REPRESENTING UNDOCUMENTED WORKERS UNDER THE VIRGINIA WORKERS' COMPENSATION ACT

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I. GROWTH OF THE HISPANIC POPULATION

A. Numbers: United States

1. The most recent estimates from the U.S. Bureau of Census and Pew Hispanic Center: as of 2006 there were 44.3 million Hispanics living in the U.S.

2. An increase of more than 9 million since 2000.

3. Hispanics thus constitute 14.8% of the US population.

4. Since 2000 Hispanics have accounted for more than half (50.5%) of the overall population growth in the United States.

5. Hispanics have overtaken blacks (12.2%) as the highest minority population in the U.S.

6. Of this amount, 64% are Mexican, 9% Puerto Rican, 3.4% Cuban, and 11.3 Central America.

7. If current trends continue, the U.S. population will rise to 438 million in 2050 (from 296 million in 2005) and 82% of the increase will be due to immigrants arriving from 2005 to 2050 and their U.S.-born descendants.

8. In that time, the Hispanic population will triple in size and will account for most of the nation's population growth from 2005 through 2050.

9. Hispanics will make up 29% of the U.S. population in 2050.

B. Numbers: Illegal Immigration

1. According to Pew Hispanic Center Estimates, the number of Hispanic immigrants in the U.S. illegally is 11.9 million.

2. This represents an increase from 8.4 million in 2000

3. Not surprising, because it is difficult to count a class of residents who are attempting to avoid notice, estimates vary.

4. Thus, a March 2001 estimate by INS was 6.5 million illegal immigrants. [1]

C. Numbers: Virginia

1. In Virginia, there are 465,545 Hispanics living in the Commonwealth.

2. This is a 132, 063 increase from 2000-2006 (39.6%)

3. Hispanics comprise 6.1% of the population.

4. The INS estimated in February 2003 that the illegal immigrant population in Virginia was about 103,000 residents as of January 2000.

5. This reflects an increase of almost 100% from the previous estimate in 1996 (55,000).

6. Many believe the actual number is much higher because this figure does not accurately reflect illegal immigrants who do not wish to be counted or are not identifiable by the U.S. Census.

7. In fact, one "immigration reform" group, FAIR, estimates the current illegal alien population in Virginia at 205,000 as of 2007.

II. BACKGROUND: WORKERS COMPENSATION BENEFITS AND UNODCUMENTED WORKERS

A. Workers Compensation Benefits: Pre *Granados*.

1. Employers and carriers traditionally used a variety of defenses to avoid paying pay workers' compensation benefits to illegal aliens based on a number of legal theories.
2. One early argument was simply that someone considered "illegal" should not recover monetary benefits.

- The Full Commission rejected this argument and held that an employer hiring an illegal alien may not "escape liability for injuries suffered in . . . employment" by asserting the illegal alien status as a defense to an otherwise valid claim and, thus, "benefit

[1] The terms "undocumented alien" "undocumented worker" and "illegal alien" can be used interchangeably.

from its own illegal act." *Francisco v. Formwork Services, Inc.*, 65 O.1.C. 232, 234 (1986).

3. A subsequent tactic asserted that an illegal alien who provided an invalid social security number or other false information procured his employment through fraud or misrepresentation, thereby barring benefits.

    - Past decisions had held that a false representation by an employee during the application process bars a claim only where the employer proves that: (1) the employee intentionally made a false representation; (2) the employer relied upon that misrepresentation; (3) the employer's reliance resulted in the resulting injury; and (4) there exists a causal relationship between the injury and the misrepresentation. *McDaniel v. Colonial Mechanical Corp.*, 3 Va. App. 408, 411-12, 350 S.E.2d 225, 227 (1986).

    - This defense met with mixed results:

    - In *Rilbao v. Dee Shoring Co., Inc.*, 66 O.LC. 53 (1987), the Full Commission held that because Va. Code § 40.1-11.1 made it a misdemeanor to knowingly hire an illegal alien, the employer would not have made an offer of employment to the employee had it been aware of the misrepresentation.

        a. Simply the threat of criminal sanctions was seen as sufficient proof to establish the causal relationship between the misrepresentation and the injury.

    - The Commission reached the opposite decision in *Mahone v. Prince William Co. School Rd.*, VWC File No. 15 1-24-67 (February 24, 1992) (benefits not denied to an illegal alien who misrepresented his status on the application for employment).

    - The Court of Appeals confronted the issue and held that a claimant who initially provided false documentation but later obtained a valid social security number prior to the date of the accident had "cured" any prior misrepresentation because there was no longer any causal relationship between the misrepresentation and the injury. *Billy v. Lopez*, 17 Va. App. 1, 434 S.E.2d 908 (1993).

4. A third defense used focused on the alleged inability of undocumented aliens to look for alternative employment. Defense attorneys argued that a claimant legally prohibited from working in the US is incapable as a

matter of law from marketing his residual capacity or accepting an offer of light duty employment.

- This argument was initially rejected by the Commission on the grounds that an employer who hired a claimant without inquiring into his alien status did so at its own peril and could not later use the claimant's illegal status as a basis for suspension of compensation. *Francisco v. Formwork Services, Inc.*, 65 O.I.C. 232, 234 (1986).

- *Francisco* also contained some compelling public policy language: the employer is estopped to rely on Va. Code § 40.1-11.1 as justification for its failure to offer light work inasmuch as it failed to comply with its own obligations under that section. . . . If compensation were suspended upon this ground, the employer would benefit from its own illegal act in hiring the claimant and escape liability for injuries suffered in their employment while claiming the benefit of a law which they themselves had violated in part.

- This remained the law until the Court of Appeals, in *Manis Constr. Co. v. Arellano*, 13 Va. App. 292, 411 S.E.2d 233 (1991), reversed the Full Commission's decision that, based on *Francisco*, an illegal alien could receive benefits while partially disabled and had adequately marketed simply by inquiring about work with employers known to hire illegal aliens. Instead, the Court held that an illegal alien who cannot be lawfully employed in the US is incapable, as a matter of law, of marketing his remaining work capacity.

- In effectively overturning *Francisco*, Judge Bray wrote "We will not sanction a violation of one law by approving it as compliance with another." *Id*.

B. Along Comes *Granados*

1. Background: Jose Ismael Granados, who entered the US illegally and did not possess a valid work visa was employed by the Windson Development Corporation as a carpenter. Granados presented a forged social security and alien resident card at his initial interview with the employer. *Granados v. Windson Development Corp.*, 96 WC UNP 1734884 (1996).

    - On February 13, 1995, Granados was injured when he fell at a construction site, and Windson thereafter denied his claim because he had misrepresented his alien status. *Id.*

- Granados relied on *Francisco* to argue that an employer who knowingly hires illegal aliens cannot escape liability by its own unlawful act. *Id.*

2. Full Commission: The Commission denied the claim based on a finding that the employer would not have hired Granados had he not used forged documents, thus finding evidence of a supposed causal connection between the misrepresentation and the injury. *Id*.

    - Of note, the three Commissioners wrote three separate opinions, with Commissioner Tarr's concurring opinion stating "neither the present decision nor previous decisions of the Commission adopt a *per se* rule that exempts employers of illegal aliens from workers' compensation liability."

    - Commissioner Diamond's dissent argued for a more specific causal connection between the misrepresentation and injury.

3. Court of Appeals (panel): Although the Court of Appeals affirmed the Commission, a separate opinion concurring in the result only disagreed with the analysis that a misrepresentation of employment status constituted a bar for employment and instead relied on *Manis* for the rule that a partially disabled illegal alien cannot market his residual capacity. *Granados v. Windson Development Corp.*, 24 Va. App.80, 480 S.E.2d 150 (1997).

4. Court of Appeals (*en banc*): in a rehearing *en banc*, the Court issued an order, not accompanied by an opinion, that affirmed the Commission's decision "by an equally divided court." *Granados v. Windson Development Corp.*, 26 Va. App. 251, 494 S.E.2d 162 (1997).

5. Virginia Supreme Court: *Granados v. Windson Development Corp.*, 257 Va. 103, 108 509 S.E.2d 290, 292 (1999)

    - <u>The Good</u>: The Court adopted Commissioner's Diamond's dissent and the concurring opinion before the Appeals panel that the claim was not barred based on misrepresentation because there was no causal connection to the injury. *Id.* In so ruling the Court limited the defense to scenarios where the misrepresentation is responsible for the subsequent injury. Thus the Court overturned the Commission's holding in *Bulbao,* and the basis for the Court of Appeals' decision in *Billy.*

    - <u>The Bad</u>: The Court held that because the Immigration Reform and Control Act of 1986 prohibited an illegal alien from being lawfully employed in the US, the claimant's contract for hire was

void and unenforceable. Thus, Granados could not receive benefits because he could not qualify as an "employee" under Va. Code § 65.2-101, which defines an "employee" as: [e]very person, including a minor, in the service of another under any contract for hire. *Id*. Because Granados was not an employee, the Commission thus had no jurisdiction over accident. *Id*.

- The Ugly: After January 8, 1999, an illegal immigrant could not receive workers' compensation benefits in Virginia, and an entire class of employees was suddenly without any protection for workplace injuries.

6. Public policy & unintended consequences:

    - The ruling encouraged employers to hire illegal aliens since they would not have to be responsible for paying them workers' compensation benefits, a result and public policy objective expressly criticized in *Francisco*.

    - *Granados* also created the undesirable policy of allowing employers who hired illegal aliens to pass on the cost of their injuries to the public through various forms of medical programs and public assistance.

    - In a likely unintended result, *Granados* exposed Virginia employers to additional liability by permitting those undocumented workers to pursue civil actions based on theories of negligence. Because the Commission had no jurisdiction over their injuries, employers were not protected by the Act's exclusivity provisions. *E.g. Ramsey v. Bobbitt*, 250 Va. 474, 474 S.E.2d 437(1995) (employee allowed to sue employer when accident subject in the "going and coming" rule and thus outside the Act); *Lipsey v. Case*, 248 Va. 59,445 S.E.2d 105 (1994) (attack by a co-worker's dog did not arise out of the employment thus allowing civil action to proceed); *Lichtman v. Judi Knouf*, 248 Va. 138, 445 S.E.2d 114 (1994) (intentional infliction of emotion distress not covered by the Act); *Slusher v. Paramount Warrior, Inc.*, 336 F. Supp. 1381(W.D. Va. 1971) (an independent contractor not engaged in the same business, trade or occupation as the general contractor may pursue civil tort claim); and *Blue Diamond Coal Co. v. Aistrop*, 183 Va. 23, 31 S.E.2d 297 (1944) (employee may maintain civil action against employer for injuries incurred under circumstances not covered by the Act).

C. Post-*Granados*: Legislative Remedy

1. Quite obviously, employers were quite concerned with the prospect of a rash of personal injury law suits seeking civil damages that had the potential to result in higher, and more importantly unknown, pay-outs than the benefits paid by workers' compensation.

    - Moreover, because workers' compensation insurance carriers were charging premiums based on payroll and the number of employees, employers employing illegal aliens were paying premiums on employees for whom no coverage was available while remaining susceptible to personal injury actions.

2. During General Assembly session the following year, an unholy alliance of trial lawyers, lobbyists, farming interests, and other employer based groups including representatives for the construction and manufacturing industries came together to push for a legislative remedy to *Granados* that included illegal aliens in the definition of "employee" under Va. Code § 65.2-101.

3. In response, then-Delegate Robert Bloxom, representing a district on the Eastern Shore with many agricultural interests, became chief patron of House Bill 1036 in the 2000 Session of the General Assembly, which would redefine "employee" under Va. Code § 65.2-101 as: "Every person, <u>including aliens</u> and minors, in the service of another under any contract of hire or apprenticeship, written or implied <u>whether lawfully or unlawfully employed</u>.

4. The bill was subsequently tied to proposed amendments to Va. Code § 65.2-502 & 603 which essentially codified the state of the law prior to *Granados* in *Manis Constr. Co. v. Arellano, supra*, which prohibited illegal aliens from receiving benefits while partially disabled and excused employers from providing vocational retraining to illegal aliens.

5. With these additional amendments, the bill passed the House of Delegates 99-0 vote and the Senate 40-0. As an indication of the seriousness with which corporate interests took the threat of personal injury suits, the General Assembly subsequently passed a resolution designating the bill as emergency legislation, which had the effect of making it effective immediately rather than the following July 1.

6. Then-Governor James Gilmore vetoed the legislation on April 9, 2000. However, that veto was overridden during the General Assembly's veto session and thereafter became law on April 19, 2000. Interestingly, the bill represented the sole veto overridden by the General Assembly in the 2000 Session.

7. Amended Va. Code § 65.2-101:

> "Employee" means:
>
> 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.

8. Amended Va. Code § 65.2-502:

> However, the employer shall not be required to pay, or cause to be paid, compensation under this section to any injured employee not eligible for lawful employment; nor shall any such injured employee not eligible for lawful employment who is partially incapacitated be entitled during partial incapacity to receive temporary total benefits under § 65.2-500

9. Amended Va. Code § 65.2-603(A):

> The employer shall also furnish or cause to be furnished, at the direction of the Commission, reasonable and necessary vocational rehabilitation services; however, the employer shall not be required to furnish, or cause to be furnished, services under this subdivision to any injured employee not eligible for lawful employment.

III. POST-2000 AMENDMENTS/EMERGING ISSUES

A. Timing/Retroactive Effect: fate of claims that arose prior to April 19, 2000 effective date of amendments or prior to January 8, 1999 effective date of *Granados*? Uncertainty!

1. *Auceda-Matamoros v. Krajewski*, 00 WC UNP 1847362 (2000): after an illegal alien died on January 14, 1997, his statutory beneficiaries filed a claim on January 11, 1999, three days after the *Granados* decision. The Full Commission rejected claimant's argument that *Granados* could not be applied retroactively to an accident that occurred two years earlier.

- Commission relied on cases interpreting *Stenrich Group v. Jemmott*, 251 Va. 186, 467 S.E.2d 795 (1996) to hold that *Granados* would not apply to final claims but would bar claims pending determination. Commissioner Diamond filed a dissenting opinion holding that because *Granados* created a new principle of law, it could not be applied retroactively.

2. However, in *Quezada v. P M M C Associates, Inc.*, 79 Va. WC 46 (2000), the Commission took the exact opposite tack by retroactively applying *Granados* to vacate an award on the grounds that the Commission lacked subject matter jurisdiction to have originally entered the award. Illogically, however, the Commission then seemingly rejected the portion of *Granados* eliminating misrepresentation as a defense to illegal alien cases by holding that the claimant's use of forged documents constituted a fraud that resulted in an imposition on the Commission.

3. Only two months later the Commission veered away from the rationale used in *Quezada*. In *Escobar v. Norton Concrete Co., Inc.*, 00 WC UNP 1857944 (2000), the Commission refused to vacate an award for an illegal alien entered prior to *Granados*. Citing the same carpal tunnel case as *Matamoros*, the Commission held that "*Granados* did not change the law as it applied to earlier similar cases." Citing *Quezada* Commissioner Tarr disagreed with that portion of the holding although he concurred in the result.

    - Without referencing the Commission's holding that *Granados* did not affect earlier cases, the Court of Appeals affirmed *Escobar*. *Norton Concrete Co., Inc. v. Escobar*, 01 Vap UNP 1645002 (2001).

4. *Matamoros* Appeal: Meanwhile, *Matamoros* also reached the Court of Appeals, and in affirming the Commission, the Court held simply that *Granados* could be retroactively applied without limiting it to pending claims. *Alvarado v. Krajewski*, 01 Vap UNP 0981004 (2001).

5. Meanwhile in a case that arose before Granados but decided after the 2000 amendments, the Court of Appeals held that it could not "give the amendment retroactive effect unless and until the Supreme Court shall declare that the amendment was intended 'as a legislative interpretation of the original act.'" *Rios v. Ryan Inc. Central*, 35 Va. App. 40, 542 S.E.2d 790 (2001).

    - In a concurring opinion, however, Judge Annunziata suggested that the Supreme Court could

use the passage of the Amendments as the basis to make an award to the claimant although the Court of Appeals was bound by *Granados*. A subsequent appeal to the Supreme Court was denied.

- Thus, the Commission and Court of Appeals both held that *Granados* could be retroactively applied while the 2000 Amendments to Va. Code § 65.2-101 could not be retroactively applied.

6. These interpretations reached their illogical extreme in *Cenovio v. Chavez Brothers, Inc.*, 06 WC UNP 1920389 (2006) in which an illegal alien injured in 1998 was voluntarily paid compensation benefits for 5 years through 2003 before finally filing an actual claim -- seeking PPD benefits – in 2004.

    - Although initially responding to the 20 Day Orders that the claim was accepted, the employer subsequently retained counsel who asserted for the first time that the Commission did not have jurisdiction pursuant to *Granados*.

    - After reaffirming that *Granados* applied retroactively to cases in which awards had not been entered but the 2000 Amendments were not retroactive, the Commission then rejected an argument by the claimant that the employer had any jurisdictional argument under *Granados* under the doctrine of laches by failing to raise the defense in the preceding 5 years. Of note there is no indication that the claimant asserted either a *de facto* award or the doctrine of imposition.

B. Foreign Injuries: Accidents involving immigrants in another state or foreign country.

1. *Herrera*: Facts: Herrera, a Mexican agricultural worker, died in a bus accident on July 20, 1999, while in transit from Morelas to Monterrey, Mexico. A Virginia tobacco farmer employed foreign workers under the federal H2A visa program. A Virginia company acting as a “broker” placed qualifying workers with individual jobs in Virginia while a related ”broker” in Mexico helped the workers qualify for and obtain the necessary visas and paperwork. Herrera died while traveling to the American consulate to obtain his visa.

2. Full Commission: The Full Commission held that there was no jurisdiction

under the Act pursuant to Code § 65.2-508(A) because there was no specific contract of employment at the time of the claimant's death as required by Code § 65.2-508(A). Rather the Commission held that contract of employment was "anticipated, but not completed" on the grounds that obtaining his visa was only one step in Herrera's process of gaining entry into the United States and working for the employer. *Herrera v. E. Dale Martin*, 06 WC UNP 2009718 (2006)

- Dissent: Commissioner Diamond argued that the fact that that Herrera had worked for the same employer for the preceding 3 years, the employer had specifically requested his the previous two years, and had again requested him as an employee that year established an "implied contract of employment." Diamond relied on the definition of employee under Va. Code § 65.2-101 as any "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 . . . ."

3. Court of Appeals: In *Herrera Ex Rel. Varela v. Martin*, 49 Va. App. 469, 642 S.E.2d 309 (2007) the Court affirmed the Full Commission and rejected the argument on appeal that Herrera had met all conditions precedent to employment because Herrera's visa had already been issued by the US Consulate which, as federal property was within the jurisdiction of the Commission. *Cf Coldtrain v. Starco, Inc.*, 65 OIC 19, 65 Va. WC 19 (1976).

C. Discovery and *de benne esse* depositions.

1. One difficulty in representing immigrant claimants, especially undocumented aliens, relates to obtaining and preserving evidence by deposition from witnesses located in a foreign country. Generally, resolution of discovery disputes is within the discretionary power of the deputy commissioner, whose decisions will not be overturned absent an abuse of discretion or where substantial hardship to a party would result. *Burke v. Testing Specialties, Inc.*, 04 WC UNP 1845004 (2004). In *Burke* the Commission upheld the deputy's decision granting the claimant's request to allow her discovery deposition be conducted by telephone based in part on the fact that the deputy did likewise allow the claimant to present her hearing testimony via *de benne esse* deposition.

   - However, in *In Re: Ferrel*, 01 WC UNP CV991366 (June 11, 2001), the Commission permitted telephone testimony of a crime victim, a Texas resident, when she could not appear at hearing.

- Likewise, in overruling a deputy commissioner's decision not to allow the employer's witness to testify either by telephone or by *de benne esse* deposition, the Commission held that "a party or essential witness should not be forced to change longstanding vacation plans or to interrupt a vacation to appear at the hearing when there are reasonable and acceptable alternatives for obtaining their testimony that do not delay a hearing." *Townsend v. Food Lion, #170,* 06 WC UNP 2207976 (2006).

2. In *Herrera v. Martin*, 01 WC UNP 2009718 (2001), the defendants sought to require the deceased widow, who was the claimant, to travel from Mexico to Richmond for a discovery deposition. Claimant's counsel argued the defendants should have to take the discovery deposition by telephone with the witness either in Mexico or San Antonio, Tx. and that witness' *de benne esse* deposition be taken immediately thereafter for use at the hearing.

   - The Commission affirmed the deputy commissioner's ruling that the defendants had to take the witnesses deposition by telephone based on the "potentially substantial hardship" of traveling to Richmond.

   - However, because convening the *de benne esse* deposition immediately thereafter would prevent the defendants from having the opportunity to investigate the information obtained during the discovery deposition and thus adequately preparing for the *de benne esse* deposition, the Commission ruled that the *de benne esse* deposition be conducted "within a reasonable amount of time thereafter."

   - Of note: The Commission declined to rule on the admissibility of the *de bene esse* deposition at the hearing and, if "unusual circumstances" arose after either deposition, agreed to entertain a motion to determine whether to require the claimant to attend the hearing in person in consideration of the associated hardship.

3. In *Evans v. Fruit Hill Orchard*, 05 WC UNP 2168379, VWC File No. 216-83-79 (April 5, 2005), the claimant was permitted to testify telephonically because he could not obtain a visa. The Commission noted that although live, in-person testimony of witnesses is always preferred, the discretionary power given to deputy commissioners to conduct hearings includes the discretion to accept witness testimony telephonically or by *de bene esse* deposition and to accept hearsay testimony.

D. Interpretations of Va. Code § 65.2-502 denying TPD and TTD during partial incapacity to undocumented workers.

1. Va. Code § 65.2-502 states that an injured employee not eligible for lawful employment is not entitled to TPD or TTD during period of partial incapacity. *Osorio v. Maryland Applicators, Inc.*, 06 WC UNP 2173672 (2006).

    - The claimant bears the burden of proving that he was "eligible for lawful employment" during the period for which TPD is sought under Code § 65.2-502. *Pedro v. Cellofoam North America, Inc.*, 05 WC UNP 2142034 (2005).

2. An illegal alien's immigration status is not set and does not "attach" as of the date of the accident. Rather, an undocumented worker can become eligible for TPD or TTD during partial incapacity if there is a change in immigration status. *Pedro v. Cellofoam North America, Inc.*, 05 WC UNP 2142034 (2005).

    - In *Pedro*, a claimant initially denied TPD benefits because her work visa had expired was later awarded TPD benefits following a change in condition application after she subsequently received a new Employment Authorization Card. *Id*.

3. Question: Does the phrase "not eligible for lawful employment" only apply to the claimant's eligibility for employment in the United States? Answer: To be determined in an issue of first impression.

    - In *Ocampo v. CJ Bales*, VWC File No. 220-31-79 (June 1, 2007), after being released to full duty by his treating physician in Virginia, the claimant returned to his native Mexico where he underwent surgery and was eventually partially disabled based on a light duty release. Of note, the claimant had been legally in the US and eligible for lawful employment at the time of his original accident but had subsequently returned to Mexico after his visa had expired.

- Although he found that the claimant had adequately marketed his residual capacity in terms of the number and character of job contacts, the deputy commissioner rejected the claimant's argument that he was entitled to receive TTD benefits while partially disabled because he was "eligible for lawful employment" in Mexico. **See Exhibit 1.**

- After briefly recounting the history of *Granados* and the subsequent 2000 Amendments, the deputy commissioner then cited

Osario and *Pedro* for the position that Va. Code § 65.2-502 barred benefits to claimant "unable to perform lawful employment." *Id*.

- Absent any controlling authority on the specific issue, however, the deputy held that the 2000 Amendments would be rendered "meaningless" if they only applied to employees "not eligible for lawful employment anywhere in the world" since "every employee would presumably be eligible for lawful employment in their country of citizenship." The deputy reasoned that because the amendments were intended to have "some effect," TTD benefits while partially disabled were not available to a claimant "not eligible for lawful employment in the Commonwealth of Virginia." *Id*. (emphasis added).

- Both parties sought review with the claimant challenging the deputy's determination that he was barred from receiving additional benefits while partially disabled by Va. Code § 65.2-502. Lacking any specific case law on point, the claimant argued on appeal that the deputy (1) failed to apply the plain, unambiguous meaning of the language in the statute, (2) arbitrarily applied the requirement of eligibility "in the Commonwealth of Virginia" not found in the statute or any legislative history, and (3) ignored a prior decision by the Full Commission in the same case in which benefits were denied based solely on a lack of marketing without any reference to the claimant's eligibility for lawful employment under § 65.2-502 (*Ocampo v. C. J. Bales*, 05 WC UNP 2203179 (2005)).

- Despite the fact that the parties filed their statements on review in August 2007, oral arguments have only recently been scheduled before the Full Commission on this apparent issue of first impression for late November 2008.

4. The Commission had previously "ducked" this same issue approximately 3 years earlier when a claim for ongoing benefits was denied based on a lack of evidence establishing any ongoing disability.

    - At that time, the Commission stated in a footnote that "because the claimant's H-2A work visa did not expire until approximately the end of his disability, we do not decide whether an H-2A worker who is released to light duty may receive benefits after the visa expires." *Guerrero v. Parker Farms & Sons,* 04 WC UNP 2114320 (2004).

- Accordingly, having now been presented with this issue on two occasions, a reasonable interpretation might be that the Commission has some concern about "opening the floodgates"

- Moreover, there are actually two distinct scenarios: one where a claimant is never an "illegal alien" because he is working in Virginia under a proper visa but returns to his native country after the expiration of that visa and the other scenario where the claimant comes to the US and Virginia illegally, is injured while working as an undocumented worker and then markets his residual capacity only after returning to his native country where he for the first time becomes "eligible for lawful employment.."

E. Undocumented workers and "fake" identities

1. In *Rubio v. Kalkreuth Roofing and Sheet Metal, Inc.*, 07 WC UNP 2273118 (2007), the deputy commissioner rejected a willful misconduct defense and entered an award on behalf of the claimant, Joseph Rubio. However, on review the employer alleged that the claimant was not actually "Joseph Rubio" based on a death certificate for a person with the same name, date of birth and social security number that the employer sought to have introduced as "after discovered evidence."

    - The Commission first held that the employer had not met the test for after discovered evidence because the death certificate had been available prior to the hearing and because under the 2000 amendment to Va. Code § 65.2-101, the claimant would not have been barred from receiving the benefits awarded to him even if he was an illegal immigrant.

    - After rejecting the defendant's appeal, however, the Commission "independently" concluded that an award could not be entered in favor of an individual with a false identity and likewise that an employer could not be required to pay benefits to a deceased person who is not the named party. *Id.*

    - The Commission held that the record should be reopened on the grounds that the death certificate established a *prima facie* case of fraud by clear and convincing evidence. Because the Commission affirmed the compensability of the claim itself and the denial of the employer's willful misconduct defense, , the claim was remanded back to the deputy to take additional evidence solely on the issues of the claimant's true identity and immigration status. *Id*.

IV. PRACTICE TIPS/QUESTIONS TO PONDER

1. Interpreters: In approximately 2006, the Commission began providing interpreters at no expense for non-English speaking claimants. **See Exhibit 2.**

   - Claimant's counsel should request an interpreter as early as possible through a letter directed to the Commission. **See Exhibit 3.**

   - Failure to request the interpreter within 30 days prior to the hearing can lead to a continuance. **See Exhibit 4**.

   - Any subsequent Hearing Notice will indicate that an interpreter has been requested and is being provided. **See Exhibit 5.**

2. Private interpreters: Privately retained interpreters can be very useful at medical appointments in large cases or claims in which specific medical issues are contested.

   - A certified interpreter can be paid to attend the medical appointment and based on the instruction of the attorney make sure to stress certain symptoms, prior conditions etc…. in an effort to bolster the medical evidence.

   - Former clients who speak fluent Spanish and English have also successfully been used for this purpose.

3. Answering discovery related to the claimant's immigration status: If the claimant has an ethnic name or is known to be Hispanic most defense counsel will propound discovery seeking information related to the claimant's immigration status, either in the form of interrogatories (**See Exhibit 6-7**), requests for production (**See Exhibit 8-10**), or requests for admission (**See Exhibit 11**).

   - One school of thought (ie: mine) is to refuse to answer in order to avoid potentially exposing the claimant to criminal or immigration related penalties.

   - Accordingly, an objection along with a stipulation either in the answer itself (**See Exhibit 12-13**) or by letter (**See Exhibit 14-15**) that the claimant agrees not to seek or that he is not eligible for the benefits set forth in the 2000 Amendments to Va. Code § 65.2-502 and Va. Code § 65.2-603(A).

- Thus far, deputy commissioners have been amenable to this tactic and the objections have withstood motions to compel although a deputy commissioner did require some form of picture ID be produced to establish the claimant's identity as opposed to his immigration status in accordance with *Rubio v. Kalkreuth Roofing and Sheet Metal, Inc.*, 07 WC UNP 2273118 (2007). **See Exhibit 16**.

4. New Claims: To File or Not to File? Filing a claim with the Commission on behalf of any claimant will usually trigger the carrier referring the case to defense counsel, especially if discovery is served on the adjuster with the claim. This will, in turn, generally lead to the defense attorney generating discovery to the claimant that includes specific interrogatories or requests for producing seeking information related to the claimant's immigration status as demonstrated in Exhibits 6-11, above. Accordingly, at that point, the claimant's lack of eligibility for lawful employment will almost certainly be established either through sworn discovery answers or stipulations (Exhibits 12-15, above).

- Consequently, if the accident is seemingly compensable and there are no obvious defenses, there is some benefit of pursuing a "low key" approach by attempting to convince the adjuster to agree to place the claimant under an award through agreement forms without filing an actual claim for benefits or requesting a hearing.

- Obviously this requires strict monitoring of the statute of limitations and may cause some delays. However, the obvious benefit is that the adjuster may unwittingly agree to place the claimant under an open award and be unaware that the benefits should be terminated upon a release to light duty or that there is no entitlement to TPD benefits.

5. Illegal immigrants in personal injury cases: In contrast to the rigorous oversight and relevance of a claimant's immigration status in workers' compensation claims, the common law is much more favorable in personal injury cases.

- In *Peterson v. Neme*, 222 Va. 477, 281 S.E.2d 869 (1981), the Virginia Supreme Court ruled that an illegal alien had standing to sue for personal injuries, and that her immigration status was prejudicial and thus not admissible at trial even if she made a claim for lost wages.

- The same result was reached in a personal injury action pending in federal court even where there was evidence that the plaintiff purchased a social security card to pay taxes. *Romero v. Boyd*

Brothers Transportation Co., Inc. Civ. No. 93-0085-H, June 14, 1994 (U.S. Dist Ct. W.D. Va.)(1994 WL 287434).

6. Ethical Issues: Representing an illegal alien in a workers compensation raises some ethical issues related to:

1) Can a claimant's attorney claim TPD or TTD benefits during period of partial capacity for a claimant he knows to be illegal?

2) Can an attorney file a claim on behalf of an illegal alien that identifies a name, Social Security Number or date of birth that is incorrect?

- Relevant provisions of the Rules of Professional Conduct, Rule 1.6:

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(c) A lawyer shall promptly reveal:

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

Confidentiality of Information., Prof. Conduct Rule 1.6 (2000)

- The easy answer would be a return to the Clinton era catchphrase of "Don't Ask, Don't Tell." However, as discussed above simply not asking can affect the case since it can be beneficial to work with the adjuster in an effort to get an illegal alien placed under an ward as opposed to filing a claim and having defense counsel make an appearance and initiate discovery.

- Arguably the Rule is complied with as long as the attorney truthfully answers discovery related to immigration status and does

not represent or allow the claimant to represent himself as being eligible for lawful employment.

- Likewise under Rule 3.3(a)(4) a lawyer has a duty not to use false evidence.

- Thus, filing a claim for a claimant that lists a name, SSN or date of birth known to be false could violate this provision. The Commission made a potentially veiled reference to this exact issue when reciting the facts in *Rubio v. Kalkreuth Roofing, supra,* by noting that the claim for benefits listing a name, SSN and date of birth later determined to belong to a deceased person "was signed by his attorney."

7. Independent contractors and "shell" employers: Often the perceived employer of an illegal alien will attempt to escape liability for benefits by alleging that the claimant was an independent contractor or that the employer retained an independent contractor who was the claimant's actual employer. These cases should be viewed under the traditional independent contractor analysis which generally rise or fall on the issue of control. *Craddock Moving & Storage v. Settles,* 247 Va. 165, 440 S.E.2d 613 (1994).