Conflicts of Law: Handling Workers' Compensation Claims Involving Multiple Jurisdictions

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INTRODUCTION

Most workers' compensation attorneys who represent injured employees encounter, to a greater or lesser degree, cases having multistate implications, and therefore presenting conflict-of-law questions. Typically, a client is a resident of, and was hired in, state A, but sustained his injury while working in state B. Endless factual complications can be present. Consider, for example, a case where an employee is a resident of state A, was hired in state B, by a company having its principal place of business in state C, and is injured while working in state D.

This article will consider the varying jurisdictional requirements governing choice of law, the issues to explore if the law of more than one jurisdiction may be called into play, the potential consequences that may arise from poor handling of conflict-of-law issues, and fee agreements between attorneys in different states referring and accepting referrals in workers' compensation cases. It is emphasized that an article of this nature cannot provide a definitive statement of the relevant law of all, or even most, states. Therefore, this article should be used as a guide, to be followed up by particularized research on the question at issue under the law of the relevant state or states.

Q-1: What are the typical requirements for any state's workers' compensation tribunal to assert jurisdiction over a particular claim?

It is initially noted that the United States Supreme Court, in *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965), held that the Full Faith and Credit Clause of the federal Constitution does not require that a state subordinate its workers' compensation policies to those of another state. *Crider* is frequently cited, and has been followed in such cases as *Robert M. Neff, Inc. v. Workmens Compensation Appeal Board (Burr)*, 155 Pa. Commw. 44, 624 A.2d 727 (1993). In *Neff*, it was held that a Pennsylvania employee injured in the state while working for an Ohio employer, was entitled to all Pennsylvania compensation and medical benefits to which he would otherwise be entitled, regardless of the fact that he had contractually agreed to be covered by the Ohio workers' compensation law, even if Ohio law authorized such an agreement. 624 A.2d at 732-33.

Some states do, however, as a matter of state law, decline to hear compensation cases where doing so would require enforcement of the compensation law of a state which (as do the majority of states) has an administrative (rather than judicial) enforcement scheme. For example, in *Jerry v. Young's Well Service*, 375 So. 2d 186 (La. Ct. App. 1979), it was held first that Louisiana courts had no jurisdiction to apply Louisiana compensation where the employment contract was entered into, and the accident occurred, outside the state, and then held that a Louisiana court was without jurisdiction to enforce the Arkansas compensation act, which was enforced by an administrative commission, and under which "any remedy [is] . . . inextricably bound to the administrative procedures of that commission." *Id.* at 188.

Similarly, in *Ray v. Aetna Casualty & Surety Co.*, 517 S.W.2d 194 (Tenn. 1974), it was held that, regardless of a lack of constitutional limitation on such power:

> **The general rule is that courts of one state will not enforce the workmen's compensation laws of another jurisdiction, where the other state has provided a special tribunal to administer claims thereunder.**

Id. at 197. The *Ray* court quoted the approval of that principle in the leading academic authority on workers' compensation, which presently appears at 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 140.02(3), at 140-6, -7 (2000). Some jurisdictions, however, reject that principle. See, as illustrative, the Arizona statute providing:

> **B. If a workman who has been hired without this state is injured while engaged in his employer's business, and is entitled to compensation for the injury under the law of the state where he was hired, he may enforce against his employer his rights in this state if they are such that they can reasonably be determined and dealt with by the commission and the courts in this state.**

Ariz. Rev. Stat. § 23-904(B).

It appears that, at present, most states will take jurisdiction of compensation claims for injury resulting from in-state accidents. Larson suggests "place of injury" as a basis for residual jurisdiction, thereby avoiding the danger of coverage by no state, explaining:

> **The view that, whatever other arrangements it may make about applicability, each state should unreservedly take responsibility for injuries within its borders rests not on any survival of delictual conflicts rules but simply on statutory construction, on the unavoidable interest of the state in an injury that may affect its own citizens more than those of any other state, and on the desirability of providing a backstop liability to which claimants can turn when they find themselves on the wrong side of all other extraterritoriality rules.**

9 Larson & Larson, *supra*, § 143.03(1), at 143-16.

Attention is called to *Rutledge v. Al G. Kelly & Miller Bros. Circus*, 18 N.Y.2d 464, 223 N.E.2d 334 (1966), where the New York Court of Appeals rejected a rule previously applied in that state which denied compensation coverage of in-state injuries in some circumstances, and held:

> **New York has a primary public interest in industrial accidents happening here and it may take jurisdiction when an industrial accident occurs here *even though control of the work, payment of wages, and employment of the claimant all may have their roots elsewhere*.**

223 N.E.2d at 338 (emphasis added). The *Rutledge* court applied that rule so as to hold that the New York Board had jurisdiction over a compensation claim by an Arkansas resident employed by an Oklahoma-based traveling circus, who was injured in New York.

The following Connecticut provision is illustrative of statutory provisions excluding some nonresident employees injured in in-state accidents from compensation coverage:

(B) **"Employee" shall not be construed to include:**

. . . .

(vi) Any person who is not a resident of this state but is injured in this state during the course of his employment, unless such person (I) works for an employer who has a place of employment or a business facility located in this state at which such person spends at least fifty per cent of his employment time, or (II) works for an employer pursuant to an employment contract to be performed primarily in this state.

Conn. Gen. Stat. Ann. § 31-275(9)(B)(vi). In *Kluttz v. Howard*, 228 Conn. 401, 636 A.2d 816 (1994), the court took notice of this definition while holding that a nonresident employee injured in Connecticut prior to its effective date was eligible for Connecticut compensation benefits.

Assumption of jurisdiction over out-of-state accidents is a question subject to inconsistent statutory and case law. One approach is that taken in Virginia where it is provided by statute:

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.

Va. Code Ann. § 65.2-508A. In *Worsham v. Transpersonnel, Inc.*, 15 Va. App. 681, 426 S.E.2d 497 (1993), it was held that the statutory requirement that the employer's place of business must be in the Commonwealth is not satisfied by its merely conducting business in the state, and that the WCC had no jurisdiction where the employer was incorporated and maintained its principal place of business elsewhere and the claimant was not required to live in the state. 426 S.E.2d at 499; *see CLC Construction, Inc. v. Lopez*, 20 Va. App. 258, 456 S.E.2d 155 (1995), as an example of cases where, in contrast to *Worsham*, the place of business in the Commonwealth requirement was met. 456 S.E.2d at 158.

In *General Electric v. DeCubas*, 504 So. 2d 1276 (Fla. Dist. Ct. App. 1986), it was held that under a statute providing for payment of compensation for out-of-state injuries and deaths if, inter alia, "the employment was principally localized in this state," even if the contract of employment was made elsewhere, *id.* at 1277, an employee working about 73% of his time in Florida qualified, rejecting the argument that the question to be determined was where the *employer* was principally localized. In *Johnson v. United Airlines*, 550 So. 2d 134 (Fla. Dist. Ct. App. 1989), it was held that an airline flight attendant's employment was "principally localized" in Florida, where she was based, although the majority of her flight time was spent outside of Florida airspace. In *Ewing v. George A. Hormel & Co.*, 428 N.W.2d 674 (Iowa Ct. App. 1988), it was held that the Iowa Commission had no jurisdiction over a

claim by an employee who, although an Iowa resident, had his employment "localized" in Nebraska and was injured in that state. *Id.* at 675.

The applicable Alabama statute provides that an employee or his dependants, if otherwise entitled to compensation had the injury or death resulted from an in-state accident, are entitled to compensation for an out-of-state accidental injury, provided:

> **(1) His employment was principally localized in this state;**
>
> **(2) He was working under a contract of hire made in this state in employment not principally localized in any state;**
>
> **(3) He was working under a contract of hire made in this state in employment principally localized in another state whose workmen's compensation law was not applicable to his employer; or**
>
> **(4) He was working under a contract of hire made in this state for employment outside the United States.**

Ala. Code § 25-5-35(d)(1)-(4). In *Ex parte Flint Construction Co.*, 775 So. 2d 805 (Ala. 2000), it was held the trial court (in a state utilizing the judicial rather than administrative method of enforcing its compensation act), had jurisdiction of a claim for out-of-state injuries, when his employment was not localized in any particular state, but his employment was pursuant to a contract for hire entered into in Alabama. *Id.* at 808.

Murray v. Ahlstrom Industrial Holdings, Inc., 131 N.C. App. 294, 506 S.E.2d 724 (1998), is illustrative of cases turning on whether the contract of employment was made in the forum state. There, the employee was injured in Mississippi after having been telephoned at his North Carolina home by his former, out-of-state employer and offered a job in Mississippi. The *Murray* court held that, under the rule that "for a contract to be made in North Carolina, the final act necessary to make it a binding contract must be done here," 506 S.E.2d at 726, the offer, and following telephone negotiation, acceptance by the claimant in North Carolina, was such final act, empowering the Commission to assume jurisdiction. In *D.L. People's Group, Inc. v. Hawley*, 804 So. 2d 561 (Fla. 1st Dist. Ct. App. 2002), it was held that Florida had jurisdiction over a claim for an employee's death in Missouri, where such employee signed the employment contract in Missouri and sent it to the employer's president, who signed and executed it in Florida. *Id.* at 563.

Ray should be noted as illustrating the point that if other requisite factors are not present, the mere fact that the employee is a resident of the forum state will not be sufficient to permit assumption of jurisdiction over his compensation claim. There, the Tennessee Supreme Court held that when the employee, a Tennessee resident, was injured in Missouri, and the contract of employment was entered into in that state, contacts with Tennessee were insufficient to justify application of Tennessee law. 517 S.W.2d at 197.

An interesting variation is presented by *Wartman v. Anchor Freight Co.*, 75 Ohio App. 3d 177, 598 N.E.2d 1297 (1991). The *Wartman* court applied a section of the Ohio act providing:

> **If an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, the employee and his dependents are not entitled to receive compensation or benefits under this chapter, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state and the rights of the employee and his dependents under the laws of the other state shall be the exclusive remedy against the employer on account of the injury, disease, or death.**

598 N.E.2d at 1300 (quoting Ohio Rev. Code Ann. § 4123.54(G) (which remains in effect)) to the case of a Kentucky resident employed by a Michigan corporation who was injured while driving a truck through Ohio. The court held that the employee was not insured under the workers' compensation law of another state, because he was not covered under Michigan law (as a nonresident of Michigan injured outside Michigan), and was also not covered under Kentucky law, regardless of his residency of that state. Therefore, he was not precluded from entitlement to Ohio compensation benefits. *Id.* at 1301-02.

Q-2: Where more than one state may assert jurisdiction over a claim because the employer's place of business is in one state and the accident occurred in another, what limitations might be placed on the employee's ability to choose the jurisdiction in which to file?

In general, it can be stated that, absent a specific statutory provision, there is no obstacle to prevent a compensation claimant from filing his claim in any state having jurisdiction. This point was recognized by the United States Supreme Court in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1960), which (while primarily dealing with another issue, as discussed herein under Q-3, *infra*), held that it was "perfectly clear" that the employee there:

> **could have sought a compensation award in the first instance either in Virginia, the State in which the injury occurred, *Carroll v. Lanza, supra*; *Pacific Employers, supra*, or in the District of Columbia, where petitioner resided, his employer was principally located, and the employment relation was formed.**

Id. at 279 (citations omitted). The *Thomas* Court further stated, citing, e.g., *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), and *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U.S. 532 (1935):

> **[A]s those cases underscore, *compensation could have been sought under either compensation scheme* even if one statute or the other purported to confer an exclusive remedy on petitioner. Thus, for all practical purposes, respondent and its insurer would have had to measure their potential liability exposure by the more generous of the two workmen's compensation schemes in any event.**

448 U.S. at 279-80 (emphasis added).[1]

[1]While citation is to the plurality opinion in *Thomas*, the concurring and dissenting opinions did not indicate disagreement with that opinion on the point for which it is here cited.

In *Argonaut Ins. Co. v. Vanatta*, 539 S.W.2d 35 (Tenn. 1976), the deceased employee was a Tennessee resident, whose contract of employment was made in Alabama and who was employed there, and who died in a Tennessee accident. The court held that the claim was properly instituted in Tennessee:

> **even though upon these facts the family of the deceased might also have had a claim under the Alabama statute, had they seen fit to pursue the matter in that state.**

Id. at 37. In *Rutledge*, the New York Court of Appeals held that "[w]e ought not apply a rule of mutually exclusive jurisdiction . . . and deny jurisdiction here because under the same facts jurisdiction would be taken elsewhere." 223 N.E.2d at 338. In *Neff*, it was held that although the employee had a contractual right to claim benefits in Ohio, he had a right under Pennsylvania law to file for benefits there, and "requiring [him] to first submit claims to the Ohio Bureau constitutes an unreasonable burden." 624 A.2d at 733. In *Johnson*, it was held by the Florida First District Court of Appeal that the pendency of the employee's claim in Illinois did not affect her entitlement to Florida compensation benefits. 550 So. 2d at 135.

Q-3: What will be the impact on an employee's ability to pursue a workers' compensation claim in one state of his having filed for and/or been awarded compensation benefits in another state?

The question of successive workers' compensation awards in different states has generated conflicting opinions, and cannot be regarded as completely settled. Consideration of the question should begin with three United States Supreme Court opinions. In *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1944), it was basically held that a final compensation award is entitled to the same full faith and credit as a court judgment, and that an employee therefore could not claim compensation in a second jurisdiction after claiming and recovering compensation in a first jurisdiction. In *Industrial Commission v. McCartin*, 330 U.S. 622 (1947), *Magnolia* was modified so as to permit an employee to file a compensation claim in a second state in the absence of "some unmistakable language by a state legislature or judiciary," *id.* at 627, of the first state "cut[ting] off an employee's right to sue under other legislation passed for his benefit" in the first state. *Id.* at 628. In *Thomas*, the Court (in a plurality opinion) overruled *Magnolia*. *Id.* at 285. A majority of the *Thomas* Court held that the employee there had a right to file for an additional award in the District of Columbia after obtaining an award in Virginia, because the Virginia statute alleged to bar a successive D.C. claim "lack[ed] the 'unmistakable language' which *McCartin* requires." *Id.* at 289-90 (concurring opinion).

Neff is illustrative of cases following *Thomas*. 624 A.2d at 732-33. However, *Gray v. Holloway Construction Co.*, 834 S.W.2d 277 (Tenn. 1992), should be noted as illustrating the continuing, albeit minority, viability of *Magnolia*. In *Gray*, the court held that, under Tennessee law:

> **an employee injured on the job in another state, who files a workers' compensation claim in that jurisdiction and obtains either an award . . . or a court-approved settlement of the claim . . . or who actively pursues a claim in a venue that has jurisdiction, is barred from filing a subsequent claim in Tennessee.**

Id. at 279 (citations omitted). The court further stated:

> **Although the basis for this rule is frequently expressed in the Tennessee cases in terms of an "election of remedies" on the part of the plaintiff-employee, it is also**

> **evident that an out-of-state judgment would be entitled to full faith and credit in the courts of Tennessee, and that a further recovery for the same injury under the Tennessee workers' compensation statute would be barred by the federal constitution. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149 (1943).**

Id.

In *Perkins v. Beak, Inc.*, 802 S.W.2d 215 (Tenn. 1991), a case cited in *Gray*, it was held that the employee's execution of an agreement for compensation providing that "benefits would continue until terminated in accordance with the workmen's compensation law of Virginia," *id.* at 216, constituted a binding election precluding him from obtaining Tennessee compensation benefits. The *Perkins* court held that:

> **[t]he circumstances of each case must be considered in determining *whether the employee has made a binding election*. The mere acceptance of benefits from another state does not constitute an election, but affirmative action to obtain or knowing and voluntary acceptance of benefits from another state will be sufficient to establish a binding election.**

Id. at 217. The *Gray* court approved *Perkins* and held that the employee in its case did not make a binding election to receive Texas compensation benefits by, inter alia, accepting Texas temporary disability benefits paid voluntarily by an insurer. The *Gray* court concluded:

> **The palpable if unspoken principle underlying our decision in *Perkins* was a perceived need to guard against unfair manipulation of the Tennessee legal system and a possible double recovery by an injured worker who has already secured an adequate compensation award in another jurisdiction. That concern remains a valid one. Nevertheless, to invoke the rule applied in *Perkins* to Walter Gray's case would produce just the opposite result—instead of a double recovery, there would be no recovery at all. Clearly, that result would constitute a perversion of the otherwise sound policy developed in the line of cases culminating in *Perkins.***

834 S.W.2d at 282.

The approach taken by Florida on the successive award issue can be contracted with the above-discussed Tennessee approach. It is provided in the Florida act:

> **(d) If an accident happens while the employee is employed elsewhere than in this state, which would entitle the employee or his or her dependents to compensation if it had happened in this state, the employee or his or her dependents are entitled to compensation if the contract of employment was made in this state, or the employment was principally localized in this state. However, if an employee receives compensation or damages under the laws of any other state, the total compensation for the injury may not be greater than is provided in this chapter.**

Fla. Stat. Ann. § 440.09(1)(d). In *de Cancino v. Eastern Air Lines*, 239 So. 2d 15 (Fla. 1970), *appeal after remand*, 283 So. 2d 97 (Fla. 1973), where the employee filed a compensation claim in Florida while her claim in New York was pending, the court held:

> **The only pertinence which compensation proceedings in another state may have is concerned with offsetting the amount of benefits received so that total benefits do not exceed what might have been awarded in a Florida forum. So long as this limitation on recovery is observed, it is of no importance what the stage of proceedings may be in another state.**

239 So. 2d at 15.

In *Lee v. District of Columbia Department of Employment Services*, 509 A.2d 100 (D.C. 1986), it was held that under a section then providing that "[n]o employee shall receive compensation under this chapter and at the same time receive compensation under the workers' compensation law of any other state for the same injury or death," *id.* at 103,[2] precluded the employee's receipt of D.C. compensation benefits for the period for which he had already received Maryland benefits. The *Lee* court held that the administrative rejection of proposed construction of the language as barring only complete double recovery was reasonable. *Id.* at 104-05.

It is worth noting that *Larson* takes a position upholding the public policy desirability of successive awards, arguing:

> **On the policy question whether the availability of the supplementary-award procedure is a desirable thing there is some difference of opinion. Against it is the argument that it may subject the employer and carrier to repeated claims in different jurisdictions, protracting litigation and making it impossible for the employer and carrier to know with assurance when a claim has been fully satisfied. On the other side it is urged that employees typically are at a disadvantage in learning of their potential rights under various statutes of other states, especially since complex conflict-of-laws issues may sometimes be involved; hence they may quite forgivably make an unfortunate choice at the time of filing the first claim.**
>
> . . . .
>
> **In any case, the worst that can happen to the defendants, apart from the inconvenience mentioned above*, is that they will have to pay no more than the highest compensation allowed by any single state having an applicable statute—which is the same amount that would always be payable if the claimant made the best-informed choice the first time*.**

9 Larson & Larson, *supra*, § 141.06, at 141-10, -11 (2003) (emphasis added).

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[2]The present equivalent section provides:

> (a-1) No employee shall receive compensation under this chapter and *at any time* receive compensation under the workers' compensation law of any other state for the same injury or death.

D.C. Code Ann. § 32-1503(d)(2)(a-1) (emphasis added).

Q-4: Is there a rule against double recovery of benefits when more than one state is available as a choice for filing a workers' compensation claim?

As stated by Larson, "a complete double recovery under the acts of two states" is an "impossible" result "except in a few rare fact combinations." *Id.* § 141.07 at 141-11 (2003). See, for example, as cases applying the general rule, *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608, 610 (1961); *Johnson*, 550 So. 2d at 135; and *Brooks v. Eastern Airlines, Inc.*, 634 So. 2d 809 (Fla. Dist. Ct. App. 1994). It was held in *Brooks* that the Florida statutory preclusion of award of total compensation benefits in two or more states greater than provided by Florida law applied not only to payments made in multiple states for coinciding periods of disability, but also to payments made "during an altogether separate interval of disability." 634 So. 2d at 811.

Focus, therefore, should be on the cases involving the "rare" exceptions to the general rule precluding double recovery. One such case is *Uninsured Employer's Fund v. Wilson*, 46 Va. App. 500, 619 S.E.2d 476 (2005). There, the employee was a Michigan resident, hired by his Michigan-based employer for a job in Virginia. He filed a claim with the Virginia WCC, which awarded the requested benefits. He also entered into a settlement with the employer in Michigan for payment of the Virginia award, plus $75,000 and payment of all outstanding medical benefits, which settlement was approved in Michigan. The UEF (standing in the shoes of the employer) argued, inter alia, that it was entitled to a $75,000 credit against the employee's medical claims, claiming that the employee would otherwise be getting a "double recovery." 619 S.E.2d at 479. The court rejected that argument, holding that under the applicable statute settlement payments not approved by the Virginia WCC could only "be deducted from the amount to be paid as *compensation*" to the employee under Virginia law, *id.* at 478 (court's emphasis), and that the Michigan settlement payments did not qualify. The court concluded:

> **Voluntary payments made to a claimant pursuant to an unapproved out-of-state settlement may not be credited under Code § 65.2-520 against an employer's liability to provide medical benefits.**

Id. at 480. With respect to the "double recovery" argument, the *Wilson* court held that:

> **[w]hen a correct reading of the workers' compensation statute nonetheless results in the potential for "undeserved benefits," the decision to rebalance the ledger lies solely "within the province of the legislature, not the judiciary."**

Id. at 479 (quoting *Newport News Shipbuilding & Dry Dock Co. v. Holmes*, 37 Va. App. 188, 555 S.E.2d 419, 422 (2001)).

Ryder Truck Lines, Inc. v. Kennedy, 296 Md. 528, 463 A.2d 850 (1983), is an additional case where statutory language, there ambiguous statutory language, was construed as requiring that there be what might be regarded as a "double recovery." There, the employee, a truck driver, was a resident of Maryland, where, although married to a woman (Domenica) who lived in Florida with their minor child, he lived with his girlfriend (Donna), their minor child, and a minor child from the girlfriend's former marriage. The employee's fatal accident occurred in Virginia. Donna filed compensation claims in Maryland. Domenica filed claims in Virginia and was awarded survivors benefits there for herself and her child. Domenica then filed a total dependency claim in Maryland, and the employer, inter alia, sought credit for the Virginia award. The *Ryder* court, following discussion of the relevant statutes in both states, held that the Maryland statutory language:

> **[i]f an employee or the dependents of 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 article[,]**

463 A.2d at 855, was

> **ambiguous because it does not clearly indicate whether the dependent receiving an award in a foreign state must be the same dependent in this State or may be a different and unrelated dependent before the operation of the statute is triggered.**

Id. at 855-56. The court held that the employer could not receive credit in Maryland for the Virginia award to Domenica against the Maryland benefits due Donna and her children:

> **To hold that Domenica and Teresa Grass' receipt of compensation under the laws of Virginia could bar Donna and her children from recovering in Maryland would in effect make the laws of Virginia supreme and binding in this State. They are not the same dependents and § 21(c)(4) does not apply.**

Id. at 857. The court held, however, that the Commission properly denied a partial dependency award in Maryland to Dominica and her daughter "when they had received an award of total compensation in Virginia." *Id.*

Q-5: What limitations might be imposed regarding referral fees between workers' compensation attorneys in different states?

Evaluation of this issue will in larger part require consideration of the rules governing referrals by and fee-sharing between attorneys generally, beyond both the workers' compensation and interstate contexts. Prior to discussion of these rules and related authorities, however, it is important that both referring and receiving attorneys keep in mind that fees in workers' compensation cases are heavily regulated. See, as illustrative, the section of the Virginia act providing, in relevant part:

> **A. Fees of attorneys . . . whether employed by employer, employee or insurance carrier under this title, shall be subject to the approval and award of the Commission. . . . [T]he Commission shall have exclusive jurisdiction over all disputes concerning such fees or charges and may order the repayment of the amount of any fee which has already been paid that it determines to be excessive[.]**

Va. Code Ann. § 65.2-714A. See generally, the application of this statutory provision in *Roman v. Ondeo Degremont, Inc.*, No. 1690-05-2, 2006 WL 768667 **3, 4 (Va. Ct. App. 2006).

Referrals of workers' compensation claims are subject to the ethical rules pertaining to fees to the same extent as attorneys practicing in other areas of law. The pertinent Model Rule provides:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:

> **(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;**
>
> **(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and**
>
> **(3) the total fee is reasonable.**

ABA Model Rules of Professional Conduct, Rule 1.5(e).

It is important to note that some states take a less restrictive position toward fee-splitting. For example, the Virginia version of Rule 1.5 provides:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> **(1) the client is advised of and consents to the participation of all the lawyers involved;**
>
> **(2) the total fee is reasonable; and**
>
> **(3) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.**

Va. R. Prof. Cond. 1.5(e). The Committee Commentary to this Rule explains:

> **Paragraph (e) eliminates the requirement in the Virginia Code that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing participation. The requirement in the Virginia Code was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which must include a delineation of each lawyer's responsibilities to the client.**

Id. (Committee Commentary).

Halberg v. W.M. Chanfrau, P.A., 613 So. 2d 600 (Fla. Dist. Ct. App. 1993), should be noted as applying the Model Rule in a suit to recover fees brought by a referring attorney against the receiving attorneys. The *Halberg* court held that the referral there complied with the assumption of joint legal responsibility requirement, even though such requirement was not explicitly stated in the agreement, and "it would be preferable for a written referral agreement to expressly track the language" of the Rule. *Id.* at 602. In reaching that conclusion, and therefore holding that the referring attorney was entitled to recovery of fees under the referral agreement, the *Halberg* court noted:

> **If the client had sued the referring lawyer for legal malpractice we believe the referral agreement would be sufficient to make a prima facie showing that the referring lawyer had undertaken to represent the client.**

Id. at 602 n.1.

The case of *Booher v. Frue*, 86 N.C. App. 390, 358 S.E.2d 127 (1987), *aff'd without opinion*, 321 N.C. 590, 364 S.E.2d 141 (1988), illustrates the consequences of an attorney's failure to disclose to his client a fee-sharing agreement with another attorney. There, a North Carolina attorney referred a wrongful death case to a Texas attorney and secretly negotiated a referral fee. The *Booher* court (with dissent) held that the client had stated a good cause of action against the referring attorney for constructive fraud, unjust enrichment, and constructive trust. 358 S.E.2d at 128-30.

In *Tormo v. Yormark*, 398 F. Supp. 1159 (D.N.J. 1975) (applying New Jersey law), a New York attorney (Devlin), referred his clients' personal injury case to a New Jersey attorney (Yormark) who, unknown to the former, was under criminal indictment, and who subsequently embezzled the clients' funds. The court held that the referring attorney "was under a duty to exercise care in retaining Yormark to ensure that he was competent and trustworthy," *id.* at 1170, but that such duty had limits, particularly in the case of an interstate referral. The court explained:

> **But in setting a standard of conduct required to fulfill that obligation, a distinction must be drawn between Devlin and an allegedly negligent New Jersey lawyer. Although expressing no opinion as to the latter, the *Court believes it would be unfair to require a New York practitioner referring a case to New Jersey counsel to know facts concerning him which are notorious only within New Jersey*. Yormark's indictment was reported by the New Jersey press, but there is no evidence that it was given wider coverage. Devlin ought not be deemed negligent for failing to discover that fact absent proof of the latter sort. A contrary conclusion would subject out-of-state lawyers to possible liability for negligence for failure to consult not only a New Jersey lawyer's personal references and the legal ethics committee in the county in which he practices, but also the offices of local prosecutors. Yet a reference may be unaware of an attorney's criminal misadventure, and proceedings before the State's committees on ethics are required to be kept confidential.**

Id. at 1170-71 (emphasis added). The *Tormo* court also held, however, the referring attorney was not entitled to summary judgment in view of evidence that he may have known, or should have known, that Yormark was guilty of soliciting legal employment from laymen, holding:

> **An attorney who knowingly entrusted his client's business to a lawyer who he had reason to believe was guilty of that offense would be clearly negligent either in making the referral at all, or in doing so without advising his client of his suspicions.**

Id. at 1171. *Tormo* illustrates the need for due diligence on the part of the referring attorney.

CONCLUSION

There are general rules of thumb discussed above as to when a state's workers' compensation tribunal may exercise jurisdiction over a workers' compensation claim. The question of whether different or multiple filings may be made must also be considered. Even a double recovery may sometimes be permitted. The issue of referral fees between attorneys from different states is also an issue to contend with. Failure to consider all of these issues may result in inadequate representation of injured workers and may also open the attorneys involved to unnecessary liability.

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