

**AVOIDING THE PITFALLS –
WORKERS' COMPENSATION LAW YOU
NEED TO KNOW FOR YOUR PERSONAL
INJURY PRACTICE**

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**Avoiding the Pitfalls -
Workers' Compensation Law You Need
To Know for your Personal Injury Practice**

**I. Difference in Value of Workers' Compensation
vs. Personal Injury Cases**

It is widely recognized that personal injury cases can have significantly more financial value to the injured person than a worker's compensation claim. The personal injury claimant can make claim for a wide variety of damages including pain, suffering, inconvenience, etc. On the other hand, the worker's compensation claimant is limited specified type of claims and damages which do not include pain, suffering and inconvenience. Va. Code Ann. §§65.2-500 through 513, 603. In addition, the tribunal for award of personal injury damages in most cases is a jury trial. In a worker's compensation case, a Deputy Commissioner at the Worker's Compensation Commission hears cases. Va. Code Ann. §65.2-704. What is also an important distinction is that there is a great incentive for a liability carrier in many personal injury cases to settle before trial. Should there not be a settlement, the case ultimately will be presented to a jury which will either find a verdict in favor of the plaintiff or defendant and upon finding said verdict, award money damages in an amount that the jury

limited by statute. In addition, and to compound things, if it is determined that the worker's compensation carrier is late in making payments on its obligations, the carrier is not likely to have to pay anything more than what they should have paid to begin with plus late charges on weekly checks and interest. Attorney fees are only ordered upon a showing of bad faith by the employer or carrier. Va. Code Ann. §§65.2-524 and 713, 714. As a result, all too often carriers only make payments when the commission forces them to do so by Order, and even then, somewhat reluctantly. There is not sufficient teeth in the law. Claimant's counsel are all hopeful that this is something that can be remedied at some point through legislation.

As a result of the potential difference in value between personal injury and worker's compensation cases, the personal injury law practice is often considered to be a more desirable practice. Attorney's fees in workers compensation attorneys are always subject to approval by the worker's compensation commission regardless of the agreement that attorneys may have with their injured worker clients. Va. Code Ann. §65.2-714. Blackburn v. Newport News Shipbuilding, 67 O.I.C. 251 (1988). This is distinguished from personal injury cases, with the exception of wrongful death and infant

practice and this author would not recommend it. This is particularly dangerous when plaintiff's may be long term unless the available coverage in the personal injury case is significant.

b. Notice Provisions

We also need to be aware of certain deadlines that are applicable in worker's compensation cases. For instance, in a worker's compensation claim, an injured worker's employer must be notified of the accident within 30 days of the time of accident in order for it to be covered by worker's compensation. The statute talks about the notification taking place in writing, but if the carrier and employer are not prejudiced by the lack of the notice being in writing and they have actual notice, this is not a problem. Va. Code Ann. §65.2-600. It is also true that if the injured worker is self-employed and has covered himself as a sole proprietor, that he must notify the worker's compensation insurance carrier. Va. Code Ann. §65.2-101.1.n. Failure to give the appropriate 30 day notice can result in a complete bar of the worker's compensation claim.

c. Significance of Award Orders

Most attorneys are aware of the fact that any worker's compensation claim must be filed within 2 years of the time of the accident with the worker's compensation commission. Va. Code Ann. §65.2-601. What many personal injury attorneys fail to realize is that the State of Virginia is an "award order" state. What this means is that even though medical bills are being paid for by the worker's compensation carrier, there do not appear to be any disputes and two years go by without a claim being filed with the Worker's Compensation Commission, a claim may lapse or be time barred. See Va. Code Ann. §§65.2-602, 708. There are limited exceptions to this rule.

c. Compensable Consequences

A related issue is the topic of "compensable consequences". For example, if an injured worker has a knee injury (just one example) that is covered by worker's compensation and suffers a compensable consequence such as a fall due to the knee injury and injures his neck, the neck injury will also be covered by worker's compensation. Brown v. City of Richmond, 63 O.I.C.41 (1984). Failure to be aware of this doctrine and properly advise an

injured worker of this could result in a great injustice to the injured worker. The compensable consequence is treated like a new accident and the employer and carrier must be notified of the new accident just like an original one. Leonard v. Arnold, 218 Va. 210, 237 S.E.2d 97 (1977).

e. Referral Chain

Personal injury attorneys also need to be aware of the significance of the medical treatment referral chain. From the time that an injured worker is injured and he begins treating with a doctor or chooses a doctor from a panel of physicians to treat with, that injured worker must thereafter treat within a referral chain. So long as he does, and that treatment is reasonable, necessary and related to the work injury, those medical bills should be covered by worker's compensation. However, if the injured worker steps outside of the referral chain, unless he shows justification satisfactory to the carrier or the Commission for damages, those bills will not be covered. Stevens v. United Electrical Radio & Machine, 78 O.W.C. 241 (1999). Suffice to say, all of the above reasons are good reasons for a personal injury

attorney to be well versed in worker's compensation laws or have the assistance of a worker's compensation attorney at important junctures in a case.

III. The Obvious Requirement to Obtain Approval for Settlement. The Not So Obvious Extensions of That Rule

Most personal injury attorneys are aware of that fact that they cannot settle a personal injury case for which there is also a worker's compensation claim without the worker's compensation carrier's approval. Overhead Door Company of Norfolk v. Lewis, 29 Va. App. 52, 509 S.E.2d 535 (1999). However, some personal injury attorneys assume that this rule is not a concern if they settle the case without approval so long as they pay back the worker's compensation lien for past benefits already paid. This is not the case. The worker's compensation carrier's lien extends to future benefits not yet paid. Settling without approval is a dangerous practice and may be acceptable only when the work injuries are extremely minor in comparison to the personal injury recovery. White Elec. Co. v. Bak, 22 Va. App. 17, 467 S.E.2d 827 (1996); Airtrip v. Kerns Bakeries, Inc., 75 O.W.C. 207 (1996). By the same token, should the personal injury attorney in any way

jeopardize the worker's compensation lien such as even by entering into an agreement to arbitrate the personal injury case and placing a cap on the arbitration award or agreeing to a high-low, arguably the worker's compensation lien has been jeopardized.

IV. How Personal Injury and Worker's Compensation are Interrelated - By Statute

We begin the analysis of the interrelation of personal injury and worker's compensation cases with the statutes involved (a copy of the pertinent statutes are attached at **Exhibit A** hereto). They are Va. Code Ann. §65.2-309 through §65.2-313.

a. §65.2-309 Statutory Subrogation

Va. Code Ann. §65.2-309 indicates that whenever an employee is injured at work and becomes entitled to worker's compensation benefits, any personal injury case arising out of that accident is partially assigned to the employer by this statute. The employer is subrogated to any such personal injury claim. In fact, the employer is entitled to file a third party lawsuit in its own name or in the name of the injured worker to recover any

compensation benefits that it has paid. If the employer obtains a recovery in excess of the benefits it paid, those amounts are held for the benefit of the injured worker. Just as the injured worker may not settle the third party case without the permission of the employer, the employer may not settle that third party claim without the approval of the Commission and the injured worker.

b. §65.2-309.1 Subrogation runs to UM/UIM

Va. Code Ann. §65.2-309.1 is a more recent statute adopted in 1995. It provides that the employer is subrogated to the proceeds recovered by the injured worker from the uninsured or underinsured motorist provisions of any motor vehicle policy carried by and at the expense of the employer.

c. §65.2-310 Circuit Court Authority to determine lien

Va. Code Ann. §65.2-310 provides that the state circuit courts have authority to determine the amount of the employer's lien after deduction of a prorated attorney's fee and expenses.

d. §65.2-311 Circuit Court Authority to determine who pays attorney's fees and expenses

Under Va. Code Ann. §65.2-311, the Circuit Court has ultimate authority to determine the appropriate percentage of attorney's fees and expenses which are born by the worker's compensation claimant or the employer.

e. §65.2-313 Calculating benefits after personal injury settlement

Va. Code Ann. §65.2-313 provides a manner for determining how worker's compensation benefits are calculated subsequent to a personal injury settlement. It provides that, upon settlement of a personal injury case and until the net third party recovery that the plaintiff receives is exhausted, the obligation of the worker's compensation carrier and employer in the future continues but at the same ratio that the attorney's fees and expenses bear to the third party recovery; normally about 33% to 35%.

V. Practical Tips for Dealing with Worker's Compensation Lien

a. Closely examine liens

Prior to paying back any worker's compensation lien, it is imperative

that the personal injury attorney take a close look at an itemized worker's compensation lien and recognize that frequently worker's compensation carriers will include in their lien items which they are not entitled to have paid back. For instance, reimbursement for an employer requested medical exam, the cost of job searching or medical management by a rehab group are not reimbursable. Lockwood v. Automatic Control of Tidewater, 63 O.I.C. 219 (1984); Washington v. Miller & Rhoads, 68 O.I.C. 219 (1984). (A sample itemized lien breakdown from worker's compensation carrier is shown at **Exhibit B** hereto.)

b. Get approval in writing

Also, given the fact that approval of the worker's compensation carrier is required before settlement of a third party case, it is generally recommended that this agreement and confirmation by the worker's compensation carrier be approved in writing (See **Exhibit C** hereto).

c. Consider Petition to Circuit Court

In the event that the worker's compensation carrier does not give approval for the third party settlement, the personal injury counsel may be

forced to try the personal injury case to a jury. However, if the settlement is agreed to, but there is no agreement on a reasonable reduction of the lien, it maybe that the next step by personal injury counsel would be to file a petition for lien reduction/apportionment of fees in the Circuit Court. As mentioned above, the Circuit Court has authority on an equitable basis to apportion attorney's fees and expenses between plaintiff and the employer/worker's compensation carrier. In appropriate cases it could be a great savings to the plaintiff if the Circuit Court determines that an employer in worker's compensation carrier should pay more than the normal percentage of attorney's fees and expenses. We have done this with some success in the past. (A sample of a Motion to be filed with the Circuit Court and Court Order are attached at **Exhibits D** and **E** hereto.)

d. Consider other sources of Medical coverage before settling the Worker's Compensation Case

Frequently, in order to facilitate lien reduction it is necessary to also settle the worker's compensation cases. Of course, this should not be done unless the worker's compensation claimant gets appropriate value for giving up future worker's compensation benefits. But, sometimes the settlement of

worker's compensation medical benefits can be replaced by health insurance benefits. We need to take a close look at the policy provisions to consider whether health insurance will cover future medical benefits to make up for giving up worker's compensation benefits. (A couple of samples of the type of health insurance provisions we frequently see are attached at **Exhibit F** hereto.) It is also possible that a medical trust agreement can be set up by the worker's compensation case that has settled but certain medical monies are placed in a medical trust agreement (see samples at **Exhibit G** hereto). If it is the injured worker's expectation that his medical benefits hereafter is covered through Medicaid or Medicare consideration should be given to those to applicable laws (see **Exhibit H** hereto). In the event that the worker's compensation case is to be settled, we strongly suggest that a personal injury counsel consult with a worker's compensation counsel. If it is a very small or simple case it may be something that can be handled without worker's compensation counsel (sample of worker's compensation settlement papers are attached at **Exhibit I** hereto along with a sample letter to the Worker's Compensation Commission requesting approval of settlement).

IV. The Impact of Settlement of a Personal Injury Case On Worker's Compensation Claims

In order to fully understand how worker's compensation and personal injury cases are interrelated, we must understand the impact of a personal injury settlement on future worker's compensation benefits. Some personal injury attorneys believe that once a personal injury case is settled, worker's compensation benefits continue in full. Some believe that all future worker's compensation benefits are suspended until exhaustion of the personal injury net third party recovery. Neither is true. The answer is provided in Va. Code Ann. §65.2-313. That Statute provides that upon the settlement of a personal injury case, worker's compensation benefits continue at the same percentage that the attorney's fees and expenses bear to the total third party recovery. This rate prevails until the net third party recovery is exhausted, if at all. This is often equivalent to a co-pay or somewhat extravagant co-pay; somewhere between 33% and 35% of the benefits typically. Also, if the claimant and employer are not able to agree on the exact percentage, the employer may file an application for suspension of benefits with the Commission (a copy of that type of application is enclosed at **Exhibit J** hereto). Close review of that letter and its attachments

are instructive as to the interplay between personal injury and workers compensation (see sample letter at **Exhibit K** hereto) (see sample calculations from another case with Formula at **Exhibit L** hereto). Should the parties not be able to reach an agreement on settlement of the worker's compensation case or the appropriate percentage offset in the future, the Workers' Compensation Commission would be forced to make a ruling on that. That matter would be scheduled for hearing before the Workers' Compensation Commission. Our experience is that the Commission would ultimately arrive at a figure for the percentage of future obligations and order that the wages be thereafter paid at that percentage and that claimant submit to the carrier and the Commission for reimbursement medical bills incurred on a quarterly basis Lance v. School for Contemporary Education, 73 O.I.C. 209 (1994); Kern v. Logistics Express, Inc., 74 O.W.C. 106 (1995). (A sample order for handling such benefits after settlement of a third party case with a continuing worker's compensation lien is at **Exhibit M** hereto). Obviously, this ongoing procedure is enough of a nuisance that the parties typically reach settlement in worker's compensation cases at the same time as the third party cases, if at all possible.

VI. Conclusion

Worker's Compensation rules are critical to the successful outcome of many personal injury cases having a connection to the workplace. Personal injury attorneys need to be aware of some of the above rules and/or associate with counsel who is to assist them in these case.

Biography of Andrew J. Reinhardt

Member of the State Bars of Washington, D.C., Maryland & Virginia.

Graduate of St. Lawrence University, 1975

Graduate of Syracuse University College of Law, 1979

Partner in law firm of Kerns, Kastenbaum & Reinhardt

Active Member of the Virginia Trial Lawyers Association, The Work Place Injury Litigation Group (WILG), the National Organization for Social Security Claimants Representatives (NOSSCR) and the Richmond Bar Association.

Frequent lecturer on topics related to personal injury, workers' compensation and social security disability

EXHIBIT LIST

- Exhibit A:** Va. Code Ann. §65.2-309 through §65.2-313
- Exhibit B:** Sample itemized lien breakdown from worker's compensation carrier
- Exhibit C:** Sample written confirmation by worker's compensation carrier
- Exhibit D:** Motion for apportionment of attorney's fees and costs
- Exhibit E:** Order regarding apportionment
- Exhibit F:** Sample Health Insurance Provisions
- Exhibit G:** Sample Medical Trust Agreements
- Exhibit H:** Pertinent articles regarding Medicare Laws
- Exhibit I:** Sample of Worker's Compensation Settlement Papers and requirements
- Exhibit J:** Sample of Employer's Application for Hearing for Suspension of Benefits after third party settlement
- Exhibit K:** Sample of letter discussing impact of third party settlement to resolve application to suspend
- Exhibit L:** Sample Calculations of Settlement of third party case with workers' compensation lien
- Exhibit M:** Sample Orders for handling future worker's compensation benefits after settlement of third party case
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