
536 pneumoconiosis when it is accompanied by sufficient pulmonary function loss as shown by approved  
537 medical tests and standards to render an employee totally unable to do manual labor in a dusty  
538 environment and the employee is instructed by competent medical authority not to attempt to do work in  
539 any mine or dusty environment and if he is in fact not working, it shall be deemed that he has a  
540 permanent disability and he shall receive ~~66 2/3~~*eighty* percent of his average weekly wages during the  
541 three years prior to the date of filing of the claim, up to 100 percent of the average weekly wage of the  
542 Commonwealth as defined in § 65.2-500 for his lifetime without limit as to the total amount.

543 B. In any case where partial disability as mentioned in subsection A of this section later results in  
544 total disability, the employer shall receive credit on any permanent disability payments by being allowed  
545 to deduct 25 percent of each weekly payment until payments for partial disability hereunder have been  
546 fully accounted for.

547 C. In any case where there is a question of whether a claimant with pneumoconiosis is suffering  
548 from coal worker's pneumoconiosis or from some other type of pneumoconiosis such as silicosis, it shall

549 be conclusively presumed that he is suffering from coal worker's pneumoconiosis if he has had injurious  
550 exposure to coal dust.

551 D. In the event that any coal operator wishes to insure himself under standard workers' compensation  
552 insurance rather than be self-insured against the risks and liabilities imposed by this section or by  
553 § 65.2-513, any such insurance issued in this Commonwealth covering such risks shall be rated  
554 separately for premium purposes and shall not affect workers' compensation rates for any other  
555 employers not exposed to such risks.

556 § 65.2-512. Compensation to dependents of an employee killed; burial expenses.

557 A. If death results from the accident within nine years, the employer shall pay, or cause to be paid,  
558 compensation in weekly payments equal to ~~66 2/3~~ *eighty* percent of the employee's average weekly  
559 wages, but not more than 100 percent of the average weekly wage of the Commonwealth as defined in  
560 § 65.2-500 nor less than ~~25~~ *twenty-five* percent of the average weekly wage as defined therein:

561 1. To those persons presumed to be wholly dependent upon the deceased employee as set forth in  
562 § 65.2-515 A 1, 2, and 3, for a period of 500 weeks from the date of injury; or

563 2. If there are no total dependents pursuant to § 65.2-515 A 1, 2, or 3, to those persons presumed to  
564 be wholly dependent as set forth in § 65.2-515 A 4, and to those determined to be wholly dependent in  
565 fact, for a period of 400 weeks from the date of injury; or

566 3. If there are no total dependents, to partial dependents in fact, for a period of 400 weeks from the  
567 date of injury.

568 B. The employer shall also pay burial expenses not exceeding \$5,000 and reasonable transportation  
569 expenses for the deceased not exceeding \$500.

570 C. Benefits shall be divided equally among total dependents, to the exclusion of partial dependents.  
571 If there are no total dependents, benefits shall be divided among partial dependents according to the  
572 dependency of each upon the earnings of the employee at the time of the injury, in the proportion that  
573 partial dependency bears to total dependency.

574 D. If benefits are terminated as to any member of a class herein, that member's share shall be  
575 divided among the remaining members of the class proportionately according to their dependency.

576 E. When weekly payments have been made to an injured employee before his death, the  
577 compensation to dependents shall begin from the date of the last of such payments but shall not  
578 continue for a period longer than specified in subsection A of this section.

579 § 65.2-513. Compensation for death from coal worker's pneumoconiosis; determining whether death  
580 was due to pneumoconiosis or any chronic occupational lung disease.

581 A. If death results from coal worker's pneumoconiosis or if the employee was totally disabled by  
582 coal worker's pneumoconiosis at the time of his death and claim for compensation is made within three  
583 years after such death, the employer shall pay or cause to be paid to the surviving spouse of the  
584 deceased employee until his death or remarriage or the minor dependents of the employee until such  
585 minor dependents reach the age of eighteen (or twenty-three, so long as they remain as full-time  
586 students in a generally accredited institution of learning) or such other legal dependents as the deceased  
587 employee might have had at the time of his death for the duration of such dependency, ~~66 2/3~~ *eighty*  
588 percent of the employee's average weekly wage during the last three years that he worked in the coal  
589 mines, up to 100 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500  
590 without any specific limit as to the number of such weeks. However, any claim for compensation of an  
591 employee who was totally disabled by coal worker's pneumoconiosis at the time of his death shall be  
592 paid only to the extent required by federal law.

593 B. The Commission shall, by regulation duly drawn and published after notice and hearing, prescribe  
594 standards, not inconsistent with those prescribed by the Secretary of Health, Education and Welfare  
595 under the 1969 Federal Coal Mine Health and Safety Act, as amended, for determining whether the  
596 death or total disability of an employee was due to pneumoconiosis or any chronic occupational lung  
597 disease.

598 C. In prescribing such standards the following factors shall be included:

599 1. If an employee who died from a respirable (respiratory) disease was employed for ten years or  
600 more in an environment where he was injuriously exposed to such a disease, there shall be a rebuttable  
601 presumption that his disease arose out of such employment, or if he became totally disabled from coal  
602 worker's pneumoconiosis or if such disease significantly contributed to his death or disability, there shall  
603 be a rebuttable presumption that his death or disability was due to such disease.

604 2. Where there is clear evidence of exposure to an occupational lung disease, the Commission may  
605 make its determination whether compensation is payable to the dependents based on the description of  
606 the employee's symptoms, X-rays, and other competent medical evidence, and the opinion of experts as  
607 to whether those symptoms reasonably described the symptoms of such an occupational disease.

608 3. The statement as to the cause of death on a death certificate may be considered as evidence in any  
609 such cases but shall not be controlling on the Commission's findings. The Commission may also, by  
610 regulation, establish standards, not inconsistent with those prescribed by the Secretary of Labor under

611 the 1969 Federal Coal Mine Health and Safety Act as amended, for apportioning liability for benefits  
612 under this section and under § 65.2-504 A 4 among more than one operator, where such apportionment  
613 is appropriate, provided that no apportionment shall operate to deprive an employee of the full benefits  
614 due him under this title.

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