

## **A BRIEF OVERVIEW OF THE BENEFITS AND PERILS OF THE VIRGINIA WORKERS' COMPENSATION ACT**

If you were injured at work or know a family member or friend who was injured at work, I hope that the following information will be of value to you. I'm Brenda Moses, Esq., of The Moses Law Firm, P.C., and I would like to take this opportunity to introduce you to the Virginia Workers' Compensation Act. I represent claimants in workers' compensation matters, and have learned first hand of both the benefits and the statutory perils of the workers' compensation system in Virginia. I hope that my experiences in handling workers' compensation matters for many years will aid you in understanding the workers' compensation system, whether you elect representation or not.

It is important to realize that this synopsis, while addressing the highlights, is not voluminous enough to discuss the myriad of twists and turns that individual cases often take, and is not intended to address any specific case. If additional information is needed, please feel free to contact me. The Virginia Workers' Compensation Commission also maintains a useful website at <http://www.vwc.state.va.us/>.

Let's start at the beginning - sustaining a work-related injury.

### **SO YOU WERE HURT AT WORK - NOW WHAT?**

The first thing to do is to immediately notify your supervisor of your injury. Explain how you were hurt, whether you were carrying/moving anything, bending/twisting, identify any witnesses, and so forth. These details may well become important later. Request that an accident report be completed. While the law grants you thirty days to notify your employer of an accidental injury, the sooner you tell your supervisor of a work related injury, the better. For occupational disease claims, you must give your employer notice when you learn that you contracted a work related occupational disease. Inform your supervisor as to what you were doing when injured, and the nature of your injury. Keep your employer informed as to how you are progressing medically, and make copies for your employer of any doctor's notes taking you out of work or giving you light duty restrictions. This will help defeat any allegation by your employer that your injury

was unreported or that it wasn't sustained at work. Your employer should also be filing an injury report with the Virginia Workers' Compensation Commission.

### **WHAT TYPES OF INJURIES ARE COVERED UNDER WORKERS' COMPENSATION?**

Unfortunately, under the Virginia Workers' Compensation system, not all injuries are created equal. Unfair, yes - but it is important to know what is and isn't covered.

Accidental injuries and some occupational diseases are covered. To be considered an accident, the injury must have occurred at work or at a work-related function, be caused by a specific, work related activity, and happen suddenly at a specific time.

To be considered a covered occupational disease, it must be caused by the work, and not be a disease of the back, neck, or spinal column.

Not covered are injuries that occur gradually over time or from repetitive or cumulative trauma, even if they are related to your employment. Ordinary diseases of life to which the general public is exposed outside of employment are also not covered. Possible exceptions to this include carpal tunnel syndrome and hearing loss claims. They are harder than an accidental injury to get established as compensable, but not impossible.

### **IMPORTANT STATUTE OF LIMITATIONS CONCERNS**

It is critical that an injured worker file a claim with the Workers' Compensation Commission within two years from the date of accident, or any right to benefits may be lost. This holds true even if your employer or doctor has already notified the Commission of your case, and even holds true if you have already been receiving workers' compensation benefits.

Similarly, occupational disease claims must be filed within two years from the date a doctor tells the injured worker the disease is work related, or five years from the date the employee was last exposed to the work condition causing the disease, whichever is sooner (pneumoconiosis diseases have different statute of limitations periods).

If your case is dismissed without prejudice by the Commission (for non-appearance at a hearing, for example), it is very important that you timely appeal this finding, and file another Claim for Benefits form immediately.

If after returning to work, you are again disabled (a “change in condition”), you must file a claim with the Virginia Workers’ Compensation Commission within two years of the date for which you were last paid compensation under an award. Payment only goes back ninety days from the date of filing with the Commission.

A favorite defense of workers’ compensation carriers is that an injured employee missed the filing dates, because this allows the carrier to avoid paying any additional benefits. Don’t let this happen to you!

## **HOW TO FILE A WORKERS’ COMPENSATION CLAIM WITH THE VIRGINIA WORKERS’ COMPENSATION COMMISSION**

The best way to file your claim with the Virginia Workers’ Compensation Commission, and so toll the statute of limitations running against you, is to use the “Claim for Benefits” form. This form can also be used to request a hearing, make a claim for permanency, or to notify the Workers’ Compensation Commission of a change in your condition. It is also possible to file your claim with the Commission on their web site.

## **NOW YOU NEED MEDICAL TREATMENT - HOW DO YOU GET IT?**

If your case is voluntarily accepted as compensable by the employer/carrier, you should be presented with a panel of three physicians and asked to choose one. While your selected physician can, and often does, refer you to other doctors, you cannot go outside the chain of referral. In other words, for your medical bills to be paid, you can only treat with the physician you initially selected or another health care provider that he/she referred you to. If you later wish to change physicians, you must obtain the approval of the employer/carrier (get it in writing for your protection) or after a hearing by the Commission.

If your case has been denied by the employer/carrier, or a panel of physicians is not offered to you after notice is given of your injury, begin treating with a physician of your choice. However, the same chain of referral rules set forth above

apply.

Carriers often use the defense that an injured worker has treated outside of the chain of referral to avoid paying causally related medical bills, so be careful of this.

It is also important to treat frequently, because workers' compensation wage replacement benefits are in part dependent upon the carrier receiving medical documentation of your condition.

In accepted cases, medical bills are sent directly to the carrier for payment; there is no co-pay. Please also remember that you are entitled to mileage reimbursement (currently at 55.5 cents a mile) for travel to your medical providers, including physical therapy treatments. Keep track of your mileage, where you went, and the dates that you treated for submission to the carrier.

If your case was denied by the employer/carrier, still keep track of your mileage - the fight isn't over yet. Likewise, keep track of any medical bills that you paid for yourself, as you will be entitled to reimbursement from the carrier if your case is ultimately found to be compensable. Sometimes private insurance carriers will pay for medical treatment in disputed workers' compensation cases, and later seek reimbursement from the workers' compensation carrier if the injury is found to be compensable.

### **WAGE REPLACEMENT BENEFITS**

For the periods when your physician gives you total disability, you are entitled to receive two-thirds of your gross average weekly wage (AWW), within statutory parameters. For injuries sustained after July 1, 2011, the maximum you can receive is \$905.00 weekly, and the minimum is \$226.25, not to exceed your AWW, for a period of time not to exceed 500 weeks. These statutory minimum and maximum figures differ depending upon when you were injured. Your AWW is calculated based on your earnings prior to your injury. Accordingly, if you begin making more or less subsequent to your injury, your AWW won't change.

There is a seven day waiting period for wage replacement benefits (but not for medical benefits). However, if you are out of work more than three weeks, then wage replacement benefits are retroactively paid back to the beginning.

If you worked a second job at the time of your injury, you are considered to be “concurrently employed.” Unfortunately, earnings from two or more employers are only considered when the character of the services rendered in the concurrent employment is similar to those you were performing at the time of your injury. Virginia law disallows the combination of wages earned in dissimilar employment for the purposes of calculating your AWW.

If your work status should change (you go out of work, return to work, or return to work for your initial employer or another employer at a different rate of pay), immediately notify the carrier and file another Claim for Benefits form reflecting this change. Please note that for change of condition applications, wage replacement benefits are limited to ninety days prior to the filing of the Claim for Benefits form.

### **TOTAL DISABILITY, PARTIAL DISABILITY, AND MARKETING YOUR RESIDUAL CAPACITY**

As noted above, if your physician has you out on total disability, you are entitled to two-thirds of your AWW as your total disability rate. But what happens when your physician clears you to return to work with restrictions, or light duty work?

When you are released to return to work with restrictions, immediately give those restrictions to your employer and inquire as to whether they can accommodate you. If not, you must “market your residual capacity,” which simply means that you must try to find other work within your medical restrictions. This is true even if your employer is willing to take you back when you are fully recovered.

The failure of an injured worker to market their residual capacity is a favorite and often utilized defense by carriers. If they prevail on these grounds, they can deny you wage replacement benefits for any periods that you are partially disabled.

To avoid this unhappy result, when you are partially disabled make sure to apply for at least five jobs per week that you believe may be within your medical restrictions. There is no need to accept work that is outside of your restrictions.

Keep a diary of where you applied and when, so that when you are questioned by an attorney for the carrier on this issue (and you will be) you have the information

handy. Don't be surprised if the carrier hires a vocational rehabilitation counselor to help you look for work; when you find a job they save money. Nevertheless, this assistance can often prove beneficial.

Now some good news - as long as you are looking for work, you can claim total disability benefits even when partially disabled. Some more good news - you may also be eligible for cost of living adjustments (COLA) when receiving total wage replacement benefits. However, to receive COLA, you must request the Virginia Workers' Compensation Commission to award it. If you are on a total wage replacement award as of October first of any given year, please let us know and we can help you apply for a COLA increase.

If you should find work that meets your medical restrictions, but pays less, you can receive partial wage replacement benefits. The amount of your partial wage replacement benefits is calculated using two-thirds of the difference between your AWW and your current gross earnings.

Total and partial wage replacement benefits are limited to 500 weeks, whereas coverage for causally related medical treatment continues throughout your lifetime. The only exception to this 500 week limitation is for permanent total disability. However, to be found permanently totally disabled, your injuries would need to be catastrophic (such as the loss of both hands or arms in the same accident, total paralysis, or severe brain injury).

If the carrier voluntarily accepts your case as compensable and begins paying medical and wage replacement benefits, they should send you a form entitled "Memorandum of Agreement" which sets forth pertinent information, and once signed by all parties is sent to the Workers' Compensation Commission for approval and for an award to be entered. If your work status should change, you should promptly advise the carrier, and additional forms will need to be filed.

## **PERMANENCY**

If you sustained a permanent loss of use of a body member, vision, hearing, or disfigurement, you may be entitled to a permanency award in addition to your other workers' compensation benefits. When you have reached maximum medical improvement (MMI), request that your physician assess whether you have sustained a permanent loss of use, and if so, in what percentage. The workers'

compensation statutes set forth how many weeks of benefits a total loss of use of a body part is worth, and permanency benefits are paid at the total disability rate. For example, if your physician found that you sustained a 30% schedule loss of use of your arm (total loss of use of an arm is 200 weeks), then you could receive 60 weeks of additional total disability benefits.

Don't be surprised if the carrier sets up an Independent Medical Examination (IME) for you to attend, which allows a doctor of their choice to evaluate your condition, disability, and permanency. In general you need to attend these exams - if you have questions about them please contact me. If the carrier's doctor reaches a lower permanency figure, they may well try to negotiate the difference with you.

Unfortunately, there is no recovery for pain and suffering. There are also no permanency awards for back, spine, and neck conditions, even when they are clearly permanent in nature. Permanency claims must be made within three years of the date for which you were last paid compensation under an award.

You cannot receive a permanency award (since it is paid at the total disability rate) when you are already receiving total disability payments. However, you can receive your permanency award when collecting partial disability benefits.

### **SO THE CARRIER DENIED YOUR CLAIM - NOW WHAT?**

The first thing to do is not to give up. If you believe that you sustained a work related injury that should be compensable, request a hearing from the Virginia Workers' Compensation Commission. You can do this by filing a "Claim for Benefits" form, and copies of any medical documentation you may have. The main office of the Virginia Workers' Compensation Commission is in Richmond, and their toll free number is 1-877-664-2566. Hearings are also held in District offices; the closest district office to Southwest Virginia is in Roanoke, and their phone number is (540) 776-2700.

It is not unusual for even contested cases to settle. However, whenever a settlement is being considered - be very careful. Most settlements call for the termination of both medical and wage replacement benefits in exchange for the settlement amount, and you need to be comfortable with the loss of your ongoing benefits to settle. Generally, settlements should not be done without the assistance

of an attorney.

While you have every right to represent yourself before the Workers' Compensation Commission, as a practical matter, if your case is contested you may wish to consider retaining counsel. As I am frequently asked how attorneys get paid, I'll tell you now. In workers' compensation matters, attorneys are only paid a fee if money moves on your file, and the amount of the attorneys' fee (which is deducted from your award) must be approved by the Workers' Compensation Commission. The Commission generally approves a 20% attorney's fee. Once a fee is approved, the Commission issues an Order to the carrier which sets forth the amount of monies to be sent to both you and your counsel. There should be no charge to talk with an attorney about your workers' compensation case.

### **WHAT AN ATTORNEY CAN DO FOR YOU**

Many attorneys do not handle workers' compensation claims. However, those that do, like myself, often handle quite a few. When meeting with an attorney that you are considering retaining, bring all your information, and all of your questions, with you. They will need to decide whether they can help you, and you will need to decide whether you feel comfortable with them. Remember – it is your case.

An attorney can help you with every aspect of your claim, including propounding and answering discovery, obtaining medical records, conducting settlement negotiations, representing you at depositions and hearings, and handling any necessary appeals. However, you do have the right to appear before the Virginia Workers' Compensation Commission without an attorney; there is no requirement that an injured worker be represented.

Work related injuries frequently cause emotional and financial distress, in addition to the physical discomfort from the actual injury. The aftermath of an injury can be a trying time, and we wish you the best of luck and a speedy recovery.

If we can be of further assistance, please do not hesitate to call upon us.

Brenda C. Moses, Esq.

Disclaimer: This "Brief Overview of the Benefits and Perils of the Virginia Workers'

Compensation Act” is designed for general information only. This information should not be construed to be formal legal advice nor the formation of a lawyer/client relationship.