

# A Case for Remembrance – Reflections on 100 Years of Workers’ Compensation

by Commissioner R. Ferrell Newman

*“But for injuries resulting from such inhumanity and such folly the courts can furnish no relief...”*



A young miner at his post in 1908. Courtesy Library of Congress.

Drawn by the prospect of dependable income, Charles Holt Robinson departed the family farm to work as a miner in Virginia’s coal industry. With only a few months of experience under his belt, Robinson secured employment with mine owner, Ferral C. Dininny. The Dininny mine consisted of parallel shafts connected at their respective bases by a tunnel, some 415 feet underground.

Abandoned decades before Robinson’s employment, the shafts had become pro-

gressively occluded, the consequence of cave-ins and the accumulation of rain water. Dininny was intent on reviving the mine and so employed Robinson and others to clear the shafts, a process requiring the pumping out of stagnant water and, by means of rope and bucket, removal of dirt, stone and fallen timbers. By such primitive means, Robinson and his co-workers succeeded in clearing the entirety of the northern shaft, affording access to its base and the tunnel connecting to its southern twin.

With attention directed to the remaining shaft, Robinson’s supervisor issued his directions as to the manner in which the shaft was to be cleared. The workers were instructed to descend the northern shaft, traverse the tunnel and begin clearing the southern

shaft at its base, progressing upward toward ground level. Perhaps the supervisor's plan presumed that by working from the bottom, gravity would assist in dislodging the inherently unstable obstructions which could then be carted through the connecting tunnel and removed through the cleared northern shaft. If such was his intent, then the supervisor was correct in part.

On September 25, 1895, Robinson found himself deep underground, digging away at the foundation of accumulated dirt, stone and rotten timber. Predictably, his efforts triggered the collapse of the obstructions, a cave-in of such magnitude that it took weeks to recover his body. Robinson was nineteen years old the day he died.

The wrongful death case of *Robinson's Administrator v. Dininny* made its way to the Supreme Court of Virginia in 1898.<sup>1</sup> Because the Virginia Workers' Compensation Act would not be voted into law for another twenty years, the sole means of recourse for Robinson's destitute parents was to attempt recovery through common law tort. A Chesterfield County jury, no doubt moved by the tragedy, returned a verdict of \$4,000, a substantial sum for that day. However, common law defenses of contributory negligence and assumption of the risk were insurmountable hurdles to entry of judgment and presented the trial judge with no option. He set aside the verdict.

On appeal, the Supreme Court was perplexed by the instructions issued by Robinson's supervisor and questioned why someone familiar with the business of mining would assume such a cavalier attitude toward the obvious danger. However, in affirming the trial court, the Supreme Court was constrained to assume that Robinson, though young and inexperienced, knew "the practical effects of the law of gravitation, and that when a mass of earth, stone, or other material is undermined by removing its foundation it is liable to fall."<sup>2</sup>

With stark clarity, the case of *Robinson's Adm'r v. Dininny*, illustrates the round peg – square hole inequity of applying traditional tort rules to the relationship of master and servant. Before the Workers' Compensation Act, when a servant entered the service of the master, the servant "assume[d] all risks from causes which are known to him, or which should be readily discernible by a person of his age and capacity in the exercise of ordinary care."<sup>3</sup>

In Robinson's day, employees injured on the job relied upon their employer's common law duty to provide a safe work place. Common law tort rules, however, rarely fit neatly into the relationship of master and servant. When injured in their master's service, liability rested upon proof of the employer's negligence. Even where negligence could be proven, counterbalancing affirmative defenses of assumption of the risk, contributory negligence, and the fellow servant doctrine<sup>4</sup> often barred recovery. Then, as now, workers were familiar with their workplace and the risks presented by the nature of their employment. Such knowledge played naturally into affirmative defenses when known danger translated into injury or death.

### 100 Years of Workers' Compensation

Except for a fortunate few, the decision to enter the workforce is not entirely voluntarily but motivated by need for a livelihood. With the employment contract comes the employee's duty of loyalty to the employer.<sup>5</sup> In exchange for wages, employees perform the services to which they are directed. That some such services are by their nature inconsistent with the conduct of the common law's reasonably prudent person is manifest. This was true for Robinson, whose faithful fidelity to his supervisor's instructions afforded immunity to his employer for setting him to the task that killed him. Not deaf to the irony and human tragedy, the Court wrote, "It is difficult to understand why any employer would be so inhuman as to have his work done in that way

## The relationship between employers and employees is symbiotic, but parties do not enter the workplace as equals or necessarily share the same interests and needs.

when there was a safer and better way to do it, or why any servant would be guilty of such folly as to work in a place where the danger of being injured was so obvious and so great."<sup>6</sup>

The Virginia Workers' Compensation Act's enactment in 1918<sup>7</sup> represented an acknowledgement that the workplace was worthy of special treatment and needed to be unmoored from the restraints of the common law. The relationship between employers and employees is symbiotic, but parties do not en-

ter the workplace as equals or necessarily share the same interests and needs. The Act represented an attempt to address those sometimes competing interests and needs. Employers were granting immunity from vexing lawsuits and the vagaries of the jury system. Liberated from the duty to prove, or overcome allegations of negligence, those injured in their master's service could receive timely medical treatment and wage loss benefits.

**Legislation is no cure for folly but is, perhaps, better suited for injecting some degree of humanity into a system heretofore "frustrated by the inexorable rules of the common law."**

In the years following the enactment of the Workers' Compensation Act, the Supreme Court of Virginia began to wrestle with concepts entirely novel to the common law. Different circumstances resulting in injury created questions of what constituted an accident, what risks were incidental to the employment and what it meant to be in the course of the employment.<sup>8</sup> Very quickly workers' compensation fully assimilated into our legal system and our culture. Addressing its impact in 1927, the Supreme Court wrote, "It is to be borne in mind that the compensation act is a statute apart to itself, providing compensation for the beneficiaries thereunder upon the terms prescribed, and changing many rules of the common law. It abolishes the doctrine of fellow-servants, contributory negligence, assumption of risk. It is in the light of such changes, and other ameliorations of the hardships of the common law that we are to ascertain the legislative intent from the language used in section 14."<sup>9</sup> Less than thirty years after its enactment, the Court employed lofty language to characterize the Act as "one of the most important branches of law" as "essential to industry as it is to labor."<sup>10</sup>

The Workers' Compensation Act has entered its centennial year. Exclusive jurisdiction over claims is seated with the Workers' Compensation Commission which at any one time oversees in excess of 100,000 awards of benefits afforded under the Act. In 2017 alone, 58,094 major workplace injuries were reported. Awards were entered in 26,655 cases by agreement of the parties. Over 4,000 opinions were issued following evidentiary

hearings held across the commonwealth before twenty-four deputy commissioners. The Commission has its own mediation staff that assisted in the amicable resolution of cases, resolving a variety of disputes and contributing to the over \$297,000,000 paid in settlements for injuries sustained in the workplace.

And what impact has this legislation had on the inhumanity and folly that perplexed the Robinson Court? Legislation is no cure for folly but is, perhaps, better suited for injecting some degree of humanity into a system heretofore "frustrated by the inexorable rules of the common law."<sup>11</sup> The Act's passage may be viewed as a fragment of a larger evolution of law and culture in the direction of humanity's more noble attributes. We no longer have debtor's prisons, work houses, and forced child labor. Within the context of these changes, we may view the passage of the Act. "Upon its effectiveness depends the potential welfare of a large number of employees and their families."<sup>12</sup>

Every injury is sustained for a reason, whether it be human folly or the misfortune of being in the wrong place at the wrong time. Lost to the world of common law tort are the innumerable injuries resulting not from negligence, but from the inherent incompatibility between aging human bodies and physical labor. With the enactment of the Workers' Compensation Act, injured workers were unfettered by the burden of proving an employer's negligence, immunized from common law defenses, and freed to receive necessary wage replacement benefits and medical treatment important to both the injured and to the businesses that rely upon a healthy workforce to function. A consequence of the Act is that employers and employees share a common interest in the safety and welfare of the workforce by providing relief even in those cases resulting from the inhumanity and folly that perplexed the Robinson Court.

Had the Act been in effect in Robinson's day, it may not have saved him from the folly of his supervisor's instructions. What modest income the Act might have afforded his parents would have been small consolation for the loss of a child. Equally true is that humanitarian ideals can be lost when parties advance competing interests through the dehumanizing crucible of litigation, a reality whether they find themselves in the common law courts or before the Workers' Compensation Commission. There will always remain some

number of injured workers who might have fared better through the tort system, and others, no less injured, whose injuries fall outside the Act's guidelines. But if we are left with much to lament, there is no less reason to celebrate. Every day, the workers' compensation system represents a safety net that has been instrumental in creating a communal consciousness about safety and welfare, and the value of providing relief to those injured in their employer's service.

#### Endnotes:

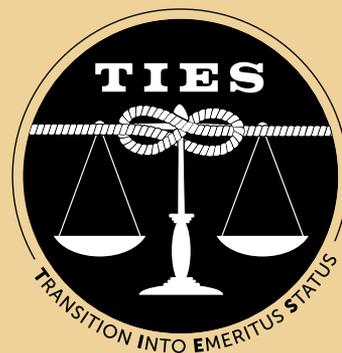
- 1 96 Va. 41, 30 S.E. 442 (1892).
- 2 *Id.* at 43, 30 S.E. at 442.
- 3 *Id.* at 42, 30 S.E. at 442 (citing *McDonald v. Norfolk & W. R. Co.*, 95 Va. 98 (1897); *Bertha Zinc Co. v. Martin*, 93 Va. 791 (1895); 1 Shearman & Redfield on Neg., sec. 185 (5th ed.)).
- 4 The fellow servant rule was a common law tort doctrine that insulated employers from liability for injuries negligently inflicted on a worker by a fellow servant.



**Commissioner Ferrell Newman** was appointed by the General Assembly to the Workers' Compensation Commission in 2013 and began his three year term as chairman on July 1, 2018. He's a 1979 graduate of the University of Richmond and obtained his law degree from the Marshall Wythe School of Law at the College of William and Mary in 1983. His appointment to the Commission followed 30 years in private practice with a high concentration in workers' compensation law.

- 5 *Williams v. Dominion Tech. Partners*, 265 Va. 280, 289, 576 S.E.2d 752, 757 (2003) (citing *Horne v. Holley*, 167 Va. 234, 241, 188 S.E. 169, 172 (1936)).
- 6 *Robinson*, 96 Va. at 43, 30 S.E. at 442.
- 7 The statute was then known as the Workmen's Compensation Act.
- 8 *See, e.g., Dreyfus & Co. v. Meade*, 142 Va. 567, 129 S.E. 336 (1925) (employee struck by a vehicle while going to lunch was on a personal errand and not in his employer's service); *Kent v. Virginia-Carolina Chem. Co.*, 143 Va. 62, 129 S.E. 330 (1925) (employee struck by train and killed walking home from work was not in the course of his employment); *Crews v. Moseley Bros.*, 148 Va. 125, 138 S.E. 494 (1927) (a physical collapse followed by death eight days later from "apoplexy" did not qualify as an "accident" as defined under the Act); *Hoffer Bros. v. Smith*, 148 Va. 220, 128 S.E. 474 (1927) (considering whether a person who sustained an eye injury while unloading a truck was a casual employee of the employer furniture company); *Maryland Cas. Co. v. Robinson*, 149 Va. 307, 141 S.E. 225 (1928) (employee suffered a hernia but was unaware of the injury until three months later, was excused from giving timely notice because notice was provided as soon as practicable, and the employer was not prejudiced); *Baker v. Nussman*, 152 Va. 293, 147 S.E. 246 (1929) (the deceased was not under sufficient control of the imputed employer and so was a sub-contractor, and his widow was not entitled to workers' compensation benefits); *Lynchburg Steam Bakery v. Garrett*, 161 Va. 517, 171 S.E. 493 (1933) (employer's foreman knew an employee's son was on the premises with a "gravel shooter" and failed to eject the child; when another employee was shot in the eye, the injury was considered a hazard of the employment).
- 9 *King v. Empire Collieries Co.*, 148 Va. 585, 139 S.E. 478 (1927).
- 10 *Feitig v. Chalkley*, 185 Va. 96, 98, 38 S.E.2d 73, 73 (1946).
- 11 *A. Wilson & Co. v. Mathews*, 170 Va. 164, 167, 195 S.E. 490, 491 (1938).
- 12 *Feitig*, 185 Va. at 98, 38 S.E.2d at 73.

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