SO YOU'RE NOT A WORKER'S COMPENSATION LAWYER

SOME OF THE THINGS YOU MIGHT NEED TO KNOW ABOUT WORKER'S COMPENSATION, EVEN IF YOU ARE NOT GOING TO BE AN EXPERT IN THE AREA

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Over the years in representing a number of injured worker's who also have other related cases running at the same time, we are often called upon to advise other attorney's about the inter-relationship between the worker's compensation laws and the laws involving the related cases. We thought it might be helpful to summarize some of the key points which we often discuss with other attorneys.

I.

DID YOU KNOW ABOUT THE MOST IMPORTANT STATUTES OF LIMITATION THAT APPLY IN WORK INJURY CASES?

a. The 30-day notice rule. Whenever an employee is injured at work he is required to notify his employer within 30 days that he was injured at work, how he was injured at work and what body parts were injured.[1] The applicable statutory provision even technically states that the notice must be in writing. If the employer isn't prejudiced by the notice not being in writing or the failure to receive all of the particulars mentioned above, sometimes this is overlooked.[2] However, some amount of notification is absolutely required or the claim can be barred. What is most interesting about this particular notice requirement is that if an injured worker has both a personal injury case and work injury case arising out of the same accident and the personal injury attorney does not make certain that the employer is notified, the worker's compensation claim may be barred even though the personal injury claim is perfectly valid. The notification

must be to a supervisor or someone in that business who is the type of person who is supposed to receive notice of the accident.[3]

b. The 60-day notice rule for occupation disease claims. Whenever a diagnosis of an occupational disease is first communicated to the employer by a treating doctor he must give written notice to the employer within 60 days. However, failure to give the notice will not deprive the employee of his claim for occupational disease, unless it is shown that the failure resulted in clear prejudice to the employer.[4]

c. Two-year statute of limitations. Most people are aware that worker's compensation claims must be filed with the Worker's Compensation Commission within two years of the accident.[5] Of course, the necessity for this claim being filed can be avoided if appropriate agreement forms are filed so that an Award Order is entered at the Commission protecting a claimant's rights. Even though your client tells you he is receiving a worker's compensation check, the statute of limitations can still expire if no claim is filed or no award order entered. For a variety of occupational disease claims such as Pneumoconiosis, Bicinosis, Asbestoses, etc. statutes limitations are delineated in the code which include not just a two year statue of limitations from the date of diagnosis but, the number of years from the date of last injurious exposure after which the claim must be filed against any particular employer.[6]

d. 90-day change in condition rule. If an injured worker has a change in his condition such as again being taking out of work as a result of surgery or a relapse in his medical condition related to the work injury, then in order to preserve the claimant's right to receipt of wage benefits, it is necessary to file a change in condition claim with the Commission. Such a claim for lost wage benefits only relates back to 90 days before filing.[7]

e. The two-year Statute of Limitations and the one-year Statute of Limitations after award entries. As will be discussed below briefly, Virginia is an award order state. This means that in order for the claimant's rights to be protected under Worker's Compensation, claims must be filed or awards entered to protect those rights. Awards are entered by the Worker's Compensation Commission.[8] Various statutes of limitation also apply in such a way that they run from the last date payments are made pursuant to an award. If a claimant is out of work, he should be paid benefits pursuant to a wage award. Then in order for that claimant to be paid for later time periods of disability from work, a claim must be filed with the Commission within two years from the last time payments were made pursuant such an award.[9] This statutory period is shortened to one year when the last payment under the award was pursuant to a permanent partial disability award (such as for a permanency to a limb).[10] Obviously, these are loopholes that can allow the employers and worker's compensation insurance companies to avoid obligations to pay benefits if these various statutes are ignored. Few things are more frightening in the practice of law than the possible lapse of a statute of limitations.

f. **How to handle these statutes.** We have often been asked by attorneys who do not handle worker's compensation cases on how to advise injured workers with minor worker's compensation claims that do not seem to require an attorney. We often suggest a standard letter be sent to the injured worker advising them that there are numerous statute of limitations and provide them with a copy of an informational booklet that spells out all of the various rules and statute of limitations. These booklets are available from the Worker's Compensation Commission. They are the same booklets that are forwarded to injured workers by the Commission after an accident is reported by the employer.

II.

DID YOU KNOW THE SIGNIFICANCE OF AGREEMENT FORMS IN A WORKER'S COMPENSATION CASE?

a. **Agreement forms.** As mentioned briefly above, Virginia is an award order state. What that means is that your injured worker client's rights can only be confirmed and protected with an award order. Those award orders are a result of either an agreement of the parties which is formalized by the Commission, or a ruling by the Commission after a hearing. The forms in question consist principally of an Agreement to Pay Benefits Form, which is entered initially when benefits are agreed upon for wage or medical benefits, a Supplemental Agreement Form which applies when benefits are reinstated or later awarded for permanent partial injuries, or a Termination of Wage Loss, which

provides for the cessation of certain wage benefits. The significance of the agreement forms is that the Commission memorializes the agreement of the parties as to type and amount of benefits awarded, and the basis for the award. More specifically, the Agreement to Pay Benefits form provides which body parts are injured, the amount of the average weekly wage, the date of accident, the time the benefits start, and so forth. If the consequences of an injury are significant, it certainly makes sense for the injured worker to have the advice of counsel in reviewing these forms.

One of the benefits resulting from a compensable worker's compensation injury is the award of lifetime medical benefits.[11] If the Commission's award does not include a particular body part and the worker later has a need for treatment and two years have passed, then the injured worker may not have medical coverage or wage benefits even though that body part was agreed to by the parties if it was not listed on the form. Similarly, if the parties reach an agreement as to the average weekly wage and that information is incorrect, then it might be that the claimant will receive a much smaller weekly check than he is entitled to. These can be very significant issues in a worker's compensation case.

b. Body parts. Over the last couple of years, the issue of the body parts listed on agreement forms has been litigated a number of times. The most significant case was one in which the claimant initially listed a head injury but it turned out that the injury was to the brain.[12] It was held that a head injury does not necessarily include a brain injury even though the brain is within the head. This might not seem fair or logical. One would think

that notice to the parties would be enough and that may be the ultimate result in some cases. However, one cannot assume that the employer will agree that it had notice of all of the body parts injured.

c. Wages. It is possible to file for an amendment to the average weekly wage if it is later determined that as a result of mutual mistake, fraud or duress, the average weekly wage was understated.[13] We find that this occurs on a very frequent basis when clients come to us after receiving benefits for some period of time without the advice of counsel. Frequently, it seems that insurance companies or employers simply pay the claimant 2/3 of a 40 a hour work week. A claimant's compensation should be calculated based upon overtime or other perks which should be included in the average weekly wage computation.[14]

III.

DO YOU KNOW HOW MEDICAL BENEFITS WORK IN WORK INJURY CASES?

a. Panel of doctors and referral chain. Whenever an injured worker's case is compensable, the employer is required to provide the injured worker with a panel of three physicians from which he picks one for his treatment.[15] Should the employer not provide such a panel within a reasonable time, the claimant has a right to choose his own doctor. Once a physician is chosen from a panel of doctors or by the claimant himself, he must

treat with that doctor in order for his bills to be paid. All of his medical care must be reasonable, necessary medical care provided by that doctor or upon referral by that doctor. Should that doctor refer the injured worker to other doctors for consultation or for subsequent care, the employer is responsible for that care and treatment. In other words, for the injured worker's bills to be paid the treatment must be within the referral chain.[16] Of course in a personal injury case, the plaintiff can chose to treat with whomever he prefers. There may be limitations in regards to referrals for heath insurance but there is not the same referral chain limitation. When an injured worker has a personal injury case, he must still be careful to stay within the referral chain in order to be certain that his bills are paid.

b. **Health insurance issues.** Sometimes plaintiff's counsel handling a personal injury case will ignore the referral chain because it is thought that the personal injury case is more important than the worker's compensation case. In some cases this is true. However, there are times when the medical or other benefits available under worker's compensation are more significant than a personal injury claim because of problems with liability or coverage in a personal injury case. There are also times when plaintiff's counsel will permit medical bills to be paid by health insurance even though they ought to be covered by worker's compensation, based on a thought that the health insurance lien need not be paid back. We do not recommend this approach and of course often times health insurance also has to be paid back because of an ERISA lien.[17] ERISA carriers may be much less receptive to lien negotiations than the comp carrier, which by statute, only receive a reduced lien reimbursement.[18] In addition, even health insurance

policies without an ERISA provision may provide for a right of subrogation to the claims of a plaintiff or his recoveries if the bills were improperly paid by health insurance when they should have been covered by worker's compensation. Every case is different and determinations must be made on a case-by-case basis as to how to properly advise the injured person.

IV.

ARE YOU FAMILIAR WITH MEDICAL MANAGEMENT ISSUES IN WORK INJURY CASES?

a. Lack of privacy. Under worker's compensation laws, because the employer and carrier have the obligation to pay medical bills, they are also given the opportunity to monitor the medical care. They have the right to speak directly with medical providers about the injured worker's care and treatment, and receive the medical records. By statute, the injured worker has very few privacy rights in regards to his medical care and treatment, although he is entitled to a private medical exam with his treating physician. [19]

b. Medical management. As a result of this interesting relationship between the worker's compensation insurance companies and health care providers, the insurance companies often engage in medical management. Technically, medical management is not permissible.[20] More specifically, the question of what type of medical care an injured worker should receive and when, is to be determined by the treating doctor. However,

insurance companies hire medical case managers to monitor care and consult with doctors on a regular basis. This is often a nuisance for injured workers and claimant's attorneys and is a great source of consternation and litigation. Medical and vocational guidelines have been promulgated by the Worker's Compensation Commission in attempt to alleviate some of these problems but they continue to exist.[21] The difficulty in a nutshell is that the vocational and medical case managers are engaged by and paid by the worker's compensation insurance companies to meet with our clients and their doctors and yet often do not have the injured worker's best interest's at heart. While there are some fine professionals working in this area, we have often seen difficulties arise specifically because of the employment of case managers.

c. **Independent medical exams.** The employer also has the right to force an injured worker to submit to an independent medical exam (defense medical exam) by a doctor of its own choosing.[22] In fact, the employee can be required to submit to an independent medical exam by one doctor per specialty. Additional examinations may be necessary with some good cause shown. This is often not that difficult to show. Failure to submit to the medical exam can result in both medical and wage benefits being stopped until the failure is resolved.

V.

ARE YOU AWARE OF THE PROBLEMS PRESENTED BY WAY OF VOCATIONAL REHAB COUNSELORS

a. Light duty refusal and settlement. As discussed above, the employer has the right to engage not only medical but vocational case managers. They often do this when the injured worker has reached or come close to reaching maximum medical improvement and when the permanent restrictions have been or are about to be determined. At that point, a vocational counselor is engaged by the employer to try to put the injured worker back to work in a "return to work program". Vocational rehab guidelines are promulgated by the Commission to resolve issues that have often arisen in these areas but, the vocational counselor is often perceived to be the enemy of the injured worker, who is harassing him to reduce the case's value rather than actually attempting to find him useful permanent employment. It is hard to argue with this perspective in most cases. Regardless, the claimant must cooperate with vocational rehab. Failure to do so can result in their benefits being stopped.[23] In fact, if a light duty position within the claimant's restrictions is refused, the employer will usually promptly file an application with the Commission to stop the claimant's benefits. If light duty refusal can be proven and the refusal cannot be cured within six months, wage benefits will be permanently stopped except for subsequent periods of total disability from work.[24] The threat of an allegation of refusal and/or nuisance of job hunting with case managers is a strong settlement incentive in some cases. This is not usually because of the claimant's lack of interest in working but the desire to control their own future.

VI.

ARE YOU FAMILIAR WITH THE MARKETING ISSUES THAT APPLY IN WORKER'S COMPENSATION CASES

a. Marketing rules. Job-hunting issues are a matter regularly discussed with injured workers. As discussed above, when an injured worker has recovered to the point of being able to do light duty work, he must cooperate with the vocational rehab counselor insofar as seeking light duty employment. In addition, if the claimant is not yet on an open award for wage benefits but has some light duty capacity, he must market his residual work capacity in order to be paid for his time out of work.[25] This means he must find suitable employment or look for it. There is no clear litmus test of what is sufficient marketing, but typically we advise our clients that they must file for unemployment with the Virginia Employment Commission, contact their previous employer in regards to possible employment and contact 4 to 5 potential employers per week for jobs reasonably within their light duty capacity and consistent with their age, education and experience. They must also keep a detailed record of all of the employment contacts, dates of the contacts, person they spoke with and the result of that contact. Anything short of this may result in wage benefits not being awarded at a hearing for contested periods of light duty.

b. Employability is not the issue. This marketing obligation is one that our clients often fail to understand. The difficulty is that many of our clients are severely injured, unsophisticated or not particularly well educated and may be of advanced age. We

advise them to job hunt as a requirement for receipt of wage benefits. They do not seem to appreciate the fact that it is not necessarily important whether they are employable. In fact, many of our clients are not employable, but must still job hunt in order to receive worker's compensation benefits on a contested case. Similarly, if an injured worker has both a personal injury and a worker's compensation case and they have some light duty capacity their marketing efforts might facilitate an argument that they have attempted to mitigate their damages. This can be useful in a personal injury case but it is particularly important and often necessary in a worker's compensation case.

VII.

ARE YOU AWARE OF THE IMPACT OF ACCIDENTS WHICH AGGRAVATE WORK INJURIES OR RESULT IN COMPENSABLE CONSEQUENCES

a. Burden of proof differences. It is important to recognize the differences between a personal injury and worker's compensation case regarding what is sufficient to show medical causation. For a person injured in a personal injury accident, if "the plaintiff had a condition before the accident that was aggravated as a result of the accident or the pre-existing condition made the injury he received in the accident more severe or more difficult to treat" then the plaintiff "may recover for the aggravation and for the increased severity or difficulty of treatment but he is not entitled to recover for the pre-existing condition".[26]

In worker's compensation, the presence of a pre-existing physical condition is immaterial if the injury partly causes subsequent medical treatment or disability.[27] First of all, if a pre-existing injury is aggravated by a specific injury at work, then the whole injury may be compensable even if it is an injury of an underlying pre-existing condition.[28] Also, the development of the "two causes rule" in worker's compensation is unique to the area of worker's compensation laws and different from personal injury law. The "two causes rule" addresses those cases where disability has two causes, one related to the employment and one unrelated. Under that situation, full benefits are allowed when it is shown that the employment is a contributing factor.[29] In addition, employees are entitled to recover compensation for an aggravation or exacerbation of a compensable injury by accident even when the event that caused the aggravation or exacerbation did not involve the work place.[30]

b. Aggravation cases. If an injured worker subsequently has a personal injury accident and that accident caused or contributed to causing an aggravation of the work injuries, then the worker's compensation insurance company may have a lien on any personal injury recovery.[31] Then, if that personal injury case is settled without the employers or carrier's knowledge and approval, the plaintiff has jeopardized any further worker's compensation benefits.

The classic case is the situation of an injured worker who has a significant loss with permanent and total disability and significant medical needs, who thereafter has a minor personal injury accident which aggravates a work injury. The impact of settling

the subsequent personal injury case without the compensation carrier's approval is it that it can wipe out the worker's compensation case. This is true whether the work accident arose out of the same accident as the personal injury case or whether the personal injury case occurred later and aggravated or contributed to aggravating the work injuries.[32]

c. **Compensable consequences issues.** If an injured worker suffers another accident which is not merely an aggravation, it may be a compensable consequence. This is a subsequent and separate injury to the injured worker which is a natural consequence of his work injuries or treatment therefore.[33] One example of this might be an automobile accident or a slip and fall accident occurring while the injured worker is on the way to treat with his authorized worker's compensation doctors. This is a compensable accident which is a consequence of his work injuries and which becomes covered by worker's compensation. There may also be a personal injury claim arising out of it. The personal injury claim should not be settled without the worker's compensation carrier's approval. Also, because it is a compensable consequence, which occurs in an accident, as opposed to a gradual worsening over time, we may have the same 30-day notification requirement to the employer and carrier like an original accident.

VIII.

ARE YOU AWARE OF THE OTHER SUBSTANTIVE CLAIMS WHICH OFTEN ARISE IN WORK INJURY CASES

This is not the time or the place to discuss in detail all of the various laws which often arise in the context of a work injury case. However, any attorney handling cases for injured workers needs to be at least somewhat familiar with the laws relating to the Americans With Disabilities Act, Unemployment Compensation, Social Security Disability, ERISA and disability insurance claims, the Family Medical Leave Act, and other discrimination claims. It is not unusual in a single case to encounter each of those laws along with personal injury laws and domestic issues. It often seems that there are more laws intersecting in the area of worker's compensation than most other areas.

IX.

SOME OF THE THINGS YOU MIGHT NEED TO KNOW ABOUT WORKER'S COMPENSATION SETTLEMENTS

a. The settlement approval process. Worker's compensation cases often settle. Some never settle. They can never settle without the approval of the employer, the injured worker and the Worker's Compensation Commission.[34] After agreement of the injured worker and the employer, the process consists of submitting a Petition, Order and

Affidavit to the Commission along with supporting medical records and an informational letter requesting the approval by the Commission. The documents are all signed by the employer and injured worker and/or counsel for submission. Claimant's attorneys handling the settlement are typically awarded a percentage of the total lump sum settlement if the settlement results in a lump sum as opposed to a lien reduction or simply medical coverage. What is interesting about worker's compensation settlements is that often times most of the work in regards to worker's compensation settlement is done after the settlement is verbally agreed to.

b. Post settlement considerations. In addition to submission of appropriate papers to the Worker's Compensation Commission for approval we are also concerned about the impact of the settlement on Social Security and Medicare benefits. We also need to consider the impact on health insurance or the inter-relationship with health insurance. If the future medical needs are significant, these are issues that we spend a great deal of time with.

c. Social Security offset issues. When an injured worker is receiving or may receive Social Security benefits, those benefits are often reduced by the amount of any worker's compensation benefits received.[35] We put language in the worker's compensation settlement papers that provides that even though the injured worker may be receiving a lump sum of money that the lump sum should be treated as compensation for a permanent impairment that effects that person for the rest of his life and should be treated as if spread out over the course of his life in terms of any offset against Social

Security benefits. The Social Security Administration will honor this language. Without this language, the Social Security benefits might be drastically reduced or completely reduced until the lump sum is exhausted.

d. Medicare approval. Medicare is also a concern. Medicare will not typically cover work injuries for a settled worker's compensation case without prior agreement.[36] Therefore, we often will obtain approval by Medicare of the worker's compensation settlement and agree with Medicare on a specific amount of money that should be set aside in a self-administered trust to be expended on benefits of the type that would be normally covered by Medicare, such as hospital or doctor visits for work injuries. After that amount is exhausted, an injured worker can have their medical needs from the work accident covered under Medicare.

e. Health Insurance and disability policies. We also spend a great deal of time examining health insurance polices, short term and long-term disability polices and other such documents to determine the impact of the worker's compensation settlement. Typically health insurance policies today provide that if a worker's compensation case settled then health insurance would not pick up the work injuries in the future. Long-term disability policies often provide for an offset or credit for income received from other sources including Social Security or Worker's Compensation benefits. Should there be a lump sum settlement, it may be important to determine the long term or short-term disability carrier's interpretation of those provisions.

f. Medical trusts. If an injured worker's future medical needs are extremely significant and cannot be passed on to health insurance or Medicare and the worker's compensation settlement will not include future medical coverage, provision may need to be made for the establishment of a trust. That medical trust will often times be administered by a third party which is custodian of funds for the injured worker. The injured worker may be provided with a medical card, much like an insurance card and the trustee sees too it that only reasonable and customary charges are paid to the health care providers. The trustee can handle this trust for an annual fee until such time as the trust is exhausted or revoked by the injured worker. It may be necessary for the worker's compensation settlement to include an annuity as part of the settlement. The annuity could be used to pay the trustee's annual fee for administering the trust, whether it be a simple medical trust or a Medicare set aside trust.

X.

ARE YOU FAMILIAR WITH THE LATEST ISSUES IN REGARDS TO THIRD PARTY SETLEMENTS INVOLVING INJURED WORKERS

a. Itemized lien breakdown. One problem that we frequently see coming up in worker's compensation cases is that plaintiff's counsel might not think to obtain an itemized breakdown of the worker's compensation lien before they pay it off or attempt to negotiate a reduction. More often than not the itemized lien contains items which are not reimbursable such as vocational and medical case management fees, independent

medical exam charges, or other administrative costs of handling the worker's compensation claim. Sometimes we have even seen fees paid to the insurance carrier's defense counsel listed in the itemized lien. The lien statute only permits reimbursement of charges for items paid to or for the benefit of the injured worker pursuant to worker's compensation laws.[37]

b. What happens to the worker's compensation case when the 3rd party case settles? The impact of settling a third party case which also involves the worker's compensation case is that thereafter the worker's compensation benefits are only payable at the same rate which attorney's fees and expenses bear to the entire recovery of the third party case (normally around 34% to 35%).[38] This new rate is sometimes referred to as the recovery ratio. In addition, until that recovery ratio is determined and memorialized in an order endorsed by the Commission, the worker's compensation carrier will typically suspend all benefits, whether medical or wage benefits. That order spelling out the recovery ratio for further benefits to be received by the injured worker will also typically provide for wage benefits for the injured worker on some periodic basis weekly at the recovery rate but that the medical benefits are not automatically paid at all. Instead, the injured worker would be required to pay all of the medical charges for his work injuries and then on a quarterly basis submit those charges to the carrier for reimbursement at the recovery ratio rate.[39] While this statutory scheme and the case law which follows it may be logical, it is often unworkable and results in litigation. For these reasons, it is often preferable that the worker's compensation and personal injury cases resolve at the same time, if possible.

XI.

SETTLEMENT APPROVAL ISSUES

a. Approval issue. Up until a couple of years ago, the worker's compensation insurance carrier could unreasonably refuse to permit the settlement of a related third party case and force a trial of the third party case. However, the laws have changed. Currently, the injured worker has the right to obtain a Circuit Court approval of the settlement to avoid unnecessary trials.[40] This new statutory provision is often useful but it did not resolve all of the issues in regards to worker's compensation liens on third party cases.

b. Yellow Freight. In 2003, the Supreme Court of Virginia issued an opinion that any Virginia worker's compensation or plaintiff's counsel should be aware of.[41] This case provided that while a worker's compensation insurance company employer is subrogated to the rights of the employee to the extent that benefits were paid on behalf of the injured worker, the lien is not automatic. It must be perfected. The lien could be perfected by an independent filing by the worker's compensation insurance company of its own Motion for Judgment or a lien Petition filed in the same Court where a Motion for Judgment has been filed by plaintiff's counsel.[42] If this was not done, the settlement of the third party case before perfection might cut off any possible statutory lien. Some have argued that the result could be different if the plaintiff has not yet filed suit. These authors do not agree. Regardless, recent statutory amendments have effectively overruled Yellow Freight effective July 1, 2004.[43]

In the event that the third party settlement was entered into without the approval of the worker's compensation carrier before July 1, 2004 and a lien was not properly perfected it may be that the lien was extinguished but other consequences may also have arisen. One significant consequence is that the injured worker will have no further rights under worker's compensation. It is also possible that the worker's compensation insurance company will take the position that it has a quantum merit/unjust enrichment claim in equity against the plaintiff or his recovery for any and all benefits that it has provided to the injured worker. The insurance company may contend that the injured worker, by virtue of the workers compensation and the personal injury recoveries combined, has received a double recovery. It could be said that this is not likely to have occurred because personal injury claims, at least in part, will consist of claims for pain, suffering, inconvenience and various other type of claims which are not part of the workers compensation remedies. Insurance companies may also argue that conversations or correspondence between counsel and/or the carriers have occurred which warrant a reliance type claim by the worker's compensation carrier. Several cases are now pending in regards to these issues. At least two courts have arrived at different conclusions regarding the possible existence of an equitable claim.[44] After July 1, 2004, the lien on a third party case is automatic when a worker's compensation claim arises relating to the same accident.[45] Failure to honor that lien may result in a credit against future benefits and a right to pursue the entire lien without reduction for attorney's fees or prorated expenses against the person who received those third party proceeds.

XII.

CONCLUSION

Considering all of the various loopholes in regards to the statute of limitations, agreement forms, problems with the vocational and rehab managers and the inter-relationships with workers compensation and other substantive laws, it is safe to say that any attorney who deals workers compensation cases needs to be more familiar with all of these issues or have the name of a worker's compensation expert available to call on to discuss these issues in a pinch.

[1] Va. Code §65.2-600

[2] Kosma v. Neil Bellamy t/a B&B Wood, O.W.C. 10 (2000) (it is well established in Virginia Law that written notice is not necessary, where actual notice is given to the employer)

[3] Department of Game and Inland Fisheries v. Joyce, 147 Va. 89, 136 S.E. 651 (1927) (where a foreman or a superior officer had actual knowledge of the accident...and no prejudice to the employer's rights was shown, this was sufficient notice under this provision of the Statute) See also Goodyear Tire & Rubber Co. v. Harris, 35 Va. App. 162, 543 S.E.2d 619 (2001) (written notice is not necessary if the employer has actual notice of the accident through a superior employee)

[4] Va. Code §65.2-405

[5] Va. Code §65.2-601

[6] Va. Code §65.2-406

[7] Rule 1.2 of the Virginia Workers' Compensation Commission

[8] Va. Code §§65.2-701, 704; 8 Arthur Larson, The Law of Workers Compensation §131.02[1] (2000)

[9] Va. Code §65.2-708

[10] Va. Code §65.2-501

[11] Va. Code §65.2-603

[12] Johnson v. Johnson Plastering and National Surety Corporation, 37 Va. App. 716 (2002)

[13] John Driggs Co. v. Somers, 228 Va. 729, 324 S.E. 2d 694 (1985)

[14] Va. Code §65.2-101, Southwest Architectural Products v. Smith, 4 Va. App. 474, 358 S.E.2d 745 (1987) (the Commission has included as wages, allowances for meals, lodging and other expenses depending on the circumstances)

[15] Va. Code §65.2-603(A)

[16] Breckenridge v. Marval Poultry Co., 228 Va. 191, 319 S.E.2d 769 (1984) (Once a selection of the treating physician is made, the employee is not at liberty to change there from unless referred by said physician, confronted with an emergency or given permission by the employer and/or its insurer or the Commission)

[17] Liberty Corp. v. NCNB Nat. Bank of South Carolina, 984 F.2d, 1383 (4th Circuit 1993); Employee Retirement Income Security Act of 1974, §2 et seq., 29 U.S.C.A. §1001 et. seq.

[18] Va. Code §65.2-311. (employer responsible for pro rata share of attorneys fees and costs incurred to obtain the third party recovery)

[19] Va. Code §65.2-607(A); Wiggins v. Fairfax Park Ltd., Partnership, 22 Va. App. 432, 470 S.E.2d 591 (1996); See Workers' Compensation Guidelines for vocational rehabilitation available on the Workers' Compensation Commission's website at www.vwc.state.va.us/vocrehab.htm.

[20] Schwab Constr. v. McCarter, 25 Va. App. 104, 486 S.E.2d 562 (1997)

[21] See Endnote 19

[22] Va. Code §65.2-607

[23] Va. Code §65.2-603(B)

[24] Va. Code §65.2-510; Hoy Construction, Inc. v. Flenner, 32 Va. App. 357, 528 S.E.2d 148 (2000) (employee who did not cure an unjustified refusal within 6 months forever loses the right to additional temporary partial benefits)

[25] National Linen Service v. McGuinn, 5 Va. App. 265, 362 S.E.2d 187 (1987)

[26] Va. Model Jury Instruction No. 9.030

[27] Pendleton v. Flippo Construction Co., 1Va. App. 381, 339 S.E.2d 210 (1986); Ford Motor Co. v. Hunt, 26 Va. App. 231, 494 S.E.2d 152 (1997)

[28] Smith v. Frank Brisco Company, Inc., 61 O.I.C., 361 (1982)

[29] Duffy v. Com/Dep. Of State Police, 22 Va. App. 245, 468 S.E2d 702 (1996)

[30] Ledbetter, Inc. v. Penkalski, 21 Va. App. 427, 464 S.E.2d 564 (1995)

[31] Airtrip v. Kerns Bakery, Inc., 75 O.W.C. 207 (1996)

[32] Skelley v. Hertz Rental Corp., 35 Va. App. 689, 547 S.E.2d 551 (2000), aff'd 37 Va. App. 325, 557 S.E.2d 749 (2002)

[33] Com./Central Va. Training Center v. Cordel, 37 Va. App. 232, 556 S.E.2d 64 (2001)

[34] Rule 1.7 of the Virginia Worker's Compensation Commission

[35] Social Security Act, 42. U.S.C.A. §424a

[36] United States v. Blue Cross/Blue Shield of Maryland, 989 SE.2d 718 (1993) (Medicare will not pay until other potential payors or group health plan or worker's compensation program first make payment); Medicare Secondary Payor Act, 42 U.S.C.A. §1395y et. seq.

[37] Va. Code §65.2-310

[38] Va. Code §65.2-313

[39] Kern v. Logistics Express, Inc., 74 O.W.C. 106 (1995)

[40] Va. Code §8.01-424.1

[41] Yellow Freight v. Courtaulds Performance Files, 266 Va. 57, 580 S.E.2d 812 (2003)

[42] See also Va. Code §65.309

[43] House Bill 864 and Senate Bill 588 Approved April 15, 2004 amending Va. Code §§65.2-309 through 311 effective July 1, 2004

[44] Compare Michigan Mutual Ins. Co. v. Smoot, 129 F Supp. 2d 912, 921-2 (E.D. Va. 2000) (worker's compensation carriers can assert claim for unjust enrichment against work to recover from settlement with third party tortfeasors for compensation benefits paid to worker even if the carrier failed to assert its rights

for reimbursement in worker's pending tort proceedings) and Virginia Municipal Group Self Insurance Association v. Crawford, 19 Cir. CH0359, 66 Va. Cir. 236 (2004) (Michigan Mutual v. Smoot does not address Yellow Freight, or Horne v. Superior Life Insurance Company, 203Va. 282, 123 S.E. 2d 401 (1962) and is therefore not a correct statement of Virginia Law.)

[45] It should be noted that if the amendments are considered substantive charges, they may not be applied to cause of actions arising before July 1, 2004. Berner v. Mills, 265 Va. 408, 579 S.E.2d 159 (2003)