

**MEDICAL REHABILITATION,
VOCATIONAL REHABILITATION AND
MEDICAL BILLING**

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By:

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I. Virginia Code §65.2-603

It could be said that the heart and soul of the Workers' Compensation laws are contained in §65.2-603 of the Act (a copy of these provisions is at Exhibit 1 hereto). §65.2-603 outlines the obligation of the employer to furnish certain medical benefits and attention. It also outlines the consequences of the employee's failure to accept medical or vocational rehabilitation services. There may be no other area of the Workers' Compensation laws that is more important to the purpose and meaning of Workers' Compensation. But, there is also no other area of the Compensation laws which results in more disputes. It is because of this fact that the Workers' Compensation Commission issued its own medical and vocational rehabilitation guidelines for parties to follow in these cases (see copy of guidelines at Exhibit 2 hereto). I would like to discuss a few of the key provisions and issues relating to this specific statute.

II. Medical Rehabilitation

a. Panel of doctors and referral chain

In a workers' compensation case, the employer* is required to furnish to the injured worker a panel of at least three physicians from which the employee may choose one for medical attention (§65.2-603 .A.1. of the Virginia Code). Thereafter, that physician will be considered the "authorized" treating physician. The employer is then required to pay for all treatment provided by that treating physician or other health care providers to whom the treating physician refers the injured worker. This requirement continues so long as that care is "reasonable and necessary" medical attention "causally related" to the compensable work injuries. Therefore, as a general proposition, the employer is required to pay for all of the treatment provided by authorized treating physicians in the referral chain so long as that medical attention is reasonable and necessary and related to the compensable work injuries. Volvo White Truck Corp. v. Hedge, 1 Va. App. 195, 336 S. E. 2d 903 (1985).

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

Should an employer not provide a panel of doctors from which the claimant can choose a treating doctor, or for that matter, if the employer and carrier refuses to pay for the medical treatment provided by an authorized treating doctor, the claimant may choose his own doctor Breckenridge v. Marval Poultry, 228 Va. 191, 319 S.E. 2d 769 (1984); Dooley v. McCormick Foods, 56 O.I.C. 97 (1975). Once he does so, he still must thereafter stay in the referral chain in order to hold the employer responsible for further reasonable and necessary treatment causally related to his work injuries. Felise v. Delta Airlines, 76 O.W.C. 315 (1997).

There is another limited circumstance under which an employee can choose his own doctor. For instance, if an injured worker can demonstrate that the authorized treating doctor is not providing adequate medical treatment or that more appropriate medical care could be provided elsewhere, the employee may be able to step outside of the referral chain. Apple Construction Corporation v. Sexton, 44 Va. App. 448, 461, 605 S.E.2d 351 (2004); Powers v. J.B. Construction, 68 O.I.C. 208 (1989). These are special circumstances under which the Commission from time to time has found that an employer can be found responsible for medical

treatment provided by a doctor outside of the referral chain or that a new panel of physicians must be provided.

b. Scope and type of medical treatment

The requisite medical attention that the employer may be required to provide includes all appropriate treatment available from all of the medical or dental specialties. This can include acupuncture, chiropractic, psychiatric care or whatever his authorized doctor deems appropriate. Jones v. Commonwealth of Virginia Department of Corrections, 62 O.I.C. 254 (1983); Yates v. Royal Machine Works, Inc., 61 O.I.C. 444 (1982); Gentry v. City of Richmond, 62 O.I.C. 188 (1983). The employer is also responsible for prosthetic devices, home attendant care, travel expenses related to medical treatment, certain medical equipment, home improvements and other types of reasonable and necessary medical treatment. Lamb v. Southland Industries, Inc., 62 O.I.C. 282 (1983); Montgomery v. Hausman Corp., 52 O.I.C. 183 (1970); Lusby v. VA Shipbuilding Corp., 1 O.I.C. (1919). Under the Workers' Compensation laws, these medical benefits are required to be provided on a lifetime basis if related to the work injuries. This unlimited obligation of the employer is typically described as being a

requirement to provide care for “as long as necessary”. §65.2-603 of the Virginia Code.

c. Rehabilitation providers/case managers

The question of whether or not certain types of medical care and treatment are reasonable, necessary or related to the work injury is a matter about which the employer or their rehabilitation providers/case managers are constantly vigilant. It is commonplace in the industry today for employers to hire case managers to contact or call on treating doctors or contact and call on injured workers to discuss the work injuries and ongoing treatment. The employer and its rehabilitation representatives have the right in Virginia to access information about an injured worker in regards to his or her medical treatment, speak to the injured worker’s doctors and nurses and the injured worker at reasonable times and places. The injured worker does have the right to a private examination by and consultation with a medical provider without the presence of the case manager, but very little else is private about the injured worker’s treatment under today’s laws. §65.2-604 and 607 of the Virginia Code; *Wiggins v. Fairfax Park Ltd. Partnership*, 22 Va. App 432, 470 S.E. 2d 591 (1996). The Health Insurance Portability and

Accountability Act (HIPPA) does not apply to workers' compensation. The Commission's discussion of this issue is found at Exhibit 3 hereto.

d. Monitoring medical care vs. medical management

While the rehabilitation managers hired by employers are hired to monitor treatment of injured workers and have the right to do so, their job does not include one of medical management. The Workers' Compensation laws are very specific in stating that rehabilitation providers and employers are not permitted to medically manage the employee's treatment. *Woody's Auto Parts v. Rock*, 4 Va. App. 8, 353 S.E. 2d 790 (1987). They are not permitted to prescribe referrals. They are not permitted to limit treatment options. They are not permitted to participate in determining treatment unless requested by the authorized treating physician. There is a very clear distinction between monitoring treatment and medical management. However, that distinction often seems to blur in actual practice. When the distinction blurs, the injured worker's rights are violated and disputes often arise. So long as the treating physician permits it, the rehabilitation provider/case managers may meet with doctors outside of the employee's presence. Technically, under current vocational rehabilitation guidelines, the treating physician does not even need to communicate with the case

manager/rehabilitation provider if he/she does not wish to do so (see Exhibit 2 hereto at §4.B). Information about the current treatment of the injured worker can be obtained elsewhere. But, failure of a treating physician to provide medical reports within a reasonable time to the employer can result in the employer being released of its obligation to pay medical charges. The employer may also obtain the right to a change in treating physician. Parts v. Systems Engineering Associates Corporation, 66 O.I.C. 104 (1987).

e. Second opinions

While the employer is required to pay for the medical care and treatment of the employee so long as that care is reasonable and necessary and related to the accident with an authorized treating physician in the referral chain, the employer is not required to pay for "second opinions" requested by the injured worker. McDaniel v. Triple B. Mechanical Contractors, No. 0319-85 (Ct. of Appeals Jan. 8, 1986). However, the employer may require injured workers to attend medical examinations by non-treating physicians. §65.2-607 of the Virginia Code. The limitation on this is that the employer may not obtain more than one examination per medical specialty without a showing of good cause and necessity. Employers often use this right of obtaining medical examinations to question

views of authorized treating physicians. On the other hand, treating physician's opinions are given greater weight than non-treating physicians.

Food Distribs. v. Estate of Ball, 24 Va. App. 692, 485 S.E. 2d 155 (1997).

Furthermore, treating physicians may, without the permission of the employer, refer injured workers for consultations, for second opinions and may even refer injured worker for all further care and treatment to other doctors. Press v. Ale, 1 Va. App. 153, 336 S.E. 2d 522 (1985).

f. Treating physicians

The Commission's rules recognize the difficulty and burden often placed on authorized treating doctors whose care and treatment is required in order for an injured worker to return to work, resume a normal quality of life, etc. They also recognize that authorized treating doctors working within the Workers' Compensation system ought to be properly paid for the services. §65.2-605 of the Virginia Code (see Exhibit 4 hereto). For all of these reasons, the opinion of authorized treating doctors on medical matters, whether it be on questions of diagnosis, appropriate treatment or the causal connection between treatment and work injuries, will be given greater weight than the opinions of other physicians. Food Distribs v. Estate of Ball, supra. In this respect, treating doctors are often placed in the position of

being the “arbiter” of many important matters throughout the course of a Workers’ Compensation case. They have the ability to make all the difference for the injured worker or the employer to see that justice is done.

III. Vocational Rehabilitation

a. Rehabilitation laws and their purpose

Under §65.2-603 of the Workers’ Compensation laws, the employer is also required to provide reasonable and necessary “vocational rehabilitation” services. These services may include vocational evaluation, counseling, job coaching, job development, job placement, on-the-job training, education and retraining. To the extent that these services require the exercise of professional judgement, the use of a certified rehabilitation provider is required.

Vocational benefits required by the Workers’ Compensation statutes do not have the same standing as medical benefits. The provision of medical benefits is mandatory. While the provision of vocational benefits, at first glance, appears to be mandatory, the language which states that the employer “may” provide certain of those vocational services is critical (see

Exhibit 1 hereto). To be more specific, the employer is not actually absolutely required to provide, in all cases, vocational evaluation, counseling, job coaching, job development, job placement, on-the-job training education and retraining. Those things only "may be provided". The question of when they actually must be provided is on a case-by-case basis. When a dispute arises on these topics, the Commission ultimately decides what the employer must do or is not required to do. The general rule of thumb which the Commission applies recognizes the "two-fold" purpose of the vocational rehabilitation in workers' compensation. One purpose is restoring the employee to gainful employment. The other equally important purpose appears to be one of relieving the employer of the obligation of making future compensation payments to the injured worker. Bryant v. F.A. Bartlett Tree Expert Co., 76 O.W.C. 81 (1997). These two competing goals, as one might expect, often result in conflict in the application of the vocational rehabilitation provisions of the Workers' Compensation statutes. In recognition of this difficulty, there are a number of important guidelines that have been promulgated by the Commission in its attempt to resolve some of these disputes.

b. Commission Guidelines

Under Commission guidelines (See Exhibit 2 hereto), it is suggested that any vocational rehab services should take into account the employee's pre-injury job and wage classification, age, aptitude, level of education, likelihood of success in the new vocation and the relative costs and benefits of the services.

The Commission has also indicated that when attempting to return an injured worker to work, the vocational rehabilitation provider should attempt to find employment consistent with the employee's pre-injury position and salary level and take into account such factors as distance and transportation costs. Also, the rehabilitation provider has the responsibility of identifying and contacting potential employers to determine whether a suitable position is available and within the employee's restrictions and qualifications before requiring the injured worker to contact that potential employer or attend interviews.

Similarly, the rehabilitation providers who are attempting to find new employment for injured workers should not attempt to place injured workers in positions where they are likely to fail. More specifically, the potential

new employers should probably be advised of the work restrictions. Yet the employee may not act in such a way as to sabotage the interview or application process. *James v. Auto Service, Inc.*, 78 O.W.C. 209 (1999).

IV. Refusal of vocational or medical services

a. The employer's application

While the employer is required to provide medical benefits and vocational services in appropriate cases to injured workers, if an injured worker refuses to accept either medical or vocational services, the employer is permitted to take steps which will immediately result in stopping payment for all services and/or all weekly compensation benefits. §65.2-603. B. of the Virginia Code. While the Workers' Compensation laws provide that the payment of medical bills and compensation should only cease during periods of refusal, that is not exactly the way it always works.

More specifically, upon the mere filing of a sworn application by the employer or Workers' Compensation insurance company stating that the injured worker is no longer cooperating with medical and vocational services, the Workers' Compensation laws permit the carrier to stop all

payments until such time as the Commission requires that they be reinstated after a hearing and/or appeal. Campbell v. Perdue Foods, Inc., 76 O.W.C. 157 (1997); Phelps v. J.B. Eurell Company, 67 O.I.C. 28 (1988). This is a tremendously powerful tool that the employer and Workers' Compensation carrier has at their disposal.

By the same token, consistent with the spirit of these rules, should the employer obtain light-duty employment which it believes is within the medical restrictions and educational experience capability of the employee, regardless of the pay and benefits, if the injured worker does not accept that position or is terminated from that position for reasons unrelated to his or her work injuries, the employer may file an application to suspend all wage benefits to the employee. §65.2-510 of the Virginia Code. Those benefits will be suspended on a mere filing of the sworn application. In fact, this application may result in a permanent suspension of all weekly benefits. Hughes v. Jones Masonry Company, Inc., 60 O.I.C. 216 (1981). These procedural rules become very powerful tools for use by the employer in a variety of circumstances.

V. Medical Billing in Workers' Compensation

a. 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. 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. Parks v. Systems Engineering Associates Corporation, 66 O.I.C. 104 (1987). Nonetheless, health care providers are not necessarily 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).

b. 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. Case Bag Company, 62 O.I.C. 247 (1983). It also seems that the peer reviews are principally designed to

adjust over-charges 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).

c. 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 (a copy of §605 is at Exhibit 4 hereto). 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).

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).

d. Methods for determining prevailing rate in community

Disputes can arise as to the proper method for determining the prevailing rate in the community. In one case, 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

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 a database that is not 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 5 hereto) (insufficient database) and Albers v. Virginia Beach Police, VWC File No. 200-81-04 (May 6, 2004). (Copy at Exhibit 6 hereto) (appropriate database).

e. 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

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. 542 S.E. 2nd 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 Exhibit 7 and 8).

f. 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.

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LIST OF EXHIBITS

Exhibit 1: §65.2-603 of the Virginia Code

Exhibit 2: Rehabilitation Guidelines from the Workers' Compensation Commission

Exhibit 3: Commission Advisory of HIPPA and Privacy Issues

Exhibit 4: §65.2-605 of the Virginia Code

Exhibit 5: Watson v. Johnston Willis Hospital, VWC File No. 196-40-51 (September 26, 2003)

Exhibit 6: Albers v. Virginia Beach Police, VWC File No. 200-81-04 (May 6, 2004)

Exhibit 7

and 8: 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)