

**ATTORNEYS FEES UNDER §65.2-714  
OF THE VIRGINIA CODE**

**By:**

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## **Attorneys Fees under §65.2-714 of the Virginia Code**

### **I. Commission Jurisdiction over Attorneys fees**

The Virginia Workers' Compensation statute is designed to prevent lawsuits against employers and simultaneously provide specified benefits to workers' compensation claimants for lost wages, medical benefits, permanent partial compensation, death benefits and so forth. However, those benefits could not exist without a portion of the workers' compensation statute that seldom involves injured workers; §65.2-714 of the Virginia Code. This Section specifically provides that both health care providers who care for the claimant and the attorneys who make sure that the claimant's rights are taken care of are paid for their services.\* Copy of Section 714 at Exhibit 1 hereto.

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\* The Commission has exclusive jurisdiction over fees of health care providers under §65.2-714. While there is no official schedule of charges, those charges are limited to the prevailing rates in the "same community for similar treatment." §65.2-605, Virginia Code. If a dispute arises, any contest on the reasonableness of the charges can be referred to a peer review committee established pursuant to §65.2-1300 to 1310 of the Virginia Code. Our discussion here will be limited to attorney's fees under Section 714 and/or the topic of attorney's fees as a percentage of contested medical bills. However, the fees of doctors and lawyers are closely intertwined under Section 714. There is also brief discussion herein regarding attorney's fees under §65.2-713 of the Virginia Code.

Much like the rest of the Workers' Compensation statute, the Commission's concern with Section 714 is what is in the best interest of the claimant. Consequently, the Commission is not bound by fee agreements between claimant's and their attorneys. The Commission has repeatedly taken the position that it must instead look at the circumstances surrounding each case in determining reasonable attorney's fees. Blackburn v. Newport News Shipbuilding, 67 O.I.C. 251,252 (1988). If an attorney's fee is reduced in a settlement order by the Commission, the carriers liability is not reduced. Instead, that amendment by the Commission only increases the portion of the proceeds that the claimant will receive. Smith v. Catron Companies, 68 O.I.C. 245-247 (1989). In determining an appropriate fee, the Commission will consider the complexity of the issues involved, the time expended and the result obtained. Sauder v. The Times General Company, 71 O.W.C. 304, 306 (1992); See also, Dillon v. Holiday Inn Tyson's Corner, 64 O.I.C. 113, 115 (1985). The Commission maintains jurisdiction over this issue in order to avoid claimants' being overcharged. Beehive Mining Company v. Industrial Commission, 144 Va. 240, 242 (1926). The collection of attorney's fees in excess of an amount awarded by

the Commission constitutes contempt and unethical conduct. Smith v. School Board, 64 O.I.C. 283, 292 (1984).

Recently, the Commission has officially recognized two general rules of thumb in regards to the award of attorney's fees. More specifically, the commission has stated that 15% of permanent partial disability awards, Down v. Jim Price Chevrolet, 77 O.W.C. 91, 92 (1998), and 20% of lump sum settlements, King v. Boggs & Sloce Municipal Services, 77 O.I.C. 160, 161 (1998) are reasonable fee percentages. Compare Marcus V. Foley, 64 O.I.C. 224, 225 (1985). The Commission has also ruled that it has the right and authority to set appropriate fees for defense attorneys. However, the Commission normally chooses not to get involved in regards to defense attorney's fees. Hodge v. Great Coastal Express, 63 O.I.C. 182, 187 (1984). Normally, an employer has no standing to comment on or complain about the award of a claimant attorney's fees when paid from the claimant's award. Mongold v. Christ Masonry Products, 62 O.I.C 326, 328 (1983). Also, in a surprising ruling, the Commission held that it will not exercise jurisdiction over a dispute between two claimant's counsel as to the division of the fee. Moore v. Security Storage Company, 76 O.W.C. 163, 165 (1997).

## II. Award of Attorneys fees against employers and carriers.

In appropriate circumstances, the Commission will determine that attorney's fees and/or expenses should be paid by an employer or insurance carrier.\*\* For instance, attorney's fees have been assessed against the carrier for unexcused failure to pay medical expenses. Whitlow v. Paul Sinoco Service, 61 O.I.C. 416 (1982). The Commission awarded attorney's fees when the employer withheld the Memorandum of Agreement purposely and without cause. Howard v. Little River Seafood, 71 O.I.C. 293 (1982). When the employer failed to produce any persuasive evidence at hearing in opposition to the treating physician's recommendation, the Commission awarded attorney's fees. Schluser v. Chevrolet Corporation, 70 O.I.C. 272, 274 (1991). Also, the Commission awarded attorney's fees when the employer attempted to withdraw a stipulation without any legitimate grounds, Watson v. Quality Service, 70 O.I.C. 65 (1991), and where a hearing was necessitated by the employer's failure to stipulate to known facts. Malone v. Cisco, 70 O.I.C. 61, 64 (1991).

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\*\* This line of cases relies on both §65.2-713 and 714 of the Virginia Code and their predecessor provisions.

The general rule of thumb is that the employer and carrier may not defend a claim without some reasonable grounds. Volvo White Truck Corp. v. Hedge, 1 Va. App. 195, 201 (1985). If a claim is defended without justification, reliance on information furnished by the Commission is no excuse. Bell v. Kings Kid Contracting Company, 65 O.I.C. 330, 333 (1986). The Commission may use its own discretion in determining whether a case was defended unreasonably and assess attorney's fees even without a request from claimant's counsel. Ridgeway v. Universal Electric Company, 67 O.I.C. 160, 164 (1988). However, it has been held that the determination as to whether the employer defended a proceeding without reasonable grounds is to be judged from the perspective of the employer and not the employee. Lynchburg Foundry Company v. Goad, 15 Va. App. 710, 716 (1993). It has also been held that there is no provision of the Workers' Compensation statutes to charge the employer for the cost of transportation and lodging incurred by parties to attend a hearing. Malone v. Cisco, supra. at 64.

### **III. Section 714 attorney's fees for collecting medical bills: General Guidelines**

While fees awarded to attorneys for processing a permanent partial award or lump sum settlement may be satisfactory, fees for attending a hearing are extremely inadequate at best. As some justification for that, the Commission has indicated that claimant's attorneys often obtain additional funds under §65.2-714. Kerrigan v. The Weekend Furniture Store, 98 WC UNP 179363 (1998). Nonetheless, the difficulties in obtaining such fees are often significant.

Any attorney attempting to obtain Section 714 fees must be extremely familiar with the statute itself. In particular, each sentence of §65.2-714(b) is fraught with problems. First, the claimant's attorney must be able to establish that the medical bills were "contested". Pavlicek v. Jerabeck, Inc., 21 Va. App. 50, 58 (1995). The fact that there may have been a delay in investigating bills or providing a Memorandum of Agreement with no specific denial is not considered a contest. Gamble v. PA Cold Company, Inc., 71 O.W.C. 299, 301 (1992). Also, a Section 714 attorney fee may not

be awarded if there is neither a hearing on the issue of compensability or an abandonment of defenses prior to a hearing. Thornton v. Virginia Concrete Company, 67 O.I.C. 240, 242 (1988).

Prior to scheduling a hearing on the issue of attorney's fees, claimant's counsel must be certain that the provider has been paid or that the third party insurance carrier has been reimbursed. Danville Radiologists Inc. v. Perkins, 22 Va. App. 454, 459 (1996). The claimant's attorney must also seek a Section 714 fee within a reasonable time after entry of the final award or order providing for the medical benefits and give notice to the health care provider or third party carrier of his intention to seek an award for fees. Sines v. Better Homes Realty, Inc., 66 O.I.C. 162, 165 (1987); Begley v. Shaw, 64 O.I.C. 39, 41 (1985). However, the statute does not require that the health care provider or carrier agree to be represented by the employee's counsel in regard to obtaining payment or reimbursement of the medical bill. Doss v. ARA Group, Inc., 75 O.W.C. 79, 82 (1996).

#### IV. Section 714 fees: Other Pitfalls

Much like liability carriers and medical payment carriers in personal injury cases, health insurance companies and workers' compensation insurance companies have begun to raise other issues making payment of medical bills and collection of 714 fees increasingly complex. I will mention a few of those issues here.

There are occasions where medical bills are processed and paid by a "servicing company" with no funds of its own at risk. This type of company may not be considered a third party insurance carrier under Section 714. When this happens, it may be that a 714 fee cannot be collected from that servicing company. This may be a common problem with state employees. Eveland v. Commonwealth of Virginia, 74 O.W.C. 189, 190 (1995). The fact that the health insurance company would have paid the bills if the compensability of the medical bill was denied is somewhat irrelevant in terms of entitlement to a Section 714 attorney's fee. The claimant's attorney is still entitled to seek those fees. Shelton v. PA Coal Company, 71 O.W.C.

296, 299 (1992). However, where the health insurance company has paid a significant part of the medical bill, the assessment of an attorney fee against the health care provider may be limited to that portion of the payment which is procured by the claimant counsel's efforts. Therefore, in appropriate cases, claimant's counsel will have to determine what portion of the Section 714 fee would be collected against the health care provider and what portion against the third party insurance carrier. Williams v. Philip Morris, Inc., 69 O.I.C. 207, 208 (1990). It is worth noting that at least one State Supreme Court has ruled that Medicaid is not a third party insurance carrier. Pearson v. C.P. Buckner Steel Erection, 348 N.C. 239, 498 S.E. 2d 818 (1998). It has occasionally been argued by workers' compensation insurance companies and health insurance companies that §65.2-714 only applies to an original contested claim as opposed to a contested bill after a claim has been found compensable. This argument is not valid. Avent v. Fleetwood Transportation, 98 WC UNP 1714816 (1998). See also, Murphy v. Woodside Association, 94 WC UNP 1467470 (1994). But, the medical services rendered must have been incurred prior to the time the contest was settled. Pearn v. Service Electrical Contractors, Inc., 00 WC UNP 1851231 (2000).

Some workers' compensation insurance companies have taken the position that once the compensability of a case has been determined and so long as the medical bills have been paid by health insurance or there are no collection efforts pending against the claimant, claimant's counsel has no standing to bother the workers' compensation insurance company or Commission with a 714 application. This writer believes this position is frivolous. It was dealt with in the case of Brown v. Howmet Corporation, 76 O.W.C. 342, 345 (1997) where the Commission made it clear that claimant's attorneys have an interest in the payment of certain bills since an attorney's fee may be potentially awarded out of the medical bills. It would also seem that claimant's attorneys and the Commission have an interest in being certain that the workers' compensation insurance companies do not stick claimant's and health insurance companies with bills, however small, that the workers' compensation insurance companies should be paying.

**V. Section 714 Fees: Write offs and contracts between carriers and providers.**

On a similar vein, workers' compensation insurance companies have taken the position that they are not required to pay any amounts in excess of amounts paid by health insurance. This is somewhat similar to the write off tactics of liability carriers. Fortunately, the Virginia Supreme Court eliminated that issue just recently on liability cases. Acuar v. Letourneau, 260 Va. 180 (2000). See copy at Exhibit 2. Two cases have dealt with this issue in the workers' compensation arena. In the case of Sun v. Advanced Technology Systems, Inc., 00 WC UNP 1823409 (2000) (copy at Exhibit 3), the Commission held that there was a presumption that the full amount of medical charges as originally billed by the claimant's health care providers is both reasonable and necessary. However, in the case of Melchor v. Trussway, Ltd., 00 WC UNP 1815646 (2000) (see Exhibit 4), the full Commission held that, as distinguished from Sun v. Advanced Technology Systems, if there is privity of contract between the workers' compensation carrier and a preferred provider organization (PPO) that the health care provider deals with, that health care provider may be required to accept

contractually reduced fees from the workers' compensation carrier. It is worth noting that more often than not, at Section 714 hearings, workers' compensation insurance companies and health insurance companies do not bring in the applicable contracts or have evidence presented at hearings of appropriate related charges in the community. In that instance, the medical bills received by the claimants are presumed to be both reasonable and necessary. Sun v. Advanced Technology Systems. See also, Blevins v. Williamsburg Pottery Factory, 75 O.W.C. 103, 104 (1996); Bogle Development Company v. Buie, 19 Va. App. 370 (1994).

## **VI. Section 714 Fees: Forms**

Assuming all the various landmines above discussed can be circumvented, the Section 714 practice can be financially rewarding and allow claimant's counsel to make up for the lack of fees at hearings with occasional percentages of contested medical bills. However, the question of proper handling of that may at times be left to only the more experienced

staff or outside contractors. Whomever does the work, the forms attached hereto may be of some help.

We normally try to obtain the original bills containing certain appropriate codes making processing of payment or reimbursement on the backend efficient. See Exhibit 5. Also, in order to avoid undue delay in the fee processing, reaching agreement with providers on the percentage of fees/bill split at the earliest possible time may avoid problems. See Exhibit 6. Verifying which bills are contested and unpaid prior to negotiation is necessary. See Exhibit 7. The bill must be paid or reimbursed before filing for a Section 714 fee. See Exhibit 8. If agreement with providers or carriers is worked out, a consent order can be forwarded to the Commission. See Exhibit 9. Invoicing the providers and insurers may still be necessary, even if an agreement is reached. See Exhibit 10. Finally, for Section 714 cases, filing for a hearing is always an option. See Exhibit 11. Be sure to look at Rule 6 of the Rules of the Commission before filing for a hearing. See Exhibit 12.

## **VII. Conclusion**

Section 714 fees for lawyers and doctors are critical to both our ability to represent or the doctors' ability to care for workers' compensation claimants. We must make every effort to prevent workers' compensation carriers or health insurance carriers from unfairly reducing either medical bills or Section 714 fees.

## **Index of Exhibits**

1. Section 65.2-714 of the Virginia Code
2. Acuar v. Letourneau, 260 Va. 180 (2000)
3. Sun v. Advanced Technology Systems, Inc., 00 WC UNP 1823409 (2000)
4. Melchor v. Trussway, Ltd., 00 WC UNP 1815646 (2000)
5. Letter to provider to obtain medical bills.
  - 5a. HCFA form
  - 5b. UB-92 form
6. Letter to provider in regards to fees/bill split.
  - 6a. Consent Order awarding attorney's fees.
7. Letter to workers' compensation carrier to obtain an itemized statement of medical bill payments.
8. Letter to workers' compensation carrier for payment of medical bills.
9. Letter to Commission with executed Consent Order.
  - 9a. Consent Order awarding attorney's fees.
10. Letter to provider for invoicing.
11. Letter to Commission to request a hearing on request for attorney's fees against provider.
12. Rule 6 of the Rules of the Commission