

VIRGINIA LAW ON MULTI-STATE WORKERS' COMPENSATION ISSUES

**VTLA Advanced Workers' Compensation Retreat
Richmond, Virginia
November 13-14, 2009**

By:

**Andrew J. Reinhardt, Esquire
Kerns, Kastenbaum & Reinhardt, PLC
1809 Staples Mill Road, Suite 300
Richmond, Virginia 23230
Phone: (804) 355-7900
Fax: (804) 355-9297
Email: andy@kkrfirm.com**

In a previous article, we discussed how various states address the pertinent issues that arise when a workers' compensation claim involves more than one jurisdiction.¹ The purpose of this article is to address how the state of Virginia statutes and cases have addressed those issues. This may be of some assistance to attorneys practicing in the state of Virginia or attorneys from other states when their client's claims might potentially also be filed in this state. That is the purpose of this discussion below.

I. What Are The Requirements For Virginia To Assert Jurisdiction Over A Workers' Compensation Claim?

The Virginia Code addresses when the Virginia Workers' Compensation Commission ("WCC") will assert jurisdiction over an accident that happens outside the Commonwealth.

Pursuant to Va. Code Ann. ' 65.2-508(A):

When an accident happens while the employee is employed elsewhere than in this Commonwealth which would entitle him or his dependents to compensation if it had happened in this Commonwealth, the employee or his dependents shall be entitled to compensation, if:

1. The contract of employment was made in this Commonwealth; and
2. The employer's place of business is in this Commonwealth; provided the contract of employment was not expressly for service exclusively outside of the Commonwealth.

In *Worsham v. Transpersonnel, Inc.*, 15 Va. App. 681, 426 S.E.2d 497 (1993), the parties agreed that the contract of employment was made in Virginia and that the services

¹ Andrew Reinhardt, *Conflicts of Law: Maximizing your recovery when handling Workers' Compensation claims involving multiple jurisdictions*, VTLA Journal, Summer 2006.

were not to be performed exclusively outside of this state, leaving the only question for the court to be whether the employer's place of business was in the Commonwealth. The court concluded that, although the term "employer's place of business" is not defined in the Virginia Code, the General Assembly must have been something other than that the employer merely conducted business in the state. Accordingly, under the facts of the case in which the employer was not incorporated and did not maintain its principal office in Virginia, the claimant was not required to live in the state, the claimant's paychecks were issued from another state, the claimant's work instructions were sent from outside Virginia, and the claimant, a trucker, delivered all of his loads outside of Virginia, the WCC was not plainly wrong in refusing to exercise jurisdiction.

In contrast, in *CLC Constr., Inc. v. Lopez*, 20 Va. App. 258, 456 S.E.2d 155 (1995), the court of appeals found that it was appropriate for the WCC to assume jurisdiction over an out-of-state accident. The contract was entered into in Virginia because the employer and employee met at the employee's home, where he was hired. Moreover, the employer's place of business was in Virginia because the employer not only conducted business in Virginia, but it maintained its bookkeeping functions, including taxes and payroll, in Virginia, and it rented a construction yard in Virginia, where it stored its equipment and where employees met on a daily basis to go to job assignments. For two cases in which a determination of jurisdiction rested on whether the employment contract was entered into in Virginia, *see Herrera ex rel. Varela v. Martin*, 49 Va. App. 469, 642 S.E.2d 309 (2007) (the WCC had no

jurisdiction over the claim of the family of a Mexican agricultural worker who died in a bus accident in Mexico while en route to obtain his visa in order to work on Virginia farm because he had not obtained the necessary document for entry into the United States, a visa, and he had not filled out an I-9 form, which is also necessary to obtain employment in the United States, or executed an employment contract); *Pro Football Inc. v. Paul*, 39 Va. App. 1, 569 S.E.2d 66 (2002) (the WCC had jurisdiction over the claim of a Redskins football player whose contract had been assigned to Washington through a Trade Agreement by the Denver Broncos because the final acts necessary to form the contract of employment between the player and the Redskins, i.e., report to Redskins Park, complete the Club's physical, and be on Washington's roster during the 1999 season, occurred in Virginia).

II. Will Virginia Allow Simultaneous Or Successive Recoveries For The Same Accident And Injury In Multiple States?

Yes. There is no statutory prohibition against filing a claim in more than one jurisdiction. However, Va. Code Ann. ' 65.2-508(B) provides that "if an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this title." While the Virginia WCC must give full faith and credit to a final decision on the merits of the workers' compensation commission in another jurisdiction, and, pursuant to ' 65.2-508(B), credit the final award of another jurisdiction in adjudicating a Virginia claim for the same injury, the WCC need not give credit to a settlement approved by another workers' compensation commission if that settlement has not been presented for

approval to the Virginia WCC. On the other hand, the purpose of the Workers' Compensation Act is to compensate a claimant for lost wages and medical benefits, not to allow a claimant to be unjustly enriched. Therefore, even absent approval of the out-of-state settlement by the WCC upon the request of the employer, the Virginia WCC may grant a dollar for dollar credit in the full amount of the settlement paid to the claimant in another state. *United Airlines, Inc. v. Kozel*, 33 Va. App. 695, 703, 536 S.E.2d 473, 477 (2000); *see also* Va. Code Ann. ' 65.2-520 ("Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this title were not due and payable when made, may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation[.]").

As demonstrated by *Uninsured Employer's Fund v. Wilson*, 46 Va. App. 500, 619 S.E.2d 476 (2005), a set-off for compensation paid in settlement does not apply to medical expenses. In that case, a Michigan employee of a Michigan employer was injured while working in Virginia. The employer and employee entered into a settlement which was approved by the Michigan Bureau of Workers' Disability Compensation, but not by the Virginia WCC. Later, the employee filed a Virginia Workers' compensation claim for prescription medications purchased after the settlement. The Virginia Court of Appeals rejected the argument of the employer, and later the Uninsured Employer's Fund, that the amount of the Michigan settlement for compensation should be credited against any future Virginia medical claims because the relevant statute, Va. Code Ann. ' 65.2-520, referred to

deductions for compensation payments voluntarily made, and medical expenses are not compensation.

III. What Is The Impact In Virginia Of An Acceptance Of Benefits Or Election In Another State?

The impact appears to be to cause a credit against future benefits if doing so will avoid duplication of benefits. No case law could be found discussing whether the election of remedies under another state's workers' compensation law bars a claimant from receiving benefits in Virginia. Thus, the impact of acceptance of benefits in another state seems to be, as set forth in answer to Question 2, to reduce the amount of the Virginia compensation award by the amount of compensation benefits awarded in the other jurisdiction. Even if the award is the result of a settlement and, thus, not entitled to full faith and credit, the Virginia WCC may still credit a Virginia compensation award in the amount of the compensation settlement in the other jurisdiction if the claimant would otherwise would be unjustly enriched. However, as seen in the *Uninsured Employer's Fund* case, if an out of state settlement is not submitted to the Virginia WCC for approval, there may appear to be some duplication of benefits paid in so far as payment of medical benefits. Should there be a need to pursue claims in Virginia simultaneously with another state, or consecutively, a version of the form at Exhibit 1 hereto might be used.

IV. How Will Virginia Do A Benefit Comparison To Allow A Maximizing Of Recovery Between States?

As set forth in the answer to Question 2, pursuant to Va. Code Ann. ' 65.2-508(B), a Virginia compensation award must be set-off by the amount of the award in another jurisdiction, and the total compensation cannot exceed that which is permitted by Virginia law. Accordingly, if Virginia benefits are more generous, than a claimant should consider filing in the other jurisdiction first. If the award in the non-Virginia jurisdiction is the result of a settlement that has not been approved by the Virginia WCC, the Virginia WCC is not required to, but may, offset the Virginia compensation award by the amount of the foreign settlement. *See United Airlines, Inc.; see also* Va. Code Ann. ' 65.2-520. There is no statutory provision authorizing the Virginia WCC to offset a Virginia claim for medical expenses by the amount of a foreign settlement for compensation. *See Uninsured Employer's Fund.*