WHAT THE GENERAL PRACTITIONER

SHOULD KNOW

ABOUT WORKERS' COMPENSATION

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I. FIRST THINGS FIRST: CAN I GET PAID IN THE CASES? HOW?

A. The Basics

1. The easy answer to "how do I get paid?" is scarcely answered and only with considerable difficulty at times.

2. If you think attorney's fees in workers compensation cases are just like personal injury cases …. **think again!**

3. All fees must be awarded and approved by the Workers' Compensation Commission.

4. The standard 33.3% contingency fees are not available and the Commission is not bound by any contingency fee contract signed by the claimant. *See Blackburn v. Newport News* Shipbuilding, 67 O.I.C. 251 (1988).

5. No upfront retainers permitted unless placed into escrow and drawn down following award from the Commission.

6. The client rarely if ever has a situation where he will pay you directly out of pocket for any fees.

7. Multiple forms or types of fees may be awarded during the pendency of a single case. See below.

8. For workers compensation cases to be reliably profitable, a volume of cases is necessary.

B. Types of Fees Permitted, How Much & How to Collect

1. Have the client execute a retainer spelling out what fees you may collect during the pendency of a case. ***See* Exhibit 1**.

2. Virginia is an "Award Order" state in which the Commission enters new Awards specifying benefits owed to a claimant. See § 65.2-701 and -704. An Award Order entered by the Commission establishing

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or providing benefits to the client through the use of voluntary agreement forms, *infra*, will generally also contain an award of fees to counsel for the claimant.

- **These fees are set at the discretion of the Commission.**

- These fees are generally modest in amount: $250.00 – $700.00.

- They are usually awarded as a matter of course by the Commission but if additional time was spent leading up to the entry of the award a specific letter requesting a fee and outlining the time and effort expended should be submitted. ***See*** **Exhibit 2.**

3. An Opinion authored by the Commission following a successful evidentiary or on-the-record hearing will contain an award of fees to counsel for the claimant.

   - **These fees are set at the discretion of the Commission.**

   - The amount of the fee will be included in the Opinion. If the claim is appealed by the workers' compensation insurance carrier ("the carrier") and you prevail before the Full Commission their Opinion will generally contain an increase in the fee.

   - If the case is appealed to the Court of Appeals or Virginia Supreme Court, a letter should be sent to the Commission requesting an award of additional fees and costs. ***See*** **Exhibit 3.**

4. For awards of Permanent Partial Disability (PPD) benefits pursuant to § 65.2-503, the Commission will generally award a fee equal to 15% of the total amount awarded to the claimant. *See Down v. Jim Price Chevrolet*, 77 O.W.C. 91 (1998)

   - The Commission <u>may</u> award this fee as a matter of course but it should be specifically requested to be sure. ***See*** **Exhibit 4.**

5. For lump sum settlements, the Commission will generally award a fee equal to 20% of the settlement. *See King v. Boggs & Sloce Municipal Services*, 77 O.W.C. 160 (1998).

   - If the case was exceptionally difficult in terms of length, procedural history (multiple appeals, Court of Appeals) or complexity (disease case, traumatic brain injury, unexplained death) the Commission <u>on occasion</u> has awarded a fee of 25%.

- Settlements must be accompanied by an Attorney's Fee Statement signed by the client and the attorney. ***See*** **Exhibit 5.**

- Commission is not bound by retainer agreement or Attorney Fee Statement as, once again, all fees are subject to the discretion of the Commission.

- Settlements must also be accompanied by a confidential settlement letter setting out the background of the case and why the attorney is recommending the settlement be approved. Rule 1.7, Rules of the Commission. The Commission has issued an outline of information to be provided by unrepresented claimants which serves as an outline for what should be included in the confidential letter along with an explanation of the basis for the requested fee. ***See*** **Exhibit 6.**

6. Pursuant to § 65.2-714, if , a medical provider or 3rd party health insurance carrier have their outstanding balances paid or reimbursed because the claimant's attorney either wins or causes the carrier to abandon its defenses in a contested case, the attorney is entitled to a fee and *pro rata* costs from the amounts paid to the medical provider or insurance company. ***See*** **Exhibit 7.**

   - Awarding the fees is mandatory under the statute based on the language "shall award" and entitlement to fee does not depend on agreement or consent by the medical provider. *See Doss v. The ARA Group, Inc.*, 75 O.W.C. 79 (1996).

   - Right to fee does not accrue until medical bills are actually paid. *See Danville Radiologists Inc. v. Perkins*, 22 Va. App. 454 (1996).

   - After prevailing in the case, claimant's attorney must give notice to the medical provider that fees will be sought under the statute. *See Sines v. Better Homes Realty, Inc.*, 66 O.I.C. 162 (1987).

   - The amount of the fee is set at the discretion of the Commission.

   - If an agreement is reached with the medical provider, a joint order is submitted to the Commission pursuant to Rule 6.1. ***See*** **Exhibit 8.**

   - If no agreement is reached, the attorney should request a hearing and follow the requirements under Rule 6.2, including making good faith effort to resolve and then providing written notice of hearing time and date to the medical provider.

7. Pursuant to § 65.2-713, the Commission can assess costs and fees against the carrier if proceedings brought or defended by the carrier are without reasonable grounds, if payments are delayed without reasonable grounds or where the carrier files an application against the claimant in bad faith. ***See*** **Exhibit 9.**

   - To obtain fees, file a claim with the Commission requesting the fees prior to a hearing and the Commission will determine whether bad faith exists and/or whether reasonable grounds existed for the carrier's conduct.

   - Fees are awarded at the discretion of the Commission.

   - Whether the proceedings were defended without reasonable grounds is judged from the perspective of the carrier and employer. *See Myers v. Bill Myers Constr. Co.*, 76 O.W.C. 283 (1997).

8. Other than "bad faith" fees under 65.2-713 assessed against the carrier, most fees awarded by the Commission are generally withheld from compensation owed to the claimant and paid directly to the attorney by the carrier.

   - If there is not enough accrued compensation owed to the claimant to satisfy the awarded fees, the Commission will generally order the weekly deductions to be withheld from the claimant by the carrier and paid to the attorney until the fee is satisfied, often in increments of $50.00 - $100.00 per week.

II. WHAT BENEFITS ARE AVAILABLE TO CLAIMANTS?

A. Wage Loss or "Indemnity" Benefits

1. First step in understanding and calculating what benefits a claimant is entitled to receive is to determine the Average Weekly Wage (AWW). AWW is defined and the method(s) of calculation found at § 65.2-101.

   - Standard formula is to add the total wages earned in 52 weeks preceding the accident and divide by 52. If there are any periods of 7 days or more not worked then divide by number of remaining weeks.

   - If claimant worked less than 52 weeks divide by number of weeks that were worked.

- If time worked prior to the accident is too short to provide fair representation, use wages of a "like employee" as the basis for calculation. Information on like employees can be obtained through discovery.

- Otherwise the employer is required to complete a 52 Week Wage Chart to be provided to the Commission and the claimant. . ***See*** **Exhibit 10** (sample completed form) or **Exhibit 11** (blank form)**.**

- Wages from a 2nd job may be added to the calculation of the AWW if the jobs are "substantially similar." *See Creedle Sales Co. v. Edmonds*, 24 Va. App. 24 (1997).

2. Temporary Total Disability Benefits (TTD) paid to the claimant for total disability from work and based on 2/3's of the claimant's AWW. *See* § 65.2-500

   - Subject to maximum and minimum rates that are adjusted each year. ***See*** **Exhibit 12.**

3. Temporary Partial Disability Benefits (TPD) paid to the claimant for partial incapacity to work when claimant returns to light duty or some form of restricted employment in which he earns less than his AWW. *See* § 65.2-502.

   - Calculation of TPD rate is based on 2/3's of the figure representing the difference between the AWW and the light duty or partial wages earned by the claimant.

B. Benefits for Permanent Loss

1. Permanent Partial Disability benefits (PPD) paid at same compensation rate as TTD.

2. Benefits do not represent wage loss but the permanent impairment to a covered body party, which includes arms, legs, hands, feet, vision, hearing and scarring not to the arms or legs. *See* §65.2-503.

   - **Note:** no PPD for permanent impairment to the neck or back.

   - However, PPD benefits are available for an injury to the neck or back that causes permanent impairment to an arm or leg. *See Washington Metro Transit Auth v. Rogers*, 17 Va. App. 657 (1994).

3. Statute establishes number of weeks of PPD benefits to be paid in case of total loss. If there is a partial loss, then number of weeks to be paid based on percentage of impairment multiplied by number of weeks available for the scheduled extremity.

   - For example, § 65.2-503 provides for 200 weeks of PPD benefits for the total loss of an arm (or amputation above the elbow). A rating of 25% impairment would entitle the claimant to 50 weeks of benefits (200 x 25% = 50 weeks)

4. Entitlement to benefits requires a physician opining that the claimant's injuries have reached Maximum Medical Improvement (MMI) and assigning a permanent impairment rating to the injured extremity. *Mercy Tidewater Ambulance Serv. V. Carpenter*, 29 Va. App. 218 (1999).

   - Physicians can provide necessary evidence through a report that is filed with the Commission.

   - Claimant's attorneys must be pro-active in requesting the information in order to establish the claim and obtain benefits from the claimant. ***See* Exhibit 13.**

   - Carrier not required to pay for the cost of the doctor performing the rating. *See Harris v. Goodyear Tire & Rubber Company*, 79 O.W.C. 198 (2000).

   - Ratings not <u>required</u> to be based on the *AMA Guides to Permanent Impairment*. *See Jackson v. Haynes Furniture Company, Inc.*, 77 O.W.C. 92 (1998).

5. A claimant is not entitled to receive PPD benefits while he is under an award for TTD benefits. However, a claimant may simultaneously receive PPD & TPD benefits subject to the approval of the Commission. *See* § 65.2-503 (E)(1)-(2).

6. TTD, TPD and PPD benefits limited to a total of 500 weeks *See* § 65.2-518.

C. Permanent and Total Loss: under certain limited circumstances, the 500 week limit on compensation may be extended for the life of the claimant. *See* § 65.2-500(D)

   1. Permanent and total benefits available if the claimant suffered (a) loss of 2 extremities, (b) an injury resulting in paralysis or (c) a brain

injury that renders claimant permanently unemployable, he is eligible for weekly benefits for life. *See* § 65.2-503(C).

2. If claim is based on the loss of extremities, the test is whether the claimant is able to use the injured extremities in any substantial degree in any gainful employment, not whether the claimant retains any mobility or use of the extremity. *See Gunst Corp. v. Childress*, 29 Va. App. 701 (1999).

   - Accordingly, where a claimant with 100% loss to one leg and a 15% loss to the other leg was rendered unemployable he was entitled to permanent and total benefits. *See Georgia Pacific v. Dancy*, 24 Va. App. 430 (1997).

   - However, the claimant must have rated impairments to the 2 extremities at issue. *See Hill v. Woodford B. Davis Gen. Contr.*, 18 Va. App. 652 (1994).

3. A claim for permanent and total benefits cannot be filed until close in time to the expiration of the 500 weeks. *See Herring v. The Zeropack Co.*, 75 O.W.C. 44 (1996).

D. Lifetime Medical Benefits: a claimant injured in a compensable accident is entitled to an award of lifetime medical benefits to be paid by the carrier. *See* § 65.2-603.

1. Claimant not entitled to select his own physicians. The carrier is afforded an opportunity to provide the claimant with a panel of three. *See* § 65.2-603(A)(1).

   - If the carrier fails to provide a panel within a reasonable time, the claimant can select his own doctor.

   - After a doctor is selected, the carrier is only responsible for treatment from that doctor, medical providers to whom that doctor refers the claimant or doctors for whom permission is given by the carrier. In other words there must not be a break in the "chain of referrals." *See Breckenridge v. Marval Poultry Co.*, 228 Va. 191 (1984).

2. The carrier is permitted to monitor medical care and the physician-patient privilege is waived by statute so that the carrier or its representatives can directly communicate with, meet with or even request reports from treating physicians. *See* § 65.2-607(A).

- Claimant is entitled to a private examination by the physician and is not required to allow the carrier's representative in the exam room pursuant to the Workers' Compensation Guidelines for Vocational Rehabilitation. ***See*** **Exhibit 14.**

- Nurse case managers are not permitted to "medically manage" the claimant's care by prescribing or limiting referrals or dictating frequency of treatment or treatment options. *Id.*

3. The carrier is entitled to one IME exam per medical specialty. *See* § 65.2-607. Additional exams in the same specialty allowed with leave of the Commission if good cause shown. *Id*.

E. Vocational Rehabilitation: technically, claimant is entitled to job search services to obtain employment consistent with any limitations or restrictions resulting from the injuries. *See* § 65.2-603(A)(3).

1. Although presented under the statute as a form of benefits for the claimant, it is in practice a "sword" used by the carrier to reduce or suspend benefits to the claimant.

2. When a claimant reaches MMI and has permanent restrictions, the carrier will often assign a vocational counselor to work with the claimant to look for employment within the restrictions.

- From the claimant's perspective this process is often perceived as a tactic to harass the claimant by forcing him to apply for jobs that are unappealing, or entrap the claimant into a situation where he loses his benefits for failing to cooperate.

- A claimant is required to cooperate with vocational rehabilitation and failure to do so or sabotaging interviews and vocational efforts will lead to a termination of benefits. *See* § 65.2-603(B).

- The Workers' Compensation Guidelines for Vocational Rehabilitation; *supra*,

- If a claimant unjustifiably refuses a light duty job within the restrictions and does not cure that refusal by obtaining other employment within 6 months, TTD and TPD will be permanently barred absent a future period of total disability. *See* § 65.2-510; *Hoy Construction v. Flenner*, 32 VA. App. 357 (2000).

- Child care, family considerations, Union membership or hours of employment are not valid justifications for refusing selective

employment. *See e.g. Pauley v. Rokeby Farms*, 75 O.W.C. 150 (1996); *Mason v. Philip Morris, USA*, 60 O.I.C. 296 (1981).

F. Death Benefits: if a claimant dies within 9 years from his accident as a result of the accident, his statutory beneficiaries are entitled to death benefits paid at the normal TTD rate. *See* § 65.2-512.

1. Classes of beneficiaries defined by statute and length of benefits available. *See* §§ 65.2-512 & -515.

- spouse and dependent child under 18 or up to 23 if full time student may receive up to 500 weeks.

- parents in destitute circumstances if no other beneficiaries exist may receive up to 400 weeks of benefits.

2. The compensation rate (ie: the TTD rate) is divided equally among the beneficiaries. If benefits are terminated to any beneficiary, that person's share of the payments are divided by the remaining beneficiaries. *See* § 65.2-512 (C) & (D).

3. Only other benefits available upon death are for any medical expenses incurred prior to death and funeral ($10,000 maximum) and transportation expenses ($1,000.00). *See* § 65.2-512(B).

III. THE CLAIMS PROCESS: FILING AND LITIGATING CLAIMS

A. Types of injuries and conditions covered by the Workers' Compensation Act

1. The Act provides workers compensation benefits for claimants who sustain injuries or experience the onset of an "occupational disease" as defined under the Act. *See* § 65.2-101 and -400.

2. In general disease cases are more complex and, other than diseases resulting in death, frequently less financially viable for both the claimant and the attorney. As a result they will not be covered here in detail. For more information, s*ee* § 65.2-400 – 407 and the accompanying annotations.

3. To be compensable, a claimant must prove that an injury was (1) an injury by accident, (2) arising out of, and (3) in the course of the claimant's employment. *See*. *See* § 65.2-101; *Southern Motor Lines Co. v. Alvis*, 200 Va. 168 (1958).

4. The "injury by accident" element of the test is defined as an occurrence where (1) the injury appeared suddenly at a particular time and place and upon a particular occasion, (2) it was caused by an identifiable incident or sudden precipitating event, and (3) it resulted in an obvious mechanical or structural change on the human body. See *Goodyear Tire & Rubber Co. v. Harris*, 35 Va. App. 162 (2001).

   - Injuries resulting from repetitive trauma, continuing mental or physical stress, or other cumulative events, as well as injuries sustained at an unknown time do not qualify as an "injury by accident." *See Morris v. Morris*, 238 Va. 578 (1989).

   - Likewise, gradually incurred injuries are not covered. *See Middlekauff v. Allstate Ins. Co.*, 247 Va. 150 (1994).

   - Although the accident must occur at a reasonably identifiable time and place, a claim will not be defeated simply because a claimant cannot recall the exact date of an accident. *See Mullins v. Dominion Coal Co.*, 68 O.I.C. 43 (1989)

   - An injury qualifies as an injury by accident even if the exertion is sufficient only to aggravate a pre-existing condition. *See Kemp v. Tidewater Kiewit*, 7 Va. App. 360 (1988).

   - An unexplained accident where the claimant cannot recall how the accident occurred is not an injury by accident and thus not covered by the Act. *See e.g. Grand Piano & Furn. Co. v. Gray*, No. 2372-96-2 (Ct. of Appeals Apr. 29, 1997).

5. The "arising out of" component refers to the origin or cause of an injury. *See Hercules, Inc. v. Stump*, 2 Va. App. 77 (1986). Only those injuries resulting from risks peculiar to the nature of the work are covered while injuries resulting from risks to which all persons similarly situated are equally exposed are not covered. *See Richmond Mem. Hosp. v. Crane*, 222 Va. 283 (1981).

   - An injury arises out of the employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. *See Fouts v. Anderson*, 219 Va. 666 (1979).

   - Virginia follows the "actual risk" doctrine which holds that the mere fact that an employee was injured at work is not enough to show that his injury arose out of his employment. *See County of Chesterfield v. Johnson*, 237 Va. 180 (1989). Rather, the employee

must show that his injury resulted from an "actual risk" of the employment, which can only be met "if there is a causal connection between the claimant's injury and the conditions under which the employer requires the work to be performed." *See R.T. Investments v. Johns*, 228 Va. 249 (1984).

- This causal connection is established when "the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment." *See Bradshaw v. Aronovitch*, 170 Va. 329 (1938). This "causative danger" or risk "must be peculiar to the work . . . . It must be incidental to the character of the business and not independent of" the employment relationship. *See Combs v. Virginia Elec. & Power Co.*, 259 Va. 503 (2000).

- Unlike the "positional risk doctrine" which Virginia has rejected, an injury arising from a hazard to which the claimant "would have been equally exposed apart from the employment" and that "cannot fairly be traced to the employment as a contributing proximate cause" does not constitute an injury arising from the employment. *Id.*

- An injury is not compensable merely because it occurred during the performance of some employment duty if the act performed by the claimant is not a causative hazard of the employment. Simple acts of bending, or turning, without any other contributing factors are not risks of the employment. *See Southside Virginia Training Center v. Ellis*, 33 Va. App. 824 (2000).

- Example: falls on stairs are not compensable unless there is either a defect in the stairs or the claimant fell as a result of a condition of the employment (ie: carrying something that prevented him from seeing the stairs or using the handrail). *See County of Buchanan School Bd. v. Horton*, 35 Va. App. 26 (2001).

6. The "in the course of" component refers to the time, place and circumstances under which the injury occurred. *See Boys & Girls Club v. Marshall*, 37 Va. App. 83 (2001).

- An accident occurs during the course of the employment if it takes place within the period of employment, at a place where the employee may reasonably be expected to be, and while the employee is reasonably fulfilling the duties of the employment or is doing something reasonably incidental to it. *See Briley v. Farm Fresh, Inc.*, 240 Va. 194 (1990)

- Under the "personal comfort" doctrine, an accident that occurs during a periodic break or excursion for food, drink and the restroom visitation occurs in the course of the employment and is thus compensable. *See Kraf Constr. Servs. V. Ingram*, 17 Va. App. 295 (1993).

- Under the "going and coming" rule, an injury sustained by a claimant while "coming and going" to work does not occur in the course of the employment and is not compensable. *Sentara Leigh Hosp. v. Nichols,* 13 Va. App. 630 (1992). However, there are three exceptions to this rule: (1) where the means of transportation are provided by the employer or the time consumed by travel is paid for and is included in the employee's wages; (2) where the way used to and from employment is the sole and exclusive means of ingress and egress; and (3) where the employee is engaged in some duty or task in connection with his or her employment, i.e., when the employee is on a special errand. *Id*.

- Closely related is the "extension of the premises" doctrine which holds that the period of employment includes not only the actual performance of the work, but also "a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done" such that an injury sustained while passing to or from work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, is as causally related to the employment as if it had been sustained while the employee was engaged in work at the place of its performance. *Prince v. Pan American Airways,* 6 Va. App. 268 (1988).

- Thus accidents on sidewalks outside the workplace, in parking lots owned and controlled by the employer or where employees are assigned spaces, or that occur shortly before or after clocking out are compensable.

- Note: Where the employer does not "control the use of the parking area" and "does not control where its employees park," the parking lot is generally not considered part of employer's "extended premises" and accidents that occur thereupon are not covered *See Hunton & Williams v. Gilmer,* 20 Va. App. 603 (1995).

B. Filing the Claim

1. Again, because Virginia is an "award order" state, a claimant or his attorney must pro-actively file a claim with the Commission seeking

benefits, and the fact that the carrier may be voluntarily paying benefits does not excuse this requirement.

- The requirements of the initial claim are set forth by the Commission. *See* Rule 1.1.

- The claimant or attorney may use the standard Form 5 Claim for Benefits created by the Commission. ***See* Exhibit 15.**

- Or a simple letter setting for the information required by Rule 1.1 may be used instead. ***See* Exhibit 16.**

- A claim will not be referred to the docket unless or until medical evidence supporting the claimed injuries and disability is submitted to the Commission. *See* Rule 1.1(B)

- Any time a claimant is entitled to additional benefits, he can file subsequent claims with the Commission. In fact, multiple claims may be filed during the pendency of a single claim.

C. Agreement Forms or Hearing: after a claim is filed. The Commission sends "20 Day Orders" to the carrier where they either agree to accept the claim or state the reasons for denying it.

1. Agreement Forms: If the claim is accepted as compensable, the carrier will submit agreement forms setting forth a description of the accident, the nature of the injuries, the AWW and compensation rate, and other relevant information.

- The form which serves as the basis for the Commission's original Award Order and sets out what benefits he will receive is an Agreement to Pay Benefits. ***See* Exhibit 17.**

- If the claimant returns to work or his earnings change, a Termination of Wage Loss sets out when and why the compensation is terminated. ***See* Exhibit 18.**

- If the claimant is entitled to any additional compensation after that date, a Supplemental Agreement to Pay Benefits is used. ***See* Exhibit 19.**

- Once these forms are signed by both parties and submitted to the Commission, they are used as the basis for entry of an Award Order. ***See* Exhibit 20.**

- Supplemental Agreement forms can be used as the basis for additional Award Orders if the claimant becomes entitled to additional benefits.

2. If the claim is denied by the carrier, it is referred either for an evidentiary hearing (*See* Rule 2.2) before a deputy commissioner or an on-the-record hearing (*See* Rule 2.1) relying on the submission of records and documents without live testimony.

   - Hearings are scheduled for only 30 minutes so you must request additional time in writing. ***See*** **Exhibit 21.**

   - The Commission only recently instituted a policy of providing interpreters in cases for non-English speaking claimants, which must be requested in writing. ***See Id.*** **and Exhibit 22.**

3. A hearing is conducted before a deputy commissioner who serves as the fact-finder. *See* Rule 2.2

   - Evidence is presented through live testimony and the introduction of documents similar to a regular court.

   - A deputy commissioner has the discretion to accept hearsay evidence although there is no uniformity among different deputies as to when and under what circumstances this will occur.

   - Witnesses and documents can be subpoenaed for the hearing. *See* Rule 1.8(F).

   - A deputy commissioner can leave "the record open" for submission of additional evidence after the hearing.

   - A decision is not reached or announced at the hearing. The deputy commissioner considers the evidence and then issues a written Opinion usually several weeks thereafter setting out his findings, resolution of contested issues, and citing case law to support his conclusions. The Opinion can, however, take up to several months.

4. In general, medical evidence is based upon records, reports, letters and notes of the medical providers. Physicians do not testify at hearings, and depositions of physicians by claimants are infrequent.

5. At the hearing, both parties must submit a designation of medical records upon which they rely to support their positions. *See* Rule 2.2(B)(3). ***See*** **Exhibit 23.**

D. Developing Evidence/Discovery

1. Normal discovery similar to that in circuit courts is permitted under the Act. Up to 15 interrogatories and unlimited requests for production and requests for admission are permitted. *See* Rule 1.8.

- A standard set of interrogatories and requests for production should be propounded to the adjuster or defense attorney at the time the claim is filed. ***See* Exhibit 24.**

- Specialized interrogatories can be used for specific issues, such as to determine wages for a "like employee" if the claimant only worked for the employer for a short time prior to the accident and the AWW is being contested. ***See* Exhibit 25.**

- Note: although not required, experience has shown serving discovery at the onset of the claim pushes the case along more quickly. Often the claimant is not going to receive the benefits he is seeking until after the hearing or else by agreement after the evidence has been developed.

- Experience has demonstrated that often defense attorneys will not provide full and complete answers to standard discovery responses, even when they have been specifically ordered to answer the same discovery requests in prior cases.

- Motions to compel are required on a regular basis and should be directed either to the deputy commissioner assigned to the case or to Deputy Commissioner Temple Mayo who oversees the claims department if the claim has not yet been referred to the docket. ***See* Exhibit 26.**

- The Commission has the authority to enter sanctions against a party for failing to respond to discovery or comply with an order compelling additional responses. *See* Rule 1.12.

2. Rule 4.2 Medical Reports: This Rule promulgated by the Commission and unique to the practice of workers' compensation requires either party to immediately file with the Commission and the opposing party a copy of all medical records, reports or other documents

- There is no formal or required method of submitting medical records under Rule 4.2 and a simple transmittal letter copied to opposing counsel with the records attached will suffice. ***See* Exhibit 27.**

- Depositions taken of doctors qualify as medical records under Rule 4.2 and thus must be filed with the Commission. *See Lowery v. Globe Iron Const. Co., Inc.*, 76 O.W.C. 221 (1997).

- The Commission has the authority to fine a party for failing to comply with Rule 4.2. *See* § 65.2-902.

3. Depositions: the deposition of a party or physician is allowed as a matter of right while leave of the Commission is required to depose a non-party witness. *See* Rule 1.8(G).

   - Depositions are conducted in accordance with the Rules of the Supreme Court of Virginia applicable to discovery in civil cases. *See* Rule 4:0 *et seq*.

4. Medical Evidence: often a doctor's regular office notes will lack the necessary statements or opinions related to causation, disability or work status necessary for a claimant to establish his *prima facie* case. There are a variety of techniques necessary to obtain such evidence:

   - Taking a doctor's deposition and having it transcribed is an option but is often cost prohibitive in a workers' compensation claim.

   - Some doctors who understand the workers' compensation system will waive or greatly reduce their normal fees for attorney conferences or letters addressing contested issues.

   - The goal is to take up as little of the doctor's time as possible and thus to "idiot proof" it as much as possible.

   - These costs can be further reduced by asking the doctor to complete the Commission's Form 6. ***See* Exhibit 28.**

   - A better alternative is to prepare a letter, report or "physician's statement" for the doctor setting out his opinions that all he has to do is read and sign. ***See* Exhibit 29 and Exhibit 30.**

   - Often times, the quickest, cheapest yet most reliable method is to schedule a "short 5 minute conference" with the doctor by telephone where you explain the issue, get his opinion and then tell him that in order to be convenient for him and to save your client money you will prepare a statement setting out his opinions that so all he will need to do is make sure it is accurate, sign and return by

fax. Experience has demonstrated that this technique is reliable and is used on a constant basis.

- An unexpected benefit of obtaining medical evidence in this fashion is that in response, defense attorneys will sometimes take the doctor's deposition to challenge the opinions. That simply provides the claimant's attorney the opportunity at the expense of the carrier (both financially and tactically) to ask the doctor additional leading questions that will elicit favorable responses thereby further strengthening the medical evidence in the case.

- Although the carrier has the luxury of obtaining IME's from numerous doctors in different specialties, there is a long line of decisional law establishing the Commission's preference for the opinions of the a treating physician over those from an IME, thus establishing a "tie goes to the runner" scenario when the doctors disagree. *See Food Distributors v. Estate of Ball*, 24 Va. App. 692 (1992); *Pilot Freight Carriers, Inc. v. Reeves*, 1 Va. App. 435 (1986); *Arzola v. Cherner Lincoln Mercury, Inc.*, 77 Va. WC 12 (1998).

E. Medical Causation and Special Doctrines Related to Injuries

1. The carrier is responsible for all medical attention necessary to treat injuries sustained in the accident. *See* § 65.2-603.

2. Whether medical treatment is "necessary" is for the determination of the treating physician, not the carrier. *Jensen Press v. Ale*, 1 Va. App. 153 (1985).

3. The employer is responsible for an injury which aggravates or accelerates a pre-existing condition. *Southern Iron Works v. Wallace*, 16 Va. App. 131 (1993).

   - If a pre-existing condition is aggravated by the accident, the carrier can be responsible for the whole injury. *See Smit v. Frank Brisco Company, Inc.*, 61 O.I.C. 361 (1982).

4. Under the "two causes rule" – which is unique to workers' compensation – full benefits, including medical treatment and resulting disability, are owed to the claimant as long as the work accident is a cause or one of the causes of the injury or condition. *See Ford Motor Co. v. Hunt*, 26 Va. App. 231 (1997).

   - The extent or degree to which the original accident causes disability is irrelevant, even if the work accident is only

responsible for the continuing disability to "a minute degree" or "one iota." *Henrico Co. School Board v. Etter*, 36 Va. App. 437, 443, 552 S.E.2d 372, 374 (2001).

- Accordingly the employment need only be a "contributing factor" of the disability. *See Duffy v. Commonwealth/Dep't of State Police*, 22 Va. App. 245 (1996).

5. Doctrine of Compensable Consequences: another doctrine or rule of law unique to workers' compensation holds that when a primary injury under the Act is shown to have arisen out of the course of employment (ie: the injury is compensable), every natural consequence that flows from the injury is compensable if it is a direct and natural result of a primary injury. *See Leonard v. Arnold*, 218 Va. 210 (1977).

- In practical terms this means that when, as in *Leonard*, a claimant with a leg cast using crutches for treatment of a compensable injury falls as a result of those crutches and sustains new injuries to different body parts, those new injuries are also compensable and must be covered by the carrier. *Id*.

- Stated differently, where a causal connection between the initial compensable injury and the subsequent injury is established, the doctrine of compensable consequences extends the coverage of the Workers' Compensation Act to the subsequent injury because the subsequent injury is treated as if it occurred in the course of and arising out of the employee's employment. *See Bartholow Drywall Co. v. Hill*, 12 Va. App. 790 (1991).

- The doctrine applies both to an aggravation/exacerbation of a prior compensable injury and to a new injury so long as it results as a consequence of the original injury. *Id*. In *Hill*, a claimant who originally injured her back fell 3 years later due to residual weakness and injured her wrist, and that injury was also compensable. *Id*.

- The subsequent injury or aggravation/exacerbation of a compensable injury is compensable <u>even when the event that caused the subsequent injury or aggravation/exacerbation did not involve the workplace</u> or would not, standing alone, be compensable under the Act. *See Leadbetter, Inc. v. Penkalski*, 21 Va. App. 427 (1995).

- There must be a "chain of causation" from the original compensable injury to the subsequent injury or

aggravation/exacerbation, so long as the chain is not interrupted by any intervening cause attributable to the claimant's own intentional conduct. *Id*.

- Doctrine applies even where a subsequent unrelated accident aggravates or exacerbates a compensable injury. *See Fairfax Hospital v. DeLaFleur*, 221 Va. 406 (1980). In *DeLaFlaeur*, a claimant with a compensable back injury was involved in a car accident unrelated to her employment that injured her neck and back, and the aggravation of the back injury from the car accident was held compensable. *Id*.

- Other examples: Claimant on pain and sleeping medications to treat a covered injury falls asleep and gets in a car accident. Claimant with a right knee injury develops low back pain from an altered gait. Claimant in a car accident while traveling to a medical appointment to treat a compensable injury. Claimant experiences side effects or complications from surgery to treat compensable injury. As a result of pain or effects from compensable injuries, claimant develops or aggravates pre-existing depression or other psychiatric illness, even resulting in suicide

- However, the chain of causation only extends one link away from the original injury. In other words, a compensable injury which causes another injury is compensable. However if that subsequent injury in turn leads to causes a 3rd injury that injury is not compensable. *See Paul Johnson Plastering v. Johnson*, 265 Va. 237 (2003); *Amoco Foam Products Co. v. Johnson*, 257 Va. 29 (1999) (to be a compensable injury, the causation link must directly connect the original accidental injury with the additional injury for which compensation is sought).

F. Statues of Limitations: Traps for the Unwary

1. As an award order state, there are numerous different statutes of limitations that apply in workers' compensation cases, many tied to the last date for which compensation was paid or owed pursuant to the last Award order entered by the Commission. Thus, statutes must constantly be monitored and present ongoing traps.

2. The original accident must be reported to the employer within 30 days of the accident. The report must include the nature of the injury, and how it occurred. *See* Va. Code § 65.2-600.

- Although the statute requires the notice to be in writing, the lack of written notice or failure to include all of the required information

will not defeat the claim if there is no prejudice to the employer or the employer has actual notice of the accident. *See Kosma v. Neil Bellamy t/a B&B Wood,* 79 O.W.C. 10 (2000).

- The notice must be to a supervisor or someone with superior knowledge or responsibility. *See Department of Game and Inland Fisheries v. Joyce,* 147 Va. 89 (1927).

- Failure to give notice within allotted time is reasonable where the claimant did not believe the accident was serious or did not think the symptoms were attributable to the accident. *See Coffey v. Westmoreland Coal Co.,* 13 Va. App. 446 (1991).

3. The original claim must be filed with the Commission within 2 years of the accident. *See* Va. Code § 65.2-601.

- The only reliable exception or grounds for the claimant not filing a claim is for the appropriate agreement forms to be filed with the Commission. Because not all carriers promptly submit signed agreement forms, this alternative still carries great risk. Thus, it is recommended that claims be filed with the Commission in all instances.

- A claim should be filed within 2 years if there is not already an Award Order covering the benefits <u>even in instances where the claimant is being paid by the carrier</u> as claimant's can be lulled into a false sense of security when the carrier is voluntarily making the appropriate payments. <u>Without an existing Award Order or filing a claim, the claimant is not fully protected</u>.

4. If a claimant experiences a change in condition that entitles him to additional benefits (e.g. another surgery or relapse that creates additional disability), a new claim must be filed with the Commission and any such claim for lost wage benefits (TTD or TPD) can only relate back to 90 days prior to filing. *See* Role 1.2(B).

- In other words, if the attorney waits longer than 90 days to file the change in condition application the claimant will lose out on any TTD/TPD benefits he may have been entitled to before that time.

5. Change in condition applications seeking additional TTD or TPD must be filed with the Commission within 2 years from the last date payments were made pursuant to an Award Order providing for TTD or TPD benefits. *See* Va. Code § 65.2-708.

- This limitation is tolled for up to 2 years where a claimant who is physically unable to perform his pre-injury employment is provided light employment within his restrictions and paid at or above his AWW. *See* Va. Code § 65.2-708(C)

6. PPD: there are some additional statue of limitations with respect to PPD claims for permanent impairment pursuant to § 65.2-503.

- The statutory period to file a change in condition seeking additional TTD or TPD benefits is reduced from 2 years to 1 year after the last date payments were made pursuant to an Award Order for PPD benefits. *See* Va. Code § 65.2-501.

- The statute of limitations to file a claim for PPD benefits is 3 years after the last date payments were made pursuant to an Award Order providing for TTD or TPD benefits. *See* Va. Code § 65.2-708(A)(i)

- Where no prior compensation has been awarded, the statute of limitations to file a claim for PPD benefits is 3 years after the date of the accident. *See* Va. Code § 65.2-708(B).

G. A Word About "Body Parts"

1. Whether the original award in a case results from either an Award Order following submission of agreement forms or from an Opinion following a contested hearing, it is <u>imperative</u> that all body parts injured in the accident be included as part of the award.

2. In recent years a line of cases has come to prominence in which the Commission and the Court of Appeals has ruled that specific body parts injured as a result of the original accident that were either not claimed within 2 years following the accident, not listed in the agreement forms or not made part of the Commission's award in an Opinion were not compensable.

- In the most egregious of these cases, the Court of Appeals ruled that where the original Agreement to Pay Benefits listed the claimant's injury as a <u>head injury</u>, benefits sought for a <u>brain injury</u> after 2 years were not covered. *See Johnson v. Johnson Plastering*, 37 Va. App. 716 (2002).

- The decision was based on the holding that a head injury does not include a brain injury even though the brain is inside the head. *Id*.

- Where a claimant initially files a claiming alleging an injury to her shoulder and neck but later agrees that all outstanding issues were resolved through the agreement forms which only listed her shoulder as the claimed injury, her claim for medical treatment to treat an injury to her neck is barred by the statute of limitations. *See Tuck v. Goodyear Tire & Rubber Co.*, 47 Va. App. 276 (2005).

- However, where the original Award only listed the claimant's shoulder injury and after the expiration of 2 years, the source of her complaints was determined to have been a neck injury suffered in the original accident that had been incorrectly diagnosed as a shoulder injury and where the claimant consistently complained of pain that extended into her neck, the claim for treatment to the neck was not barred. *See Corporate Resource Mgmt. v. Southers*, 51 Va. App. 118 (2008) (*en banc*). In *Southers*, a divided panel that included a strongly worded dissent initially held that the claim for treatment to the neck was barred under the holding in *Johnson Plastering* before the Full Court reversed the decision.

- The *Southers* Court also noted that from a public policy standpoint and consistent with the Act's purpose, a claimant should not be penalized because her physicians were not initially successful in identifying the source of her symptoms, particularly in light of the lengthy break in her medical treatment caused by a dispute between the employer and carrier. *Id.*

IV RESOURCES

A. Commission's website: http://www.vwc.state.va.us/ is an invaluable resource for attorneys and claimants.

B. Peter M. Sweeny, *Virginia Workers' Compensation Case Finder*, (3d ed., LexisNexis 2003).

C. Lawrence J. Pascal, *Virginia Workers' Compensation*, (Michie 1986).

D. Andy Reinhardt and Stephen Harper, "What you might need to know about Workers Compensation," *The Journal of the Virginia Trial Lawyers Association*, Spring 2004.