

**MEDICAL BILLS AND ATTORNEY'S FEES
UNDER §65.2-714 OF THE VIRGINIA CODE**

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By:

**Andrew J. Reinhardt, Esquire
Kerns, Kastenbaum & Reinhardt, PLC
1809 Staples Mill Road, Suite 300
Richmond, Virginia 23230
(804) 355-7900
Email: andy@kkrfirm.com**

Part A: Medical Billing in Workers' Compensation

I. Commission's exclusive jurisdiction pursuant to §65.2-714

The Workers' Compensation Commission has exclusive jurisdiction over fees of health care providers treating Workers' Compensation claimants pursuant to §65.2-714 of the Virginia Code Combustion Engineering, Inc. v. Lafon, 22 Va. App. 235, 468 S.E2d 698 (1996). There are several requirements to an employer's* responsibility for paying a bill. Pursuant to Section 714, if: 1) a medical provider is treating a compensable work injury; 2) that provider is an authorized treating physician in the referral chain; and 3) the care provided is reasonable, necessary and related to the work injuries, the medical bills of that provider should be paid by the employer. Watkins v. Halco Engineering, Inc., 225 Va 97, 300 S.E. 2d 761 (1983); Selman v. McGuire Group Service, Inc., 77 O.W.C. 18 (1998); Boettger v. Div. of Motor Vehicles, 64 O.I.C. 51 (1995). However, in order for health care providers to be entitled to collect fees from an employer, they must provide medical reports to the employer within a reasonable time. §65.2-714A of the Virginia Code. See also §65.2-604 of the

* The term employer is used interchangeably with Workers' Compensation carrier since the employer's obligations are typically administered by the carrier.

Virginia Code. Parks v. Systems Engineering Associates Corporation, 66 O.I.C. 104 (1987). Nonetheless, health care providers are not permitted to bill for case management and/or normal medical reports. Fox v. Waffle House, VWC File No. 194-57-70 (April 30, 2001). In addition, the employer's responsibility for specific medical bills may not be ripe until the carrier has been furnished with copies of the bills and afforded an opportunity to conduct an audit. Mann v. Old Dominion Peanut Corporation, VWC File No. 176-33-87 (September 18, 2000).

II. No balance billing or collection permitted, peer reviews

Ultimately, when a medical bill has been paid by the employer, a health care provider is not permitted to balance bill the injured employee in connection with that medical treatment. §65.2-714D of the Virginia Code. Also, during the pendency of litigation at the Commission regarding the bill, the provider may not attempt to collect the unpaid bill from the injured worker. §65.2-601.1 of the Virginia Code.

In the event a dispute arises, contests on the reasonableness of medical charges can be referred to a peer review committee established pursuant to §65.2-1300 to 1310 of the Virginia Code. However, a peer review committee may not

rule upon medical expenses previously approved or ruled upon by the Commission. Jenkins v. Chase Bag Company, 62 O.I.C. 247 (1983). It also seems that the peer reviews are principally designed to adjust overcharges by providers as opposed to underpayments by employers. See §65.2-1306; Davis v. Rosso & Mastracco, t/a Giant Open Air, 69 O.I.C. 211 (1990).

III. Prevailing rate in community is rule of thumb

The general rule of thumb in regards to payment of medical services provided in Workers' Compensation cases is that the employer is responsible to pay medical charges at the prevailing rate in the "same community". §65.2-605 of the Virginia Code. The "same community" refers to the city, county or town in which the medical care provider practices. Hopkins v. Fairfax County School Board, 73 O.W.C. 168 (1994). Without evidence to the contrary, medical bills received by the injured worker are considered "prima facia" evidence that the bills are reasonable and that the treatment was necessary. Blevens v. Williamsburg Pottery, 75 O.W.C. 103 (1996). Therefore, upon proper submission of those bills by the claimant or provider (i.e. with CPT Codes, etc.), the employer alleging excessive or unnecessary doctor's fees must prove that the costs exceed the prevailing rate in the community for the same or comparable services. Korsh v.

Builders Hardware & Architectural Prods., Inc., 76 O.W.C. 76 (1997). The Commission may not make a ruling on the reasonableness of a health care providers charges without that provider being made a party to or receiving notice of the proceedings. Venable v. Rush Companies, VWC File No. 187-65-57 (July 26, 1999).

IV. Methods for determining prevailing rate in community

Disputes can arise as to the proper method for determining the prevailing rate in the community. In previous cases, the Commission determined that an acceptable method for determining what constitutes the prevailing rate in the same community was utilized when the employer retained the services of a business called MedCheck. Their procedures involved collecting data from physicians, clinics, insurance carriers and other existing fee schedules, grouping them by geographic area and CPT, dividing the 50 states into 195 fee similar geographic areas by zip code and making payment recommended at the 80th percentile.

Davison v. Smyth County Public Service Authority, 73 O.W.C. 171 (1994).

Subsequently, it was held that MedCheck procedures, a service of Corvel Corporation, were not appropriate. The evidence revealed that the cost database was incomplete and was not shown to be truly representative of the cost of similar

services charged by health care providers in the community. In that case, it was held that the employer's decision to pay only at the 70th percentile failed to show any correlation with the standard for determining appropriate costs as set out in the Workers' Compensation code. Louise Obici Hosp. v. Dept. of Trans., 75 O.W.C. 235 (1996); See also Lillard v. Safeway Stores, Inc., 71 O.W.C. 213 (1994); Griffin v. Suffolk City Public Schools, 71 O.W.C. 217 (1992). More recent cases have routinely rejected the use of the MedCheck database type approach and centered instead on requiring the use of a database that is truly representative of costs of similar services charged by providers in the Community. For a specific application of current case law, see Watson v. Johnston Willis Hospital, VWC File No. 196-40-51 (September 26, 2003) (Copy at Exhibit 1 hereto) (insufficient database) and Albers v. Virginia Beach Police, VWC File No. 200-81-04 (May 6, 2004). (Copy at Exhibit 2 hereto) (appropriate database).

V. Provider contracts trump statutory and case law

The issue of provider contracts presents an entirely separate layer of consideration of the amount of medical bills. Despite all of the above discussion, health care providers and employers or various insurance companies can

completely ignore this statutory and case law and enter into contractual arrangements to the contrary. When the parties have bound themselves by “provider contracts” for payment of medical services at specified rates, the Commission will not override those agreements, absent, fraud, mutual mistake or violation of law or public policy. In re Cohen 75 O.W.C. 63 (1996). The only question may be whether or not, in a particular case, the provider contract governs. This point has been a matter of litigation over the last couple of years with somewhat unintended results from the standpoint of the providers involved. Melchor v. Trussway, Ltd., VWC File No. 181-56-46 (January 6, 2000), aff’d, Leibovich v. Melchor, 35 Va. App. 51, 542 S.E.2d 795 (2001) (holding that if there is privity of contract between the Workers’ Compensation carrier and a preferred provider organization (PPO) the health care provider deals with, that the health care provider may be required to accept contractually reduced fees from the Workers’ Compensation carrier) (copy of cases at Exhibits 3 and 4).

VI. Real issue is late payment requiring legislative remedy

The ultimate problem with payment of medical bills in Workers’ Compensation cases is probably not the amount of the bill. Either reasonable people can ultimately agree, or the Commission could ultimately rule on whether

or not the medical services in question were reasonable, necessary, in the referral chain, related to the work injury and the appropriate amount that should be paid for them. Perhaps what is of greater moment is the amount of time it takes for these matters to be resolved. What is also of great significance to health care providers who wait for payment or injured workers who wait for services to be provided, is that often it seems that the Workers' Compensation insurance companies suffer little or no penalty for non-payment or late payment of these medical bills. After it is all said and done, it seems that the worst that can happen to the employer or Workers' Compensation insurance carrier for causing a delay in provision of medical services or delay in reasonable payment of medical bills is that they ultimately provide those services or pay the bills at the same rate that they would have had to pay them at the outset with no penalty, no interest, no additional cost to the employer or carrier, despite perhaps years of delay and the imposition of hardship or even attorney's fees to claimants or health care providers. The Commission is without jurisdiction to assess penalties for late payment of medical bills. Jenkins v. Chase Bag Co., supra at 249-50. Toward this end, some reasonable legislation to resolve this issue ought to be considered.

Part B: 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.*

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

*As discussed above, 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. Our discussion here will be primarily limited to attorney's fees under Section 714 and/or the topic of attorney's fees as a percentage of contested medical bills. However, there is also brief discussion herein regarding attorney's fees under §65.2-713 of the Virginia Code.

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).

The Commission has officially recognized several rules of thumb in regards to the award of attorney's fees to claimant's attorneys. 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). In a \$714 fee dispute 25% of the disputed medical bill is not unreasonable when vigorously contested by the provider at trial and on review. LaCroix v. Howell's Heating & Air Conditioning, VWC File No: 197-56-76 (December 19, 2001).

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). The Commission 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).

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

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

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, VWC File No. 179-36-36 (May 26, 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 more common problem with state employee cases. Eveland v.

Commonwealth of Virginia, 74 O.W.C. 189, 190 (1995). But compare Haggerty v. Crestar Bank, VWC File No. 156-82-48 (October 27, 1993) (In spite of use of servicing companies, a self insured employer stands in the shoes of an insurer and is subject to the provisions of §65.2-714(B)). 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, VWC File No. 171-48-16 (April 8, 1998). See also, Murphy v. Woodside Association, VWC File No. 146-74-70 (November 16, 1994). But, the medical services rendered must have been incurred prior to the time the contest was resolved. Pearn v. Service Electrical Contractors, Inc., VWC File No. 185-12-31 (May 2, 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.

Workers' compensation insurance companies have sometimes 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. The Virginia Supreme Court appears to have eliminated that issue on liability cases. Acuar v. Letourneau, 260 Va. 180 (2000). Two cases have dealt with this issue in the workers' compensation arena.

In the case of Sun v. Advanced Technology Systems, Inc., VWC File No. 182-34-09 (January 6, 2000)), 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., VWC File No. 181-56-46 (March 7, 2000) aff'd, Leibovich v. Melchor, 35 Va. App. 51, 542 S.E2d 195 (2001), 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: Jurisdictional Issues

While there is no dispute generally speaking that the Commission has total jurisdiction over payment of medical bills and attorney's fees in worker's compensation cases, there would appear to be potential concerns about exceptions to this rule. There is some concern about the issue of enforcing a ruling in Virginia against foreign medical providers. At least one case has stood for the proposition that when a foreign health care provider accepts payment in a worker's

compensation case this consists of consent for jurisdiction under the Act. Murphy v. Woodside Association, Ltd, Supra.

A more difficult question has arisen as to whether or not the Commission has jurisdiction to order an employer to reimburse a private health insurance company that has paid a portion of claimant's medical bills if the claimant is no longer involved in the case and no longer has a financial stake in the case. In one case where the claimant did not contend that he personally paid the bills in question or that he was owed reimbursement for out of pocket expenses, the Commission held that it was not the appropriate forum and the claimant could not attempt to make a claim on behalf of his private health insurance carrier. Shaw v. Meadow Farms, Inc., VWC File No. 196-90-31 (August 26, 2002) (copy at Exhibit 5 hereto); see also Rivera v. Sunrise Assisted Living, Inc., VWC File No. 183-52-66 (April 2, 2001). In that case it was noted that if the private health insurance carrier believes that it improperly paid for treatment for which the employer was responsible, the Commission is without jurisdiction to order the employer to reimburse the private carrier. The private carrier is left instead to its common law remedies. The Commission also noted that §65.2-714(B) would provide the Commission with jurisdiction to order the private carrier to pay a fee for any payment which it is ultimately reimbursed by virtue of counsel's efforts as

a result of a claimant's successful prosecution of claimant's claims. See Avent v. Fleetwood Transportation, Supra (copy at Exhibit 6 hereto).

VII. 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 7. 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 8. Verifying which bills are contested and unpaid prior to negotiation is necessary. See Exhibit 9. The bill must be paid or reimbursed before filing for a Section 714 fee. See Exhibit 10. If agreement with

providers or carriers is worked out, a consent order can be forwarded to the Commission. See Exhibit 11. Invoicing the providers and insurers may still be necessary, even if an agreement is reached. See Exhibit 12. Finally, for Section 714 cases, filing for a hearing is always an option. See Exhibit 13. Be sure to look at Rule 6 of the Rules of the Commission before filing for a hearing. See Exhibit 14.

VIII. 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.

Biography of Andrew J. Reinhardt

Member of the State Bars of Washington, D.C., Maryland & Virginia.

Graduate of St. Lawrence University, 1975

Graduate of Syracuse University College of Law, 1979

Partner in law firm of Kerns, Kastenbaum & Reinhardt, PLC

Active Member of the Virginia Trial Lawyers Association, the American Trial Lawyers Association, the Workplace Injury Litigation Group (WILG), the National Organization for Social Security Claimant's Representatives (NOSSCR) and the Richmond Bar Association.

Frequent lecturer on topics related to personal injury, workers' compensation and social security disability

LIST OF EXHIBITS

- Exhibit 1:** Watson v. Johnston Willis Hospital, VWC File No. 196-40-51 (September 26, 2003)
- Exhibit 2:** Albers v. Virginia Beach Police, VWC File No. 200-81-04 (May 6, 2004)
- Exhibit 3:** Melchor v. Trussway, Ltd., VWC File No. 181-56-46 (January 6, 2000)
- Exhibit 4:** Leibovich v. Melchor, 35 Va. App. 51, 542 S.E.2d 795 (2001)
- Exhibit 5:** Shaw v. Meadow Farms, Inc., VWC File No. 196-90-31 (August 26, 2002)
- Exhibit 6:** Avent v. Fleetwood Transportation, VWC File No. 171-48-16 (April 8, 1998)
- Exhibit 7:** Letter to provider to obtain medical bills
- HCFA Form
 - UB-92 Form
- Exhibit 8:** Letter to provider in regards to fees/bill split
- Consent Order awarding attorney's fees
- Exhibit 9:** Letter to worker's compensation carrier to obtain an itemized statement of medical bill payments

Exhibit 10: Letter to workers' compensation carrier for payment of medical bills.

**Exhibit 11: Letter to Commission with executed Consent Order
- Consent Order awarding attorney's fees**

Exhibit 12: Letter to provider for invoicing

Exhibit 13: Letter to Commission to request a hearing on request for attorney's fees against provider

Exhibit 14: Rule 6 of the Rules of the Commission