AN OVERVIEW OF STATUTORY EMPLOYMENT UNDER THE VIRGINIA WORKERS' COMPENSATION ACT

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When an employee suffers an injury arising out of and in the course of employment, the Virginia Workers' Compensation Act ("Act") provides his exclusive rights and remedies in claims against his employer[1] and permits recovery in tort from "any other party."[2] The exclusivity provision is equally applicable in claims brought by the employee against a statutory employer or statutory co-employee.[3] Although the Act defines *statutory employer* under Code section 65.2-302, the practical application of the statute is highly fact specific and far from straightforward. This article examines the tests applied by the Virginia Workers' Compensation Commission ("Commission") and courts as well as the factors considered when determining whether a person is a statutory employer under the Act, liable to pay workers' compensation benefits to a subcontractor's injured employee, or immune from common-law liability.

I. Statutory Employers under Section 65.2-302(A)

To evaluate a statutory employer's liability or immunity under Code section 65.2-302(A), the court must determine what is, and what is not, part of the statutory employer's trade, business, or occupation. The test is not whether the statutory employer engages in the subcontractor's trade, business, or occupation, but whether the work performed by the subcontractor is part of the trade, business, or occupation of the statutory employer.[4]

Code section 65.2-302(A) defines *statutory employer* as follows:

> When any person (referred to in this section as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation, and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work under-

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1 *See* Va. Code § 65.2-307(A).

2 *See* Va. Code § 65.2-309.

3 *See* Shell Oil Co. v. Leftwich, 212 Va. 715, 187 S.E.2d 162 (1972); Bosher v. Jamerson, 207 Va. 539, 151 S.E.2d 375 (1966).

4 Jeffreys v. Uninsured Employer's Fund, 297 Va. 82, 95–96, 823 S.E.2d 476, 483 (2019).

> taken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

The normal-work test, also referred to as the first prong of the *Shell* test, is most commonly applied when determining the trade, business, or occupation of a private entity under Code section 65.2-302(A).[5] Under the normal-work test, work that the statutory employer performs through its own employees as opposed to independent contractors is generally considered its trade, business, or occupation.[6] Although the court continues to apply the normal-work test, it has described the test as a "corollary guide" and made it clear that it does not apply in every situation.[7] The following cases provide examples of the courts' application of the normal-work test.

A. THE NORMAL-WORK TEST

In *Shell Oil Co. v. Leftwich*, two Shell service station employees were on their way to conduct a service call when a train struck their vehicle, seriously injuring one employee and killing the other. The Industrial Commission of Virginia held that Shell was their statutory employer and entered an award against it for payment of the employees' workers' compensation benefits. Shell appealed.[8]

The Commission found that Shell owned the service station that it leased to the injured workers' direct employer, Robinson. Shell sold an illuminated "Shell" sign to Robinson, which Shell installed and maintained on the premises. Shell selected the location of the service station and designed its layout. Shell employed dealer salesmen to seek dealers that would operate their service stations, training the dealers at a Shell training school. Shell designated contractors for the dealers to call if their service stations required maintenance and encouraged the use of vehicles for service calls that had the Shell emblem on the door. Robinson was considered a dealer and, pursuant to his lease with Shell, retailed Shell petroleum products and accessories in the Shell service station and performed minor repairs on motor vehicles.

The injured workers alleged that Shell was their statutory employer because they were performing work that was part of the trade, business, or occupation of Shell at the time of the accident. They argued that the proper test is not whether the owner, by engaging an independent contractor, engages in the work

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5 *Shell*, 212 Va. at 715, 187 S.E.2d at 162.

6 *Id.* at 722, 187 S.E.2d at 167.

7 *Jeffreys*, 823 S.E.2d at 484; Rodriguez ex. rel Estate of Rodriguez v. Leesburg Business Park, LLC, 287 Va. 187, 196, 754 S.E.2d 275, 279 (citing Cinnamon v. International Bus. Machs. Corp., 238 Va. 471, 478, 384 S.E.2d 618, 621 (1989)).

8 *Shell*, 212 Va. at 715–16, 187 S.E.2d 163.

of the independent contractor, but whether the contractor is performing work that is part of the trade, business, or occupation of the owner.[9]

Despite Shell's ownership of the service station, selection of the dealers, design and maintenance of the service station, and supply and delivery of gasoline and other Shell products, Shell argued that it did not operate service stations through employees and that fact controlled its liability.[10] Shell stated that its own employees located and drilled for oil, pumped crude oil out of the ground, transported oil to refineries then on to bulk plants, and finally, transported oil to the service stations. Shell argued that it neither retailed gasoline to the consumer public through employees nor operated service stations through employees.

The Supreme Court of Virginia determined that the applicable statute was Code section 65.1-29, a predecessor to section 65.2-302(A).[11] Construing that statute, the Court applied the test that Shell urged it to apply, announcing what has come to be known as the normal-work test, explaining the test as follows:

> [T]he test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business, since, after all, this could be said of practically any repair, construction or transportation service. The test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether this indispensable activity is, in that business, normally carried on through employees rather than independent contractors.[12]

The Court explained that it was applying the normal-work test in *Shell* because it had done so in previous decisions, most recently in *Burroughs v. Walmont*[13] and *Hipp v. Sadler Materials Corp*.[14] Those decisions, however, turned on the Court's determination that the act of delivering materials to a general contractor's construction site was only an act of delivery and not an act of construction; therefore, the Court determined that the delivery drivers had not engaged in work that was part of the general contractor's trade, business, or occupation.[15]

Despite relying upon *Burroughs* and *Hipp* to apply the normal-work test, the decisions in those cases did not contain any explicit analysis of what the general contractor's employees normally did. Nevertheless, the Court applied the normal-work test in *Shell* and determined that Shell was not the injured workers'

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9 *Id.* at 721, 187 S.E.2d at 166.

10 *Id.* at 719, 187 S.E.2d at 165.

11 *Id.*

12 *Id.* at 722, 187 S.E.2d at 167.

13 210 Va. 98, 168 S.E.2d 107 (1969).

14 211 Va. 710, 180 S.E.2d 501 (1971).

15 *Burroughs*, 210 Va. at 100, 168 S.E.2d at 108–109; *Hipp*, 211 Va. at 711, 180 S.E.2d at 502.

statutory employer because it neither retailed gasoline nor operated service stations through its own employees.[16] The Court explained that although the sale of gasoline was an admittedly indispensable activity for Shell, it did not perform the work through its own employees. As a result, the injured workers were not engaged in work that was part of Shell's trade, business, or occupation at the time of their accident, and Shell was not their statutory employer.[17]

B. SUBSEQUENT APPLICATION OF THE NORMAL-WORK TEST

The Supreme Court of Virginia further distilled the normal-work test in *Bassett Furniture Industries v. McReynolds.*[18] The Court explained that not every activity performed by a direct employee is part of the statutory employer's trade, business, or occupation. Factors to be considered include the frequency and regularity of performance and whether the activity performed was a de minimis part of the total business operation.[19] Having considered those factors, the Court held that Bassett was not the injured worker's statutory employer, despite the fact that Bassett's employees were engaged in the same work that the injured worker was engaged in at the time of his injury.[20]

The pertinent facts in *Bassett* are as follows. The defendant, Bassett, was a furniture manufacturer that decided to enlarge its plant by building a new five-story warehouse. Bassett's chief engineer, himself an employee of Bassett, prepared the plans and specifications for the new warehouse. Bassett awarded several construction contracts for the project, including a contract to the injured worker's employer to install a four-story conveyor system in the new building and to connect it to an existing building. Bassett's carpenters cut a hole in a floor for the conveyor system to pass through and, while working on the conveyor system, the injured worker fell through the hole and was rendered paraplegic. He received workers' compensation benefits from his direct employer and brought a tort action against Bassett.

Bassett moved to dismiss the tort action on the basis that it was the injured worker's statutory employer. It argued that when an owner acts as its own general contractor and contracts with subcontractors for the performance of construction work, the owner becomes a statutory employer if the specialized work performed by the subcontractor and injured employee is the kind of work that the owner's own employees usually perform.[21] The Supreme Court disagreed, holding that simply acting as a general contractor and contracting with independent contractors does not make an owner a statutory employer unless the work being performed is part of the owner's trade, business, or occupation. The

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16 *Shell*, 212 Va. at 724, 187 S.E.2d at 168.

17 *Id.*

18 Bassett Furniture Indus., Inc. v. McReynolds, 216 Va. 897, 902, 224 S.E.2d 323, 326 (1976).

19 *Id*. at 902–903, 224 S.E.2d at 326.

20 *Id*. at 904, 224 S.E.2d at 327.

21 *Id*. at 900–901, 224 S.E.2d at 325.

Court also pointed out that mere capacity to perform the work is not determinative.[22]

Finding that the normal-work test was the most reliable test to apply to the facts of the case, the Court considered the work performed by Bassett's employees.[23] The Court found that Bassett did not have a separate construction division, only a negligible fraction of its employees had construction skills, and, while Bassett had the capacity to build new conveyors, it had never undertaken a project of this magnitude before. Furthermore, it was Bassett's policy to employ independent contractors on major projects rather than to use its own employees because it was uneconomic for Bassett to gather employees from different plants and take them away from their regular jobs.[24]

Weighing the evidence, the Court determined that installing a conveyor belt system was not part of Bassett's trade, business, or occupation. As the injured worker was engaged in the conveyor system installation at the time of his injury, the Court held that he was not engaged in Bassett's trade, business, or occupation and Bassett was not his statutory employer.[25]

C. THE NORMAL-WORK TEST IS SIMPLY A GUIDE

The facts in *Cinnamon v. International Business Machines* are similar to the facts in *Bassett*; however, the Supreme Court of Virginia announced in *Cinnamon* that it was unnecessary to apply the normal-work test to the facts of that case.[26] The defendant in this case was a manufacturer that engaged a general contractor to construct its new building and to "do all things necessary for the construction" of the building. In performance of that contract, the general contractor engaged a subcontractor to paint the building.

The injured worker was an employee of the subcontractor and was injured painting the manufacturer's new building. He received workers' compensation benefits from his direct employer, conceded that the general contractor was his statutory employer, and brought a tort action against the manufacturer under the theory that it was an "other party," as contemplated by the Act. The manufacturer sought to dismiss the action, arguing that it was the injured worker's statutory employer, and thus his exclusive remedy was under the Act.

The Supreme Court of Virginia began its analysis in *Cinnamon* by concluding that the same principles that apply in a workers' compensation case governed this appeal, despite the injured worker's failure to seek workers' compensation benefits.[27] Next, the Court considered the applicable statute, referring to prede-

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22 *Id*. at 902, 224 S.E.2d at 326.

23 *Id*. at 904, 224 S.E.2d at 327.

24 *Id*. at 900, 224 S.E.2d at 325.

25 *Id*. at 904, 224 S.E.2d at 327.

26 Cinnamon v. International Bus. Machs. Corp., 238 Va. 471, 384 S.E.2d 618 (1989).

27 *Id.* at 474, 384 S.E.2d at 619.

cessor Code sections to both section 65.2-302(A) and section 65.2-302(B).[28] Finally, turning to the case law, the Court found it unnecessary to apply either prong of the *Shell* test to construe the language of the statute, noting instead that it need only determine whether the manufacturer engaged an independent contractor to perform work that was part of the manufacturer's trade, business, or occupation.[29]

To determine the manufacturer's trade, business, or occupation, the Court found that, in general, it did not consider the several trades involved in construction to be part of the business of manufacturing products for sale.[30] Urging the Court to make an exception to the general rule, the manufacturer argued that construction was part of its trade, business, or occupation because it maintained a real estate and construction division within its corporate structure. It reserved to its real estate and construction division the rights to prepare plans and specifications, approve subcontract awards, issue change orders, and monitor the progress of the construction.[31]

The Court rejected the manufacturer's argument, noting that the real estate and construction division was immaterial to the outcome in the case, unless it was created and used to perform its own construction work as part of the manufacturer's trade, business, or occupation.[32] Ultimately, the Court found no evidence in the record that the manufacturer's real estate and construction division had actually performed construction work, held that construction was not part of the manufacturer's trade, business, and occupation, and therefore that the manufacturer was not the injured worker's statutory employer.[33]

While the Court in *Cinnamon* stated that it did not need to apply the normal-work test to determine the manufacturer's trade, business, or occupation, it is worth noting that the Court's decision still rested on what the manufacturer's employees actually did. The Court's decision was an easy one to make because the manufacturer performed no construction work. In practice, that resulted in a decision that broke free from the normal-work test but provided no alternative framework to assess what is—and isn't—part of a person's trade, business, or occupation.

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[28] *Id.* at 474–75, 384 S.E.2d at 619.

[29] *Id.* at 478, 384 S.E.2d at 621.

[30] *Id.*

[31] *Id.* at 478–79, 384 S.E.2d at 621–22.

[32] *Id.* at 479, 384 S.E.2d at 622.

[33] *Id.*

D. THE NORMAL-WORK TEST DOES NOT APPLY WHEN DETERMINING THE TRADE, BUSINESS, OR OCCUPATION OF GOVERNMENTAL ENTITIES OR PUBLIC UTILITIES

The normal-work test is inapplicable when determining the trade, business, or occupation of a governmental entity or public utility.[34] The Supreme Court of Virginia has explained that private entities have the ability and discretion to choose their own activities and can essentially self-define their trade, business, or occupation, whereas public entities have duties and obligations imposed upon them by statute, regulation, or other means. Those governmental duties are considered part of the public entity's trade, business, or occupation whether they are performed by employees or not.[35]

In *Henderson v. Central Telephone Co. of Virginia,* the Supreme Court of Virginia stated that it had never applied the *Shell* test in a case involving a public utility or governmental entity for good reason, explaining that

> [t]he [normal-work] test is merely an approach that is useful in determining an entity's trade, business, or occupation. It is not designed for every situation. It works best in cases involving private businesses because those entities often define their trade, business, or occupation by their conduct. With regard to such entities, what they do on a day-to-day basis provides a reasonably reliable indicator of their trade, business, or occupation. Yet, public utilities and governmental entities are of another class. It is not simply what they do that defines their trade, business or occupation. What they are supposed to do is also a determinant.[36]

Not only did the Supreme Court not apply the normal-work test in *Henderson*, it went on to criticize the test, stating that

> Code § 65.1-29 [now § 65.2-302(A)] contemplates than an owner . . . can subcontract all of its work yet remain liable under the Act. The provision is meant to prevent an owner from escaping liability under the Act by the simple expedient of subcontracting away work which is part of its trade, business or occupation.[37]

The Court cautioned that, if the normal-work test is uncritically applied, the result will be that owners who subcontract all their work will never have workers' compensation liability because their own employees will never usually do anything.[38]

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34 Henderson v. Central Tel. Co. of Va., 233 Va. 377, 355 S.E.2d 596 (1987).

35 *Id.* at 383, 355 S.E.2d at 599–600.

36 *Id.* at 383, 355 S.E.2d at 599.

37 *Id.* at 381, 355 S.E.2d at 598–99.

38 *Id.* at 383, 355 S.E.2d at 600.

In *Jones v. Commonwealth*, the Supreme Court of Virginia considered whether the University of Virginia was a governmental entity for purposes of defining its trade, business, or occupation as a statutory employer.[39] In *Jones*, UVA had engaged the plaintiff's direct employer to perform asbestos abatement in a building on university grounds, and the plaintiff was injured performing that work. The plaintiff filed a tort action against UVA, and UVA filed pleas in bar, arguing that it was the plaintiff's statutory employer and his exclusive remedy was under the Act.

The Court concluded that UVA was a governmental entity because the board of visitors of the university was statutorily established as a public corporation and was made subject to the control of the General Assembly. As such, the Court found that it would challenge reason to suggest that an institution, subject at all times to the control of the legislature, is not a governmental entity.[40] Addressing UVA's trade, business, or occupation as a governmental entity, the Court explained as follows:

> The unique nature of a governmental entity requires examination of statutory authorization and mandated duties to determine the entity's trade, business, or occupation. What the legislature has authorized or required an entity to do is the trade, business, or occupation of the entity, whatever the frequency with which the task is performed or the number of employees directly employed to perform the task.[41]

The Court found that the plaintiff was injured while maintaining one of the university's buildings and that the university was charged by statute with the care and preservation of all university property; therefore, the plaintiff was engaged in the trade, business, or occupation of UVA, UVA was his statutory employer, and his tort action was thus barred.[42]

E. APPLICATION OF THE NORMAL-WORK TEST IN 2019

The Supreme Court of Virginia applied the normal-work test in *Jeffreys v. Uninsured Employer's Fund* in early 2019, proving that the test remains alive and well.[43] In *Jeffreys*, a historical society purchased the Harvey Colored School ("School") to restore it to its original condition, register it as a historic site, and thereafter preserve and maintain it. To renovate and restore the School, the historical society engaged an unlicensed contractor, which it relied upon to plan and perform the renovation because the society lacked construction experience. The contractor hired a worker who was badly injured while working on the building. Since the contractor was uninsured, the injured worker

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39 Jones v. Commonwealth, 267 Va. 218, 591 S.E.2d 72 (2004).

40 *Id.* at 222, 591 S.E.2d at 74.

41 *Id.* at 223, 591 S.E.2d at 75.

42 *Id.* at 224–25, 591 S.E.2d at 76.

43 Jeffreys v. Uninsured Employer's Fund, Record No. 171467, 823 S.E.2d 476, 483 (2019).

filed a workers' compensation claim against the historical society, arguing that it was his statutory employer because he was injured performing work that was within its trade, business, or occupation.

To determine the trade, business, or occupation of the historical society, the Court determined that the applicable Code section was 65.2-302(A).[44] The Court explained that the next step in the analysis was to identify the nature of the particular owner or contractor, distinguishing between private and public entities.[45] Concluding that the historical society was a private entity, the Court explained that it generally applied the normal-work test to determine the trade, business, or occupation of private entities.[46]

Applying the normal-work test, the Court found that the historical society was neither a construction company nor a commercial property developer but a small, grassroots, nonprofit organization with limited resources.[47] The Court found that none of the society's members engaged in construction-related activities on a regular basis, the complete reconstruction of the School fell outside routine restoration work, and the rebuilding project was simply beyond the society's capabilities.

After considering the characteristics of the society and the activities of its members, the Court held that the complete reconstruction of the School was not part of the society's trade, business, or occupation. As a result, the Court held that the historical society was not the injured worker's statutory employer.[48]

II. Statutory Employers under Section 65.2-302(B)

The term *statutory employer* is defined in Code section 65.2-302(B).

> When any person ("contractor") contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contractors with any other person ("subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if that worker had been immediately employed by him.

To evaluate a statutory employer's liability or immunity under subsection -302(B), the court need simply determine whether the statutory employer contracted to perform work for another person and, if he did, whether the work is part of the other person's trade, business, or occupation. If the other person

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[44] *Id.* at 482–83.

[45] *Id.* at 483.

[46] *Id.*

[47] *Id.* at 484.

[48] *Id.*

does perform that work within his trade, business, or occupation, the analysis falls under subsection -301(A) as opposed to subsection -302(B).

By way of example:

- If X contracts to perform work for Y, and the work is not part of Y's trade, business or occupation, X is a statutory employer under section 65.2-302(B), but Y is not a statutory employer.

- If X contracts to perform work for Y, and the work is part of Y's trade, business, or occupation, X is a statutory employer under section 65.2-302(A) by virtue of performing work that Y has undertaken to perform and is part of Y's trade, business, or occupation. Y is also a statutory employer for contracting out work that is part of Y's trade, business, or occupation.

A. THE SUBCONTRACTED-FRACTION TEST

The Court of Appeals of Virginia applied the subcontracted-fraction test in *F. Richard Wilton, Jr., Inc. v. Gibson,* holding that a subcontractor was the statutory employer of his sub-subcontractor's employee under Code section 65.2-302(B).[49] The relationships in *Gibson* demonstrate the application of the subcontracted-fraction test under subsection -302(B) perfectly.

In *Gibson*, Century Construction ("contractor") contracted to remodel a restaurant for the restaurant owner. The remodeling contract required drivit[50] installation on the exterior of the restaurant. The contractor subcontracted that work to Wilton ("subcontractor"), who in turn subcontracted it on to Conley ("sub-subcontractor"). The worker was injured installing drivit on behalf of the sub-subcontractor and, because his employer was uninsured, filed a claim against the subcontractor alleging that it was his statutory employer.

The Commission determined that drivit installation was part of the subcontractor's trade, business, or occupation, therefore, the subcontractor was the injured worker's statutory employer.[51] Although the court of appeals agreed with the Commission's conclusion, it stated that the Commission did not analyze the case using the subcontracted-fraction test.[52] The court determined that the appropriate test was the subcontracted-fraction test, explaining the test as follows:

> In the context of the construction business, the "[subcontracted-fraction prong {of the *Shell* test}] relates to a general contractor, the party obligated by the main contract with the owner to complete the whole

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[49] F. Richard Wilton, Jr., Inc. v. Gibson, 22 Va. App. 606, 611, 471 S.E.2d 832, 835 (1996).

[50] Drivit is a type of synthetic plaster. *See id.* at 608 n.1, 471 S.E.2d at 833 n.1.

[51] *Id.* at 608, 471 S.E.2d at 833.

[52] *Id.* at 611, 471 S.E.2d at 835.

> project[53]. . . . The subcontractor similarly becomes the statutory employer of a sub-subcontractor's employees. Thus, employees of an uninsured sub-subcontractor may look to the subcontractor, and to the general contractor, for coverage, although recovery is not permitted from both.[54]

The court never considered whether the drivit installation work was part of the subcontractor's trade, business, or occupation. Rather, it held that the subcontractor was the injured worker's statutory employer under Code section 65.2-302(B) because "the drivit installation was clearly a subcontracted fraction of the main remodeling contract and not part of the trade, business, or occupation of the owner, whose business was operating a restaurant."[55]

While the subcontracted-fraction test was applied to construe section 65.2-302(B) in *Gibson*, it was applied to construe section 65.2-302(A) in *Cooke v. Skyline Swannanoa*.[56] In *Cooke*, the statutory employer was a hotel operator, operating a hotel under a license with Holiday Inn, which included the requirement that it operate a restaurant within the hotel, either directly or by sublease. The hotel operator was to remain responsible for the restaurant, whether it operated it directly or not. The hotel operator opted to subcontract the restaurant operation to the injured worker's direct employer. The worker was injured while working in the restaurant. She received workers' compensation benefits from her direct employer and sued the hotel operator in tort.

The trial court determined that the restaurant operator was engaged in the hotel operator's trade, business, or occupation and, therefore the hotel operator was the injured worker's statutory employer.[57] On appeal, the injured worker argued that the hotel operator could not be her statutory employer because it had never engaged in the restaurant business through its own employees.[58] The Court stated, however, that the injured worker arrived at her position by ignoring a key element of the *Shell* test, namely the subcontracted-fraction exception.[59]

The Supreme Court found that the restaurant work that the injured worker was performing was "obviously a subcontracted fraction" of the hotel operator's main contract with Holiday Inn.[60] Having reached that conclusion, the Court stated that there was no need to consider the normal-work prong of the *Shell* test, which it stated came into play only where an obvious subcontract was "not

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53 *Id.* at 610, 471 S.E.2d at 834–35.

54 *Id.* at 611, 471 S.E.2d at 835 (citing States Roofing Corp. v. Bush Constr. Corp., 15 Va. App. 613, 616–17, 426 S.E.2d 124, 126 (1993)).

55 *Id.* at 611, 471 S.E.2d at 835.

56 226 Va. 154, 159, 307 S.E.2d 246, 249 (1983).

57 *Id.* at 155, 307 S.E.2d at 247.

58 *Id.* at 158–59, 307 S.E.2d at 249.

59 *Id.* at 159, 307 S.E.2d at 249.

60 *Id.*

first found."[61] Based on its application of the subcontracted-fraction test, the Court held that the hotel operator was the injured worker's statutory employer.[62]

Had the Court analyzed *Cooke* under subsection -302(B), it would have been required to consider the trade, business, or occupation of Holiday Inn as a party to the main contract; but the Court did not consider that. For subsection -302(B) to apply, the work the contractor contracts to perform for another person must not be part of the other person's trade, business, or occupation. In *Cooke*, the Court would most likely have concluded that operating a hotel was part of Holiday Inn's trade, business, or occupation, and if that had been the case, subsection -302(B) would not apply.

The Court's analysis of *Cooke* under subsection -302(A) was atypical. The Court simply applied the subcontracted-fraction prong of the *Shell* test; its decision was not dependent upon the trade, business, or occupation of one party being part of the trade, business, or occupation of any other party.[63] The *Cooke* decision suggests that a statutory employer is liable to all its subcontractors' employees below performing any work that the statutory employer itself contracts to perform. Whether the work that the statutory employer has agreed to perform is part of its trade, business, or occupation is a moot point after it contracts to perform it.

The hotel operator in *Cooke* was liable to the restaurant employee as her statutory employer for the simple reason that the hotel operator contracted to operate the restaurant.[64] When a subcontractor contracts to perform work for another person, the subcontractor is liable as a statutory employer under both -302(A)[65] and -302(B)[66] by virtue of contracting to perform the work. It is the trade, business, or occupation of the other person that determines whether subsection -302(A) or -302(B) will apply.

III. Other Considerations

A business can be liable as a statutory employer even if it directly employs fewer than three employees.[67] The court of appeals has determined that the employees of subcontractors are counted as the employees of the contractor, for purposes of determining whether the contractor is subject the Act.[68] The court explained in *Smith v. Weber* that, if a subcontractor's employees are employees for purposes of liability, reason dictates that they should also be considered em-

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61 *Id.*

62 *Id.* at 158, 307 S.E.2d at 248.

63 *Id.* at 159, 307 S.E.2d at 249.

64 *Id.*

65 *Id.*

66 F. Richard Wilton, Jr., Inc. v. Gibson, 22 Va. App. 606, 611, 471 S.E.2d 832, 835 (1996).

67 Smith v. Weber, 3 Va. App. 379, 350 S.E.2d 213 (1986).

68 *Id.* at 380, 350 S.E.2d at 213.

ployees for determining whether the Act applies and if a contractor should carry workers' compensation insurance.[69]

The general contractor in *Smith* argued that he was not subject to the Act because he had no employees. The court held that the general contractor was subject to the Act because his two subcontractors had three employees, and all three counted as the general contractor's employees, for purposes of the Act.[70] Because the subcontractors themselves were sole proprietors, the court did not include them in determining the total number of employees.[71]

Even though he had no employees, the court found that the general contractor was subject to the Act. It explained the rationale behind its decision as follows:

> This construction of the Act is essential to prevent evasion of compensation liability. If the subcontractor's employees were not considered in determining the contractor's exemption under the Act, the work could simply be subdivided among different contracting entities to evade liability under the Act. Employees working on a project would not be protected even if their total number exceeded three. This case demonstrates how this result could be accomplished. Three separate employers with a collective total of three employees were engaged to complete the project. None of the employers regularly had three or more employees in service. If we accepted [the general contractor's] construction of the Act, none of these employees would be protected by the Workers' Compensation Act even though the project required three employees.[72]

It would not be uncommon for an injured worker to have more than one statutory employer, especially in the construction industry. The Act permits an injured worker to recover compensation from a subcontractor or principal contractor but not from both.[73] The Commission's policy is to enter an award against "the first adequately insured contractor in the ascending chain of statutory employers."[74]

The first statutory employer in line with coverage in *Sites Construction Co. v. Harbeson* argued that all statutory employers should be jointly liable for the payment of the statutory employee's benefits.[75] The court discussed the Commission's policy of entering an award against the first adequately insured statu-

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[69] *Id.* at 381, 350 S.E.2d at 214.

[70] *Id.* at 380–81, 350 S.E.2d at 213–14.

[71] *Id.* at 381, 350 S.E.2d at 214.

[72] *Id.*

[73] *See* VA. CODE § 65.2-303; *see also Gibson* at 611, 471 S.E.2d at 835 (citing States Roofing Corp. v. Bush Constr. Corp., 15 Va. App. 613, 616–17, 426 S.E.2d 124, 126 (1993)).

[74] Sites Constr. Co., Inc. v. Harbeson, 16 Va. App. 835, 434 S.E.2d 1 (1993).

[75] *Id.* at 837, 434 S.E.2d 1–2.

tory employer and found that it had a rational basis in furthering the overall objectives of the Act.[76] Furthermore, the legislature was presumed to be aware of the Commission's established policy, and as it had continued without change, the court found that the legislature had implicitly approved the policy.[77]

In further support of the policy, the court referred to the rationale offered by the deputy commissioner, wherein she stated that it was logical to enter an award against the first subcontractor as it was in a far better position to insist that its sub-subcontractor carry the requisite insurance.[78]

IV. Conclusion

Determining which work an employer should and should not be liable for is at the heart of the statutory employer analysis. The Court in *Bassett* stated that the purpose of the Act is to prevent employers from relieving themselves of liability by doing through independent contractors what they would otherwise do through direct employees.[79] But, as the Court highlighted in *Shell*, practically any repair, construction, or transportation service is likely to be indispensable to a business.[80] Whether work is part of a person's trade, business, or occupation depends on the specific facts and circumstances in each case and, as the Court explained in *Bassett*, "the question does not readily yield to categorical or absolutely standards."[81]

The Court in *Cooke* instructs that, when considering a person's liability or immunity as a statutory employer, we first consider whether the work being performed by the injured worker is a subcontracted fraction of a main contract.[82] In *Gibson* and *Cooke*, the Court simply analyzed the work that the parties contracted to perform without regard for the trade, business, or occupation of the parties involved. From a defense perspective, if a client contracts to perform or execute work for another person, the Act and the case law suggest that the client will be deemed to be a statutory employer whether or not the work the client contracted to perform is part of his trade, business, or occupation.

If the client contracted for the performance of certain work, his liability or immunity as statutory employer under the Act will be based on a fact-specific trade, business, or occupation analysis. If the client is a private entity, it is important to fully understand the extent and limits of the client's trade, business, or occupation and that of the other parties in the litigation. If the client is a public entity, it is important to understand all the statutes or other regulations that govern the duties of that entity.

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76 *Id.* at 839, 434 S.E.2d 3.

77 *Id.*

78 *Id.*

79 Bassett Furniture Indus., Inc. v. McReynolds, 216 Va. 897, 902, 224 S.E.2d 323, 326 (1976).

80 Shell Oil Co. v. Leftwich, 212 Va. 715, 722, 187 S.E.2d 162, 167 (1972).

81 *Bassett*, 216 Va. at 902, 224 S.E.2d at 326.

82 Cooke v. Skyline Swannanoa, 226 Va. 154, 159, 307 S.E.2d 246, 249 (1983).

The gig economy continues to expand and more and more employers are contracting out work once performed through employees, resulting in increased numbers of workers operating as independent contractors. Other employers are relying upon a temporary work force obtained through staffing agencies. Construction projects are often completed through several layers of subcontractors, oftentimes involving an uninsured contractor at the bottom of the ladder. The possible statutory employer scenarios are endless, making it impossible for one rule to address every situation. As the workplace continues to evolve, it is important to understand the factors that courts consider when evaluating any statutory employer relationship to counsel clients about the possible liability or immunity that can be gained as a statutory employer under the Act.