

**MEDICAL AND VOCATIONAL
REHABILITATION FOR
HEALTH CARE PROVIDERS**

**Seminar sponsored jointly by
the Virginia Medical Society,
the Richmond Academy of Medicine and
the Virginia Trial Lawyers' Association
September 28, 2001
Sheraton Richmond West**

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**

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

TABLE OF CONTENTS

I.	Virginia Code §65.2-603.....	1
II.	Medical Rehabilitation	
	a. Panel of doctors and referral chain	2
	b. Scope and type of medical treatment.....	4
	c. Rehabilitation providers/case managers	5
	d. Monitoring medical care v. medical management	5
	e. Second opinions.....	7
	f. Treating physicians.....	8
III.	Vocational Rehabilitation	
	a. Rehabilitation laws and their purpose.....	9
	b. Commission guidelines	11
IV.	Refusal of vocational or medical services	
	a. The employer's application.....	12
V.	The role of the treating physician.....	14

Medical and Vocational Rehabilitation for Health Care Providers

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. 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. 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).

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 3 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, the opinion of treating doctors 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. The role of the treating physician

It often turns out, as discussed briefly above, that the treating physician becomes the arbiter of disputes that arise under Workers' Compensation. Once it is determined that a physician is the authorized treating doctor in the referral chain, that treating physician's opinion on matters of diagnosis, medical treatment, causation, work restrictions, etc. is given greater weight than the opinion of any other professional or lay-witnesses. Except in very unusual circumstances, that opinion will be the determining factor in the outcome of many workers' compensation disputes.

To be more specific, the treating physician is often placed in the position of determining how disputes that arise in vocational and medical rehabilitation will be resolved. It is often the treating physician's opinion whether that opinion is registered in office notes or given as testimony in a deposition that will determine what types of vocational rehabilitation services would be appropriate. It is often the opinion of the treating physician that will determine what work restrictions are appropriate, what medical benefits should be paid for, whether or not the injured worker is

entitled to a weekly check or entitled to have a weekly check restored. As a result of the design of the Workers' Compensation laws, it often seems that the treating physician has the obligation of not simply providing medical care and treatment, but of protecting the rights of the injured worker. Certainly, the treating physician also has the obligation of protecting the rights of the employer, but the Workers' Compensation carrier and employer, on a day-to-day basis, have the ability to outman the injured worker by hiring and providing case managers, nurses and adjusters to work the files, hire independent medical examination doctors and so forth. It is no wonder that the interests of doctors and treating physicians have become so closely aligned in the modern Workers' Compensation system.

VTLA FALL FIESTA 2001

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

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: §65.2-603 of the Virginia Code

Exhibit 2: Rehabilitation Guidelines from the Workers' Compensation Commission

Exhibit 3: §65.2-605 of the Virginia Code
