

Subrogation of Workers' Compensation Claims in Virginia

FRANKLIN &
PROKOPIK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Election of Remedies:

- The claimant may pursue a workers' compensation claim against the employer, and sue the third party. The claimant does not have to choose, or elect his remedy.
- The claimant cannot sue his co-worker or the employer as a third party. To maintain an action at law, the "other party" must be a stranger to the trade, occupation, or business of his employer.
- In cases involving sexual assault, the claimant is permitted to file a workers' compensation claim and a civil action against the attacker even if the attacker is an employer or a co-worker. (Va. Code § 65.2-301)

Statute of Limitations:

- The statute of limitations for tort actions is two years from the date the action accrues, usually the date of the incident. (Va. Code § 8.01-243)
- The filing of a workers' compensation claim has no effect on the running of the civil statute of limitations for tort actions.

Amount of Recovery - Claimant Institutes Third-Party Action:

- Any amount collected by the employer/insurer in excess of the amount paid by the employer or for which it is liable, is held by the employer for the benefit of the claimant. (Va. Code Section § 65.2-309B)

- The employer/insurer has a statutory lien against any verdict or settlement arising from any right to recover damages that the claimant may have against a third party. (Va Code § 65.2-309A)
- If recovery is obtained by judgment or settlement, the employer/insurer must pay a pro-rata share of the reasonable expenses and attorney's fees incurred as a result of the third-party action. (Va. Code § 65.2-311A)
- If the claimant settles a third-party case without the employer/insurer's consent, the employer/insurer may file an Employer's Application for Hearing to terminate the claimant's future right to compensation, including medical benefits.

Amount of Recovery - Employer/Insurer Institutes Third Party Action:

- The employer/insurer may institute suit or enter into a pre-suit settlement.
- If the employer/insurer are required to institute an action against any party to recover some or all of its lien, the employer/insurer is not required to pay any share of the reasonable expenses and reasonable attorney's fees associated with that portion of its lien not preserved by the claimant. (Va. Code § 65.2-311B)

Procedure for Workers' Compensation Claims in Virginia

Claim for Benefits:

- An injured worker must file a Claim for Benefits form with the Virginia Workers' Compensation Commission ("VWC") within two years of the date of the incident. Upon receipt of the claim, the VWC will order the employer to advise whether the workers' claim is accepted, or provide the reasons for the denial through the VWC's "Orders for Information," which are answerable within twenty days.

Hearing:

- If a claim is disputed, the VWC will schedule an evidentiary hearing to be held in the city or county where the injury occurred, or in a contiguous city or county, unless otherwise designated by the Commission.
- Unless the initial compensability of the accident has already been determined by the VWC, no expedited hearing may be sought. To obtain an expedited hearing, a claimant must make written request to the VWC submitting evidence that severe economic hardship would result without an expedited proceeding. The determination to permit an expedited hearing is always at the discretion of the VWC.
- Each hearing is scheduled for thirty minutes, and additional time may be available upon prior request. The VWC recommends that additional time be requested if the services of a translator are required, or if more than one witness is anticipated.
- Both claimant and employer can avail themselves of the full discovery process in Virginia.
- The evidentiary hearing is conducted as a judicial proceeding in Virginia, with witness testimony under oath, and a record of the proceeding made. A Deputy Commissioner presides over the proceeding and is not bound by statutory or common law rules of pleading or evidence, nor by technical rules of practice. Medical records may be introduced and admitted into evidence without the live testimony of a physician or other medical provider.

- A Deputy Commissioner does not ordinarily provide a decision at the time of hearing, but instead subsequently provides the parties with a written Opinion, setting forth the basis for the decision.

Request for Review – Full Commission:

- Any party who disputes the Deputy Commissioner's decision may file a Request for Review to the Full Commission within thirty days of the Opinion, assigning as error specific findings of fact and conclusions of law.
- Upon receipt of a Request for Review, the Full Commission will advise the parties of the schedule for filing written statements supporting their respective positions. No additional evidence may be introduced at the time of review except upon agreement of the parties.
- The Full Commission may review a case de novo and will not be bound by the findings of the Deputy Commissioner, except that a Deputy Commissioner's determination of witness credibility based on issues such as demeanor and appearance may not be arbitrarily disregarded, and if the Full Commission reverses a Deputy on an issue of credibility, it must articulate its reasons for so doing.

Appeals - Appellate Courts

- Any party aggrieved by the Opinion of the Full Commission, may make an appeal of right to the Court of Appeals of Virginia.
- Any party aggrieved by a decision of the Court of Appeals of Virginia may petition the Virginia Supreme Court for a review of such decision, but the Virginia Supreme Court has the discretion to decide which appeals it will hear.