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IN THE

Supreme Court of Virginia

RECORD NO. 171467

CHARLIE JEFFREYS,

Appellant,

v.

THE UNINSURED EMPLOYER'S FUND, *et al*.,

Appellees.

OPENING BRIEF OF APPELLANT

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COMES NOW, Charlie Jeffreys, Appellant/Employee (hereinafter "*Jeffreys*") and for his Opening Brief states as follows (Citations to the Joint Appendix are signified by "*J.A. p.* ___".)

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to VA. Code §17.1-410(B). This statute states appellate review may be had in the Supreme Court in any workers' compensation case "*in which the Supreme Court determines on a petition for review that the decision of the Court of Appeals involves a substantial constitutional question as a determinative issue or matters of significant precedential value..*" §17.1-410(B). This case has both matters of significant precedential value and a substantial constitutional question as a determinative issue, as explained below.

It is respectfully submitted that the Court of Appeals erred in finding that Mount Lebanon Missionary Baptist Church and its Harvey School Restoration Society were not the statutory employers of Mr. Jeffreys for purpose of coverage under the Virginia Workers' Compensation Act. The Court of Appeals held that "*the trade, business or occupation*" of those Defendants was to "*restore*" the Harvey School, but "*The complete*

reconstruction of the school was beyond the restoration project envisioned by the Historical Society, and its members were not involved in the reconstruction project or other construction activities." (J.A. p. 1067) This finding contradicts the clear record and is reversible error.

This appeal presents two issues of first impression under Virginia jurisprudence—First, how is the "*trade, business, or occupation*" of a non-profit, tax-exempt organization determined for purposes of the Statutory Employer statute, VA. Code §65.2-302? The Supreme Court of Virginia has issued several opinions detailing how the "*trade, business, or occupation*" of a private business is determined. *See* e.g., *Shell Oil Co. v. Leftwich*, 212 VA. 715, 722, 187 S.E.2d 162, 167 (1972). Several opinions have been issued describing how to determine the "*trade, business, or occupation*" of governmental employers. *See* e.g., *Henderson v. Central Telephone Co*., 233 VA. 377, 355 S.E.2d 596 (1987). *See also*, *Nichols v. VVKR*, 241 VA. 516, 403 S.E.2d 698 (1991) and *Rodriguez, Adm'r v. Leesburg Business Park, LLC*, 287 VA. 187, 754 S.E.2d 275 (2014). Undersigned counsel can find no published case describing how to determine the "*trade, business, or occupation*" of a non-profit organization. This is a matter of significant precedential value.

The second issue of first impression is whether "findings of fact" made by the Court of Appeals, not the Workers' Compensation Commission, are binding on this Court if there is no credible evidence to support the Court of Appeals' "findings of fact"? The Court of Appeals adopted findings of fact never found by the Commission, nor advocated for by any party, which the Court of Appeals held dispositive of the trade, business, or occupation of Mount Lebanon Missionary Baptist Church and its Harvey School Restoration Society. See, *e.g.*, Court of Appeals Opinion dated October 3, 2017 (J.A. p. 1067) Mr. Jeffreys demonstrates herein that there is no credible evidence to support the Court of Appeals' finding of fact that "*The complete reconstruction of the school was beyond the restoration project envisioned by the Historical Society, and its members were not involved in the reconstruction project or other construction activities.*" *Id*. In that situation the Supreme Court of Virginia is not bound by the Court of Appeals' finding of fact. *Goodyear Tire & Rubber Co. v. Watson*, 219 VA. 830, 833 (1979).

The law of Virginia gives every workers' compensation claimant, and every employer as well, the right of appellate review. *See*, VA. Code §17.1-405(2). This appellate review is partly to ensure that any findings of fact are supported by credible evidence in the record. This is a due process right

established for all parties to a workers' compensation case. When the Court of Appeals makes dispositive findings of fact never found by the Commission, nor advocated for by any party, for which there is no credible evidence in the record to support such "*finding*", the aggrieved party (here, the Claimant) is denied the due process right of appellate review because VA. Code §17.1-410(A) makes the Court of Appeals decision "*final*", unless the requirements of §17.1-410(B) are met. To preserve the due process right of appellate review granted to all parties in workers' compensation cases, when there is no credible evidence in the record to support "*findings of fact*" made by the Court of Appeals, there must be appellate review in this Court or Mr. Jeffreys is denied the due process of law granted to him by the law of Virginia. Mr. Jeffreys demonstrated in his Petition for Appeal and herein, that the Court of Appeals' dispositive "*finding*" of fact has no credible evidence in the record to allow such a "*finding*". In that situation, to preserve his due process right of appellate review, this Court should accept an appeal because of the substantial constitutional question dispositive of the case and for the significant precedential value of this unique situation, and to prevent manifest injustice. If the Court of Appeals is allowed to make findings of fact not made by the Commission, nor advocated by any party, then as a result there is no appellate review for such findings of fact. This is

contrary to the U.S. and Virginia Constitutions, Virginia law, and the public policy of Virginia which calls for appellate review of all workers' compensation cases.

"*Settled principles provide that appellate courts 'decide cases on the best and narrowest grounds available' 'and avoid deciding constitutional issues needlessly.'* Commonwealth v. Swann*, 290 VA. 194, 196-97, 776 S.E.2d 265, 267 (2015) (first quoting* McGhee v. Commonwealth*, 280 VA. 620, 626 n. 4, 701 S.E.2d 58, 61 n.4 (2010); and then quoting* Christopher v. Harbury*, 536 U.S. 403, 417 (2002))*." Unger v. Com., 2015 WL9304456 (Ct. of App. 2015). It may be possible to resolve this case without deciding the Constitutional issue presented, although the Constitutional issue is likely to be a recurring one. Mr. Jeffreys argues the Constitutional issue towards the end of this brief, should the Court determine to adjudicate the case based on the issue of significant precedential value of how to determine the trade, business, or occupation of a non-profit entity.

STANDARD OF REVIEW

Whether a Claimant is engaged in a putative employer's trade, business or occupation is a mixed question of law and fact. *Nichols v. VVKR, Inc.,* 241 VA. 516, 519 (1991) (citing *Bassett Furniture v.*

McReynolds, 216 VA. 897, 899 (1976). *See also*, *F. Richard Wilton, Jr., Inc. v. Gibson*, 22 VA. App. 606 (1996).

Undersigned counsel has not located a standard of review for findings of fact made by the Court of Appeals on review to the Supreme Court of Virginia. It is respectfully suggested that the standard of review should be the same as stated in *Goodyear Tire & Rubber Co. v. Watson*, 219 VA. 830, 833 (1979): "*Upon appeal, the [Court of Appeals] findings of fact, based on credible evidence, are conclusive and binding upon us. Code §65.1-98. If, however, there is no credible evidence to support the [Court of Appeals] findings of fact, its findings are not binding on us and the question of the sufficiency of the evidence becomes one of law*."

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in finding Mr. Jeffreys was not a statutory employee of Mount Lebanon Missionary Baptist Church and its Harvey School Restoration Society. (Error preserved at p. 10 of the Court of Appeals Opinion dated October 3, 2017. (J.A. pp. 1062-1063)

2. The Court of Appeals erred in finding that while the Harvey School Restoration Society was formed to "*restore*" the school, this did not include the complete reconstruction of the school. (Since no one knew the Court of Appeals would make findings of fact not made by the Commission nor

advocated for by any party, there was no opportunity to object or to preserve error before the Opinion of October 3, 2017 was issued.)

3. The Court of Appeals erred in making findings of fact, which the Commission did not find, and no party advocated for, and which is not supported by any credible evidence in the record, and then holding these findings of fact were dispositive of the case. (Since no one knew the Court of Appeals would make findings of fact not made by the Commission nor advocated for by any party, there was no opportunity to object or to preserve error before the Opinion of October 3, 2017 was issued.)

4. The Court of Appeals applied a narrow, constricted interpretation of the trade, business, or occupation of a non-profit organization, when the law requires a liberal construction and application of the law in favor of the worker. (Since no one knew the Court of Appeals would adopt a narrow, constricted interpretation of the trade, business, or occupation of the Church and the Harvey School Restoration Society there was no opportunity to object or to preserve error before the Opinion of October 3, 2017 was issued.)

5. The Court of Appeals erred in finding Mount Lebanon Missionary Baptist Church's "*primary*" trade, business, or occupation was to administer to the spiritual needs of its members, when VA. Code §65.2-302(A) does

not provide a worker is a statutory employee only if engaged in the "*primary*" trade, business, or occupation of the Defendant. (Error preserved at Opening Brief of Appellant Charlie Jeffreys filed in Court of Appeals on June 26, 2017 at pp. 20-21).

6. The Court of Appeals erred by not awarding workers' compensation benefits to Charlie Jeffreys. (Error preserved at Opening Brief of Appellant Charlie Jeffreys filed in Court of Appeals on June 26, 2017, p. 11, Assignment of Error Number 6).

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

The Workers' Compensation Commission of Virginia issued a ruling on April 6, 2017 finding "*There is no evidence the Church and Historical Society were in the construction business, and we find they were not. Hence there is no statutory employer situation at issue here. VA. Code §65.2-302*." (J.A. p. 1036). Mr. Jeffreys appealed this ruling to the Court of Appeals in a timely fashion. Mr. Jeffreys asserted the Commission used the wrong inquiry in adjudicating the issue based on this Court's ruling in *Rodriguez ex rel Estate of Rodriguez v. Leesburg Business Park, LLC*, 287 VA. 187 (2014). The Commission observed that Mr. Jeffreys was engaged in construction work at the time he suffered a quadriplegic injury, and then,

assuming construction work was the trade, business, or occupation of the Defendants, ruled "*there is no evidence the Church and the Historical Society were in the construction business*." See, J.A. p. 1036. As shown by this Court in Rodriguez, this was the incorrect inquiry:

> *"In determining whether Ubaldo's construction work was part of LBP's trade, business, we therefore do not simply examine whether LBP engaged in construction. Nor is the fact that LBP had no employees determinative. Rather, we must determine whether Ubaldo's construction work at the time of his fatal accident was part of LBP's business."* 287 VA. 197.

Jeffreys demonstrated that the Harvey School Restoration Society, which indisputably was a part of the Mount Lebanon Missionary Baptist Church, expressed and declared its trade, business or occupation in its published "*Goal*" and "*Mission Statement*". See, J.A. pp. 11-14: "*Mission Statement: One-Room Schoolhouse Restoration"* "*Harvey School Historical Society is a tax-exempt non-profit organization founded on July 18, 2003 to purchase, restore, preserve, and maintain the Harvey Colored School as a historical site for the African-American community of Callahan Hill located in Pittsylvania County, Virginia. (J.A. p.12); "Goal: Harvey School Restoration Society was formed to restore the school to its original condition and register it with the Virginia Historical Society*." (J.A. p.14)

The Court of Appeals held:

> *"We acknowledge that the restoration of the Harvey School necessarily involved certain construction-related activities. The complete reconstruction of the school building, however, fell outside of any routine restoration work. While the Historical Society was formed to 'restore' the school, it's 'trade, business, or occupation' did not include the complete reconstruction of the building…The complete reconstruction of the school was beyond the restoration project envisioned by the Historical Society and its members were not involved in the reconstruction project or other construction activities."*
>
> See, Court of Appeals' Opinion dated October 3, 2017 at p. 15. (J.A. p. 1067)

The Court of Appeals did not cite any part of the record in support of this finding. The Uninsured Employer's Fund did not make this argument. No party advocated for these findings of fact and there is no credible evidence in the record to support them. Mr. Jeffreys contends this finding is reversible error and herein lays his finger on the record to demonstrate the reversible errors of the Court of Appeals. The facts and the applicable law require the finding that the Defendants are the statutory employers of Mr. Jeffreys and he is entitled to workers' compensation benefits.

UNDISPUTED FACTS

Charlie Jeffreys is a 66-year old Army veteran of Vietnam. (J.A. p. 501). He has over 20 years of experience in the construction industry with various

jobs ranging from heavy equipment operator to manual construction labor such as framing, plumbing, and electrical work. Id. Mr. Jeffreys was in his usual state of good health on October 31, 2012 when he was at work dismantling, moving, and restoring the "*Harvey School*", a project of the Harvey School Restoration Society of Mount Lebanon Baptist Church. The injury by accident was described by the medical records from Danville Regional Medical Center stating Charlie Jeffreys "*is a 63-year old gentleman with no history of specific medical problem, who had sudden injury following a blunt trauma when he was working with a friend building a house and some heavy beams from above fell, landing on his back and neck. He dropped to the ground and was unable to move. There was no obvious loss of consciousness. The patient was brought to the emergency department promptly and at that time showed a very severe spinal cord injury*." See, Discharge Summary dictated 11-14-12 from Danville Regional Medical Center. (J.A. p. 790). His discharge diagnoses were:

1) Incomplete C5 quadriplegia secondary to trauma
2) Dense central cord spinal cord injury syndrome
3) Hypotension, neurogenic
4) Acute urinary retention

The record clearly shows that Mr. Jeffreys was injured while working on the "*Harvey School*", a project of the Defendant, the Harvey School

Restoration Society. The "*Harvey School*" is an old schoolhouse in Pittsylvania County where African-American youth were educated from 1880 until 1964. (J.A. p. 12; p.173). "*Harvey School Historical*[1] *Society is a tax-exempt non-profit organization founded on July 18, 2003 to purchase, restore, preserve and maintain the Harvey Colored School as a historical site for the African-American community of Callahan Hill located in Pittsylvania County, Virginia."* (J.A. p. 12; p. 173).

The deposition of Annie L. Mosby, the President of the Harvey School Restoration Society, revealed that the Harvey School Restoration Society is a tax-exempt non-profit organization which is "*an organization within*" the Mt. Lebanon Missionary Baptist Church, another Defendant. (J.A. p. 31). The goal of the Harvey School Restoration Society is described in the stated "*Goal*". (J.A. p. 176). See also, "Mission Statement" (J.A. p. 172). The goals include "*Harvey School Restoration Society was formed to restore the school to its original condition and register it with the Virginia Historical Society*." (J.A. p. 176) The purpose of the Harvey School Restoration Society was "*to purchase, restore, preserve, renovate, and maintain the old school building*." (J.A. p. 173). This was the expressed declared trade, business, or

[1] The organization used both names interchangeably: "*Harvey School Historical Society*", J.A. p. 802, and "*Harvey School Restoration Society*." J.A. p. 811.

occupation of the Harvey School Restoration and Historical Society. The Harvey School Restoration Society of Mt. Lebanon Baptist Church had several officers. (J.A. p. 172). On August 9, 2003, the Harvey School Restoration Society, by Annie L. Mosby, President, wrote a letter to the Mount Lebanon Missionary Baptist Church requesting to be associated with the Church: *"We are asking to become a part of the Church*." (J.A. p. 183). "*The members of the Restoration Society will take care of all the business and cost of maintaining Harvey Elementary School."* (J.A. p. 183).

The motivation for the Harvey School Restoration Society to request to become part of the Mt. Lebanon Missionary Baptist Church was plainly stated: "*As part of the Church, it will enable the Harvey School Restoration Society to curtail the cost for legal work and be a non-profit organization. We invite all members of the Church to work with the Restoration Society and be active members*." (J.A. p. 183).

The benefit to Mt. Lebanon Missionary Baptist Church was also expressed: "*As a partner in this historical adventure, I know it will help bring the citizens of the Callahan Hill community together. It will give the community something that we all shared in the past that will remain for generations to come*." (J.A. p. 183).

The Church, by congregational vote, made the Harvey School Restoration Society part of the Church: "*Reverend Reynolds and the church board of Mt. Lebanon Missionary Baptist Church accepted our proposal*." (J.A. p. 188) (*See also*, J.A. p. 189). (*See also*, testimony of Pastor George S. Reynolds, J.A. pp. 547-548; p. 567). (*See also*, testimony of Rosalyn Fitz, Church Clerk, at J.A. pp. 743-744; 750)

The minutes of the Mt. Lebanon Missionary Baptist Church produced in discovery show that a motion "*to adopt the Harvey School Restoration Society*" as "*carried*", stating the Harvey School Restoration Society "*will be an auxiliary of this church. The building will be used as visitor center; historical landmark, i.e., under the auspices of church*." *See*, Minutes of Mt. Lebanon Missionary Baptist Church, #3, produced by Reverend Reynolds on behalf of the church. (J.A. p. 800).

It was known from the first communication of the Harvey School Restoration Society to the Mt. Lebanon Missionary Baptist Church that the work of the Restoration Society was to be done through "*contractors*": "*We are presently waiting for proposals from moving contractors…"* (J.A. p. 811).

The documents produced by Reverend Reynolds show the Church had several people regularly in paid employment by the Church. *See*, pay records of Mt. Lebanon Missionary Baptist Church. (J.A. pp. 795-799).

Ms. Mosby, on behalf of the Harvey School Restoration Society of Mt. Lebanon Baptist Church, regularly was paying three men to dismantle, move, restore, and rebuild the Harvey School. (J.A. pp. 821-829). They were engaged in the declared trade, business, or occupation of the Harvey School Restoration Society of Mt. Lebanon Baptist Church. These men were William Jerome Johnson, Ray Smith, and the claimant, Charlie Jeffreys.

The Pastor and Secretary of Mount Lebanon Baptist Church testified that the business of the Church is performed by "*auxiliaries of the Church" such as "Deacons, trustees, choir, custodians.*" (J.A. p. 551) The Harvey School Restoration Society was adopted to be an "*Auxiliary*" by the Congregation at a Congregational meeting. (J.A. pp. 546-551; 567; 580). Mount Lebanon Missionary Baptist Church produced pay records of the "*employees*". (J.A. pp. 795-799; 555-557). These pay records included those who are designated "*auxiliaries*", such as the "*choir*" and the "*custodian*". *Id*. It was admitted that each one of these employees are also "*considered auxiliaries*." (J.A. p. 551) It was admitted that the employees, who are also "*auxiliaries*" in the Church, "*are subject to the direction of Mount Lebanon Missionary Baptist Church*." (J.A. p. 555-556).

When the Harvey School Restoration Society was adopted as an "*auxiliary*" of Mount Lebanon Missionary Baptist Church, the Restoration Society requested of "*Reverend Reynolds and Mount Lebanon Baptist Board Members"* that it be allowed to maintain a *"separate account from the church."* (J.A. p. 817). By asking for and receiving permission to maintain a separate account, this establishes the control the Church maintained over the Restoration Society. See, letter dated October 26, 2003 from Annie E. Mosby, President of Harvey School Restoration Society of Mount Lebanon Missionary Baptist Church):

> *"As an Auxiliary of the church and a separate project, we feel that Harvey School Restoration Society should have a separate account from the church.*
>
> *The elected Secretary and Treasurer and Assistant Treasurer from the Harvey Restoration Society will maintain the bookkeeping and checking account. I think this will make things easier for everyone and hope the church board member* [sic] *will approve.*
>
> *I made an offer of $2,500 to Mr. Thomas for Lot 52. He 'said he would let me know something as soon as possible.' If Mr. Thomas sells Lot 52 to us this will eliminate the parking lot problem.*
>
> *Blake Moving Company will be looking at Harvey School in about two weeks. I will let you know the outcome."* (J.A. p. 817)

It is undisputed the Harvey School Restoration Society purchased the "Harvey Elementary School". See, "*Contract*" (J.A. p. 856): "*Harvey School*

Restoration Society agrees to purchase Harvey Elementary School from Mrs. Ewell Barr, for the sum of $1,500." *This for the* "*as is*". [sic]. This contract was on Harvey School Restoration Society letterhead which shows "*Annie L. Mosby*" as "*President*" and was executed by "*Annie L. Mosby*." Id.

True to the agreement reached with the Mount Lebanon Missionary Baptist Church, Ms. Annie Mosby "*maintain[ed] the financial statement of the Harvey School Historical Society continuously from the time it was formed until today*." See, Dep. Tr. of Annie L. Mosby, J.A. pp. 39, line 25-p. 40, line 9. See also Exhibit 15 of Ms. Mosby's Deposition found at J.A. pp. 328-344. Ms. Mosby was "*The primary force, motivating force that caused the formation of the society and…*[she was] *the main and primary worker throughout* [its] *existence*." J.A. p. 44, lines 3-12. Ms. Mosby keeps the Mount Lebanon Missionary Baptist Church informed of all the activities of the Harvey School Restoration Society by reporting to the Church on a monthly basis from the beginning of the "*merger*" "*up to this day*." Dep. Tr. of Ms. Mosby at J.A.pp.153, line 25- p. 154, line 15.

APPLICABLE LAW

1. RELEVANT STATUTES

This case is controlled, in the first instance, by the statutory language of the Virginia Workers' Compensation Act. In relevant part, §65.2-101 defines "*Employee*" to mean:

> *"Every person, including aliens and minors,* ***in the service of another under any contract of hire*** *or apprenticeship, written or implied, whether lawfully or unlawfully employed, 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 subdivision 2 of this definition."*

The term "Employer" is defined by the same statute:

> " *' 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 emergency medical services agency 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."* (Emphasis added.)

2. THE DOCTRINE OF THE STATUTORY EMPLOYER UNDER VIRGINIA LAW

In the applicable part pertinent to this case, the "*Statutory Employer*" Doctrine is found in VA. Code §65.2-302(A) which provides:

> **§65.2-302(A). Statutory employer.**
>
> *"A. 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 undertaken 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 dispositive legal principle here is well established: Contractors, subcontractors,* ***and all workers who are engaged in the trade, business, or occupation of the owner of a project*** *are deemed to be statutory fellow employees. The remedy for any injury suffered by one of them as a result of the alleged negligence of another, while engaged in the trade, business, or occupation of the owner, is limited to that available under the Workers' Compensation Act. Evans v. Hook, 239 Va. 127, 387 S.E.2d 777 (1990); Smith v. Horn, 232 VA. 302, 351 S.E.2d 14 (1986); Lucas v. Biller, 204 VA. 309, 130 S.E.2d 582 (1963); Code §§65.1-29, 31,*

40." Nichols v. VVKR, Inc., 241 VA. 516, 403 S.E.2d 698 (1991).

(Emphasis added.)

VA. Code §65.2-302(A), previously known as VA. Code §65.1-29, has been explained by the Supreme Court of Virginia:

> *"Code §65.1-29 contemplates that an owner such as Centel can subcontract all its work yet remain liable under the Act. See, Smith v. Horn, 232 VA. 302, 351, S.E.2d 14 (1986). This 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. Such an owner will remain liable under the Act to the extent the work subcontracted is part of that owner's trade, business, or occupation.*
>
> *Thus, determining Centel's trade, business, or occupation is critical. But before we can determine Centel's trade, business, or occupation, we must first settle upon the appropriate test for making that determination.*
>
> *Developing the appropriate test and determining whether activities fall within or without an entity's trade, business, or occupation is not a simple, straightforward exercise. Deciding what is the trade, business, or occupation of an entity is a 'mixed question of law and fact' and is a question that 'does not readily yield to categorical or absolute standards.' Bassett Furniture v. McReynolds, 216 VA. 897, 902, 224 S.E.2d 323, 326 (1976)."*
>
> Henderson v. Central Telephone Co., 233 VA. 377, 381-82 (1987). *See also*, Rodriguez ex rel Estate of Rodriguez v. Leesburg Business Park, LLC, 287 VA. 187 (2014).

ARGUMENT

I. THERE IS NO CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT THE DISPOSITIVE FINDINGS OF FACT MADE BY THE COURT OF APPEALS (ASSIGNMENTS OF ERROR NUMBERS 2 AND 3)

The Court of Appeals made factual findings never found by the Commission, nor advocated for by any party, to determine the trade, business, or occupation of Mount Lebanon Missionary Baptist Church and the Harvey School Restoration Society. The Court of Appeals held:

> *"The complete reconstruction of the school was beyond the restoration project envisioned by the Historical Society, and its members were not involved in the reconstruction project or other construction activities. Accordingly, we conclude that the Commission correctly determined that the Historical Society and the Church were not engaged in the construction business, and we affirm its decision that neither of these parties was Jeffreys' statutory employer."* See, Opinion dated October 3, 2017 at p. 15.

The record shows the converse of the Court of Appeals' findings of fact: from the very beginning of the Harvey School Restoration Society's request to become part of the Mount Lebanon Missionary Baptist Church, the Restoration Society was aware of, anticipating, and planning for the complete dismantling, moving, and reconstruction of the school. *See*, J.A. at p. 15 where the Restoration Society, in requesting to become part of the Church, stated "*We are presently waiting for proposals from moving*

contractors and landowners." Obviously, the Restoration Society knew from the beginning of the venture that the School was going to be dismantled and moved, requiring it to be reconstructed. It is undisputed Mr. Jeffreys was injured and rendered quadriplegic in the reconstruction of the School after it was moved. *See also*, J.A. pp. 42-43 where Ms. Annie Mosby, President of the Harvey School Restoration Society, confirmed the minutes from the July 18, 2003 meeting of the "*Harvey School Restoration Society*" which recorded "*Annie will be talking to house moving contractors, purchasing land, and make preparations for the moving of the school*." *See also,* J.A. p. 186 Newsletter of the Harvey School Restoration Society dated September 13, 2003 where "*Annie Mosby, President*" reports to the "*Gold Key Members": "I have contacted several house movers and hope to have a proposal and cost estimate in hand soon.*" *See also*, J.A. p. 189 where the "*Harvey School Restoration Society*" confirmed the "*merger*" between it and the Church and reported "*Blake Moving Company will be looking at Harvey School in about two weeks. I will let you know the outcome*." *See also*, J.A. p. 191 where Annie Mosby wrote to Blake Moving Company, Inc.:

> *"The Harvey School Historical Society and Mount Lebanon Missionary Baptist Church acquired the land for the schoolhouse.*

> *I would like to move the school in the spring of 2006 before the new growth in the wood comes to life. I am planning to be home this summer in the month of June or July. I would like to discuss and finalized all the plans.*
>
> *I have not been able to find a contractor to prepare a road to the school house. If you know someone that will do what you need to move the school, please send me the name of the person or company."*

See also, J.A. pp. 318-327 where Annie Mosby, President of the Harvey School Restoration Society, kept detailed accounts of the expenses for "*Dismantling School House*" on a daily and weekly basis. See also, testimony of Annie Mosby, President of Harvey School Restoration Society at J.A. pp. 102-123 where Ms. Mosby described her extensive involvement in the dismantling, moving, and reconstruction of the Harvey School including obtaining the building permits from the County, driving the workers to and from work, driving the workers to obtain supplies, instructing the workers on the requirements of the building code, and managing the payroll. See also, testimony of Charlie Jeffreys that Stella Fitzgerald, who was identified by the Harvey School Historical Society of Mt. Lebanon Baptist Church as the Assistant Chairwoman, assisted at the job site five days per week. (J.A. pp. 391-392). Ms. Fitzgerald gave the workers "*our electrical supply or water supply to mix cement…and if we were not supposed to work the next day, she would tell us.*" (J.A. pp. 392-393) Ms.

Fitzgerald gave the workers "*instructions about what work was to be performed*." (J.A. p. 396) There is no credible evidence to support the dispositive factual findings of the Court of Appeals that the members of the Restoration Society were not involved in the dismantling, moving, and reconstruction project or other construction activities. Making these findings, upon which the case was decided, is reversible error.

II. FINDINGS OF FACT BY THE COURT OF APPEALS, FOR WHICH THERE IS NO CREDIBLE EVIDENCE IN THE RECORD, ARE NOT BINDING ON THIS COURT (ASSIGNMENTS OF ERROR NUMBER 1, 2, 3, 4, AND 6)

The Court of Appeals based its ruling that the Harvey School Restoration Society was not the statutory employer of Mr. Jeffreys on factual findings neither made by the Commission, nor advocated for the Uninsured Employers Fund. Mr. Jeffreys has laid his finger on many portions of the record demonstrating the factual findings of the Court of Appeals are incorrect. It is well-established that "*Upon appeal, the Commission's findings of fact, based on credible evidence, are conclusive and binding upon us. Code §65.1-98. If, however, there is no credible evidence to support the Commission's findings of fact, its findings are not binding on us and the question of the sufficiency of the evidence becomes one of law.*" Goodyear Tire & Rubber Co. v. Watson, 219 VA. 830, 833 (1979). Here the Commission never found the "*facts*" found by the Court of

Appeals, nor did any party advocate for such facts. The same principle which applies to findings of fact of the Commission should apply to "*Findings of Fact*" made by the Court of Appeals—if there is no credible evidence to support findings of fact made by the Court of Appeals the findings are not binding on this Court.

III. WHEN THE DOCUMENTS OF A NON-PROFIT TAX EXEMPT ORGANIZATION STATE THE ORGANIZATION WAS FOUNDED "*TO PURCHASE, RESTORE, PRESERVE, AND MAINTAIN*" AN HISTORICAL SITE, THEN THAT IS THE TRADE, BUSINESS, OR OCCUPATION OF THAT NON-PROFIT, TAX-EXEMPT ORGANIZATION (ASSIGNMENTS OF ERROR NUMBERS 1, 2, AND 4)

In the case at bar, the Full Commission held "*There is no evidence the Church and Historical Society were in the construction business, and we find they were not. Hence there is no statutory employer situation at issue here. VA. Code §65.2-302.*" (J.A. p. 1036). The Commission looked at what Mr. Jeffreys was doing when he suffered his spinal cord injury—construction work—and asked if the Church and the Restoration Society were in the "*construction business*". The Commission determined the Church and the Restoration Society were not "*in the construction business*" and denied Mr. Jeffreys benefits. As shown in *Rodriguez Adm'r v. Leesburg Business Park, LLC*, *infra*, the Commission used the wrong inquiry: *"In determining whether [Jeffreys] construction work was part of [The Church*

and the Restoration Society's] trade, business, or occupation, we therefore do not simply examine whether [the Church and the Restoration Society] engaged in construction…Rather we must determine whether [Jeffreys] construction work at the time of his [crippling] accident was a part of [The Church and the Restoration Society's] business." See, 287 VA. 197. Appellant Jeffreys has always maintained that "construction" is not the trade, business, or occupation of the Church and/or the Restoration Society. See, "Bench Brief" submitted to the Deputy Commissioner before the original hearing found at J.A. p. 462:

> *"The Employer and Uninsured Employer's Fund finally contend that the defendants are not in the trade, business, or occupation of construction. This misses the point entirely. By their very own documents the trade, business, and occupation of the Harvey School Historical Society of Mt. Lebanon Baptist Church was to "purchase, restore, preserve, and maintain the Harvey Colored School." See, Exhibit Three: "Mission Statement." Clearly Mr. Jeffreys was engaged in the trade, business or occupation of the Harvey School Historical Society of Mt. Lebanon Baptist Church when he was injured. Mr. Jeffreys therefore has established his entitlement to workers' compensation benefits for this industrial accident."*

It is thus necessary to determine what is the trade, business, or occupation of the Church and its auxiliary, the Restoration Society, and whether the construction work of Mr. Jeffreys at the time he was injured was a part of their trade, business, or occupation. Mr. Jeffreys maintains the

trade, business, or occupation of the Church and Restoration Society is to "*purchase, restore, preserve, and maintain the Harvey Colored School*" as stated in the "***Mission Statement***". In determining the trade, business, or occupation of a non-profit entity, the content of the foundational documents cannot be ignored. The activities described in the foundational documents must be included, at a minimum, in the "*trade, business, or occupation*" of the non-profit entity. Mr. Jeffreys maintains he was employed in the trade, business, or occupation of the Church and Restoration Society. As such, the Church and Restoration Society are his statutory employers, and Mr. Jeffreys must be awarded his workers' compensation benefits.

IV. THE COURT OF APPEALS APPLIED A NARROW, RESTRICTIVE INTERPRETATION TO THE TERMS "*RESTORE, PRESERVE, AND MAINTAIN*" (ASSIGNMENT OF ERROR NUMBER 4)

Mr. Jeffreys asserts that in determining the trade, business, or occupation of the Church and its Restoration Society, a liberal construction of the founding documents must be utilized to advance "*the fundamental purpose of the Act [which] is to give compensation for accidental injuries from the hazards of employment.*" Henderson v. Central Tel. Co. of VA., 233 VA. 377, 382 (1987). The Court of Appeals used a restrictive, limiting construction in finding that "*restore*" "*did not include the complete*

reconstruction of the building." See, Court of Appeals Opinion dated October 3, 2017 at p. 15.

Webster's II New College Dictionary (1999) defines "*restore*" as follows:

> *"restore (ri-stor, -stor) vt. –stored, -storing, -stores. [ME restoren <OFr. restorer <Lat. Restaurare]* ***1****. To bring back into existence or use.* ***2****. To bring to an original state.* ***3****. To put (someone) back in a former position <restore the monarch to the throne>* ***4****. To make restitution of: give back <restore the stolen goods to the rightful owner> -restor'er n.*
>
> **syns:* ***1****. RESTORE, REINSTATE, RENEW, REVIVE v. core meaning: to bring back into existence or use <restore law and order>* ***2****. RESTORE, REBUILD, RECONDITION, RECONSTRUCT, REHABILITATE v. core meaning: to bring back to previous condition <restored a Victorian mansion>* ***3****. RESTORE, REINSTATE, RETURN v. core meaning: to give (something) back to its owner or possessor <an exiled monarch hoping to be restored to the throne>"*

Even a neutral construction of "*restore*" would include the activity anticipated, planned, and executed by the Church and its Harvey School Restoration Society. A liberal construction leaves no doubt. This is especially true when it was clearly known to the Restoration Society and the Church from the very beginning of the venture the school would have to be dismantled, moved, and rebuilt. The foundational documents of the

Harvey School Restoration Society must be construed and applied in a remedial, liberal fashion to effect and accomplish the purpose of the Legislature in enacting our Workers' Compensation statute. In doing so, Mr. Jeffreys is clearly engaged in the trade, business, and occupation of the Restoration Society and the Church, and is entitled to workers' compensation benefits.

V. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR IN HOLDING THE CHURCH WAS NOT A STATUTORY EMPLOYER BECAUSE ITS "PRIMARY" TRADE, OCCUPATION, OR BUSINESS IS TO ADMINISTER TO THE SPIRITUAL NEEDS OF ITS MEMBERS (ASSIGNMENT OF ERROR NUMBER 5)

Using the literal language of the statute—"*trade, business, or occupation*"—it can be quickly seen that "*trade*" and "*business*" should be excluded from consideration here because the non-profit, tax-exempt organizations in this case do not engage in a "*trade*" or "*business*", as those terms are commonly understood and used. The term "*occupation*" is applicable however. Obviously, the "*occupation*" of the Church, in part, is to minister to and support the spiritual needs of its congregation and their families. However, a non-profit, tax-exempt organization may have more than one "*occupation*", as long held by the Appellate courts of Indiana in *Scott v. Rhoads*, 114 Ind. App. 150, 51 N.E.2d 89 (1943) (Appellate Court

of Indiana, in Banc). The Supreme Court of Virginia has repeatedly held: "*Our version of the Act is based upon Indiana's Workers' Compensation Act, therefore, we have recognized that 'the construction placed upon the Indiana law by the courts of that State merits our consideration.*" Giordano v. MeBar Ind., Inc., 284 VA. 259, 265 (2012) (citing Barksdale v. H.O. Engen, Inc., 218 VA. 496, 499, 237 S.E.2d 794, 796 (1977)). In Scott v. Rhoads the Defendant was primarily a farmer, but also had an oil well. The decedent was killed while working on the oil well. The Indiana Court held:

> *"Appellant earnestly contends that because his principal occupation was farming, the employment of decedent was not in the usual course of his trade, business, etc. It will be noted the provision of the Workmen's Compensation Act here under consideration does not provide that the employment must be in the usual course of the "principal" trade, business, etc., of the employer, but only that the employment must be in the course of the trade, business, etc., of such employer. We are of the opinion that an employer may be engaged in various separate and independent kinds of businesses or occupations, and that his employees in the usual course of each of said businesses or occupations are entitled to the benefits of the Workmen's Compensation Act. Any other construction of the provision of the statute herein involved would tend to nullify the humane purposes which the Workmen's Compensation Act seeks to accomplish."* 114 Ind. App. 150, 51 N.E.2d 91.

Here it is undisputed that Mt. Lebanon Missionary Baptist Church made the Harvey School Restoration Society a part of the Church. Therefore, the Church, in addition to fulfilling its spiritual obligation, was

also engaged in the occupation of the Restoration Society. Clearly, the occupation of the Restoration Society is, at the very least, what the Restoration Society declared its occupation to be: "*Mission Statement: One-Room Schoolhouse Restoration*", (J.A. p. 801); "*Harvey School Historical Society is a tax-exempt, non-profit organization founded on July 18, 2003 to purchase, restore, preserve and maintain the Harvey Colored School as a historical site for the African-American community of Callahan Hill located in Pittsylvania County, Virginia*." (J.A. p. 802); "*Goal: Harvey School Restoration Society was formed to restore the School to its original condition and register it with the Virginia Historical Society. It will be an integral part of the community. The school will display the history of Callahan Hill families and surrounding communities. The ultimate goal is to tie the community, church, and school together as a family. These elements were at the heart of the Callahan Hill community. It was in all of these places that we learned the lessons of life*." (J.A. p. 804); "*We are asking to become part of the church. The members of the Restoration Society will take care of all the business and costs of maintaining Harvey Elementary School*." (J.A. p. 811); "*As an auxiliary of the church and a separate project, we feel that Harvey School Restoration Society should have a separate account from the church. The elected Secretary and*

Treasurer and Assistant Treasurer from the Harvey Restoration Society will maintain the bookkeeping and checking account. I think this will make things easier for everyone and hope the church board member [sic] *will approve."* (J.A. p. 817).

Clearly, one of the occupations of Mt. Lebanon Missionary Baptist Church and its Harvey School Restoration Society was "*to purchase, restore, preserve, and maintain the Harvey Colored School as a historical site for the African-American community of Callahan Hill located in Pittsylvania County, Virginia*." (J.A. p. 802). The next inquiry is: "*Was the construction work of Charlie Jeffreys at the time of his quadriplegic accident a part of Mt. Lebanon Missionary Baptist Church and its Harvey School Restoration Society's occupation?"* Rodriguez, infra., 287 VA. 197.

Mr. Jeffreys and the other workers were "*taking down a support beam, a T-shaped support beam*" of the Harvey School when the beam fell and hit Mr. Jeffreys on the back of the neck. (J.A. p. 507-511). See also, J.A. p. 672-687. This is clearly part of restoring, preserving, and maintaining the Harvey School, the occupation of the Defendants. Consequently, they are the employers of Mr. Jeffreys by virtue of the Statutory Employer Doctrine:

> *"The dispositive legal principle here is well established: Contractors, subcontractors, and* ***all workers who are***

> ***engaged in the trade, business, or occupation of the owner of a project are deemed to be statutory fellow employees.*** *The remedy for any injury suffered by one of them as a result of the alleged negligence of another, while engaged in the trade, business, or occupation of the owner, is limited to that available under the Workers' Compensation Act. Evans v. Hook, 239 VA. 127, 387 S.E.2d 777 (1990); Smith v. Horn, 232 VA. 302, 351 S.E.2d 14 (1986); Lucas v. Biller, 204 VA. 309, 130 S.E.2d 582 (1963); Code §§65.1-29, -31, -40."* (Emphasis added).

The Court of Appeals committed reversible error in holding the Church is not a statutory employer because its "*primary*" occupation is to minister to the spiritual needs of its congregation. VA. Code §65.2-302 only requires the worker to be engaged in "a part" of the trade, business, or occupation of the statutory employer. The Court of Appeals' ruling on this issue is reversible error. Respectfully, Mr. Jeffreys must be awarded workers' compensation benefits.

VI. THE RIGHT TO WORKERS' COMPENSATION BENEFITS IS A PROPERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE (ASSIGNMENTS OF ERROR NUMBERS 1, 2, AND 3)

This Court discussed "*Our constitutional due process guarantees*" in *Klimko v. Virginia Employment Comm*., 216 VA. 750, 753, 222 S.E.2d 559, 563 (1976). There this Court held:

> *"The due process clauses of the Fifth and Fourteenth Amendments apply both procedural and substantive constraints upon deprivations of 'liberty' and 'property'.*

Whether a particular liberty interest or property interest is a protected interest no longer depends upon whether it is a 'right' or a 'privilege', for the 'wooden distinction' between the two has been 'fully and finally rejected.' Board of Regents v. Roth, 408 U.S. 564, 571, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

When procedural due process respecting deprivation of a property interest is challenged, the Supreme Court pursues a two-step inquiry. See, e.g., Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); Board of Regents v. Roth, supra; Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). The first inquiry is whether the interest is a property interest protected by procedural due process guarantees; if so, the second is whether the procedures prescribed or applied are sufficient to satisfy the due process 'fairness' standard.

Pursuing the two-step inquiry, we consider first whether the expectation of continued unemployment compensation benefits is a protected property interest.

In a constitutional context, the connotative dimensions of the word 'property' are greater than the corporeal definition used by the layman. 'The Court has…made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.' Board of Regents v. Roth, 408 U.S. at 571-72, 92 S.Ct. at 2706. Procedural due process has been extended to attachments by creditors, North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); to wage garnishments, Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); to a driver's license suspension, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); to a tax exemption denial, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); to the right to government employment, Connell v.

Higginbotham, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971); Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); But compare Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); to the right to an uninterrupted education, Goss v. Lopez, supra; and to the right to welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)."

VII. IN *AMERICAN MANUFACTURERS MUTUAL INSURANCE CO. v. SULLIVAN*, 526 U.S. 40, 119 S.CT. 977, 143 L.Ed.2d 130 (1999) THE COURT ACCEPTED THE PARTIES' UNDERSTANDING THAT THERE IS A PROTECTED PROPERTY INTEREST IN WORKERS' COMPENSATION BENEFITS

In determining if a claim for workers' compensation benefits is a protected property interest entitled to due process protection, the Court is referred to *American Mfgs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). (Hereinafter "*Sullivan*"). In *Sullivan* the High Court determined whether a workers' compensation insurance carrier's unilateral *ex parte* suspension of medical benefits pending a determination of whether the involved medical treatment was reasonable and necessary constituted denial of a property interest by virtue of state action. The Court noted that "*The Court of Appeals did not address whether respondents have a protected property interest in workers' compensation medical benefits, stating that 'neither party disputes' this point*." The Court went on

to hold the action of the workers' compensation insurance carrier's action was not "*State action*". By going through this analysis, the High Court implicitly recognized claims for workers' compensation benefits are a protected property interest.

Justice Ginsburg, in a concurring Opinion, expressly wrote *"I do not doubt, however, that due process requires fair procedures for the adjudication of respondents' claims for workers' compensation benefits, including medical benefits*." 526 U.S. 62, 119 S.Ct. 991. In a concurring Opinion Justices Breyer and Souter also recognized that entitlement to workers' compensation benefits "*may well [be] a constitutionally protected 'property' interest.*" 526 U.S. 63, 119 S.Ct. 991. Finally, Justice Stevens, concurring in part and dissenting in part, stated that workers' compensation benefits are "*unquestionably a species of property protected by the Due Process Clause of the Fourteenth Amendment*." 526 U.S. 63, 119 S.Ct. 991.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) "*The Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.*" Quoting Logan v. Zimmerman Brush Co., 445 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982).

In *Williams v. Virginia Electric & Power Co*., 18 VA. App. 569, 445 S.E.2d 693 (1994) the Court of Appeals considered a "*due process*" challenge to the Workers' Compensation Commission's use of an "*On-The-Record*" hearing procedure to grant an employer's Change In Condition application thereby terminating the claimant's benefits. The Court of Appeals held "*The 'on the record' hearing procedure satisfied the requirements of due process and adequately protected* ***claimant's substantial rights***." 18 VA. App. 576, 445 S.E.2d 697. (Emphasis added). The Court of Appeals' ruling implicitly, if not expressly, found that workers' compensation benefits are "*substantial rights*". Mr. Jeffreys asserts that claims for workers' compensation benefits are a protected property interest entitled to due process protection.

VIII. THE GENERAL ASSEMBLY HAS LIMITED THE JURISDICTION OF THE COURT OF APPEALS IN WORKERS' COMPENSATION CASES TO "*APPELLATE JURISDICTION*" (ASSIGNMENT OF ERROR NUMBER 3)

VA. Code §17.1-405 establishes that the Court of Appeals has "*Appellate Jurisdiction*" of "*Any final decision of the Virginia Workers' Compensation Commission*." In regard to "*Questions of Fact*" the jurisdiction of the Court of Appeals is limited by VA. Code §65.2-706(A) which states in pertinent part "*The award of the Commission…shall be*

conclusive and binding as to all questions of fact." The Workers' Compensation Commission's factual findings are conclusive and binding on the Court of Appeals and the Supreme Court of Virginia when those findings are based on credible evidence. Seven-Up Bottling Co. v. Moseley, 230 VA. 245, 249, 335 S.E.2d 272, 274 (1985). Purvis v. Porter Cabs, Inc., 38 VA. App. 760, 763, 568 S.E.2d 424, 425 (2002). "*The issue whether a person is a statutory employee*", as is present in this case, "*presents a mixed question of law and fact which must be resolved in light of the facts and circumstances of each case*." Stone v. Door-Man Mfg. Co., 260 VA. 406, 413, 537 S.E.2d 305, 308 (2000) quoting Cooke v. Skyline Swannanoa, 226 VA. 154, 156, 307 S.E.2d 246, 247 (1983). See also, Princess Anne Builders, Inc. v. Faucette, 37 VA. App. 102, 109, 554 S.E.2d 113, 113 (Ct. of App. 2001). Where "*The facts relevant to resolution of the jurisdictional issue* [i.e. whether a claimant is a statutory employee or not] *are not in dispute, 'we must determine whether the trial court correctly applied the law to those facts.*" Stone v. Door-Man Mfg. Co., quoting Cinnamon v. International Business Machines Corp., 238 VA. 471, 474, 384 S.E.2d 618, 619 (1989).

Here, the facts relevant to whether Mr. Jeffreys is a statutory employee entitling him to workers' compensation benefits are not in

dispute. The relevant facts—those that determine the trade, business, or occupation of the Restoration Society and the Church—are established by their own documents and their prolonged activities wholly consistent therewith. The Court of Appeals, in making factual findings unsupported by any evidence in the record, left Mr. Jeffreys in the position of having no appellate review of "*new*" factual findings, unless this Court accepts appellate review as it has done. Without the appellate review granted by this Court, Mr. Jeffreys would be left with "*new*" factual findings against him, unsupported by any credible evidence in the record, and without the appellate review granted to all parties in workers' compensation cases to ensure the factual findings made against them are supported by credible evidence in the record. (Without appellate review Mr. Jeffreys is also left with an erroneous legal analysis of how to determine the trade, business, or occupation of a non-profit entity.) Once the General Assembly grants the right of appellate review to all parties in a workers' compensation case to ensure the factual findings against them are supported by credible evidence in the record, the Court of Appeals cannot defeat that procedural right by making "*new*" factual findings which have no supporting evidence in the record. This is a denial of procedural due process. In this case this has resulted in the loss of substantial workers' compensation benefits to

Mr. Jeffreys. *See*, *Halbert v. Michigan*, 545 U.S. 605, 610,125 S.Ct. 2582, 2586, 162 L.Ed.2d 552 (2005). (Having provided the right of appellate review in criminal cases, the right cannot be arbitrarily denied to indigent defendants.) (Citing *Griffin v. Illinois*, 351 U.S. 12, 24, 76 S.Ct. 585, 400 L.Ed. 891 (1956)) (Frankfurter, J. concurring in judgment.); *see id*, at 23, 76 S.Ct. 585. *("[W]hen a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons…from securing such…review*.") Here the line drawn denying Mr. Jeffreys the right of appellate review is not one of indigency, but one drawn by the Court of Appeals whenever it decides to make "*new*" factual findings which have no support in the record. This line drawn by the Court of Appeals—whenever it chooses to make "*new*" factual findings unsupported by any evidence in the record—is even more arbitrary than a line drawn on the basis of indigency. This action taken by the Court of Appeals denies Mr. Jeffreys the fundamental fairness the General Assembly has guaranteed—that all dispositive factual findings in a workers' compensation case are supported by credible evidence in the record. This denies Mr. Jeffreys a valuable and substantial property right without due process of law.

IX. THE CONSTITUTIONAL DENIAL OF DUE PROCESS BY THE COURT OF APPEALS IS CAPABLE OF REPETITION, YET EVADING REVIEW

As expressed in the Jurisdictional Statement, it is possible to decide this case on the basis of the significant precedential issue of how to determine the trade, business, or occupation of a non-profit entity. However, the actions of the Court of Appeals most certainly can be repeated harming both claimant and employer as the case may be. Such a denial of due process can certainly evade review for many reasons. *See*, *e.g.*, VA. Code §17.1-410 limiting the right of appeal from the Court of Appeals to Supreme Court of Virginia. As with most situations involving loss or danger, it is far better to prevent a loss, than to try to fix it once the loss has occurred. Here, this Court can, and should, decide the matter of significant precedential value of how to determine the trade, business, or occupation of a non-profit entity. At the same time this Court can, and in Mr. Jeffreys' view, should, also rule that when the Court of Appeals makes "*new*" findings of fact for which there is no evidence in the record to support it, the affected party is denied the due process procedural right granted by the General Assembly of appellate review to ensure that factual findings are supported by credible evidence in the record. There are certainly options available to the Court: This Court can simply hold that factual findings

made by the Court of Appeals without evidence in the record to support it are not binding on this Court, and proceed to determine the matter of significant precedential value of how to determine the trade, business, or occupation of non-profit entity. Or, this Court can directly declare the due process violation. In Mr. Jeffreys' view this is the course that protects him and all parties in a workers' compensation case. Either way, Mr. Jeffreys should prevail, having established his right to workers' compensation benefits.

CONCLUSION

Mr. Jeffreys is entitled to workers' compensation benefits as a statutory employee for the quadriplegic injury he suffered while engaged in the occupation of the Defendants, Mt. Lebanon Missionary Baptist Church and its Auxiliary, the Harvey School Restoration Society.

When the foundational documents of a non-profit tax-exempt organization state the organization was founded "*to purchase, restore, preserve, and maintain*" an historical site, and the organization's actions are wholly consistent therewith, that is the trade, business, or occupation of that non-profit entity. The trade, business, or occupation of a non-profit entity must be given a broad, liberal construction to advance the purpose and intent of the Workers' Compensation Act.

A claimant does not have to be engaged in the "*primary*" trade, business, occupation of the employer to be eligible for benefits. The Claimant only has to be engaged in a part of the employer's trade business, or occupation.

When the Court of Appeals makes "*new*" findings of fact which are not supported by any evidence in the record, these findings are not binding on this Court. Furthermore, the Court of Appeals' action in making "*new*" findings of fact not supported by any evidence in the record operates as a denial of the due process right of appellate review granted by the General Assembly to ensure that factual findings are supported by credible evidence. This denial of due process is capable of repetition, while yet evading Judicial review.

Mr. Jeffreys moves this Honorable Court to reverse the Court of Appeals and the Commission and to award him the workers' compensation benefits to which he is entitled, including temporary total disability and medical benefits. Mr. Jeffreys moves this Court for the opportunity to present oral argument in support of his appeal.

Respectfully Submitted,

CHARLIE JEFFREYS

By: */s/ James B. Feinman*

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CERTIFICATE

I hereby certify that Rule 5:26 of the Rules of the Supreme Court of Virginia has been complied with on this 24th day of July, 2018.

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