

## Obstacles and Opportunities in Litigating and Resolving Undocumented Worker Claims

- I. What benefits are undocumented workers entitled to in Virginia?
  - A. Temporary total disability (if determined to be totally disabled)
  - B. Permanent partial disability
  - C. Permanent total disability
  - D. Lifetime medical benefits
- II. What benefits are not available to undocumented workers in Virginia?
  - A. Temporary total disability (if determined to be partially disabled)
  - B. Temporary partial disability
  - C. Vocational rehabilitation/retraining
- III. Challenges faced when assessing undocumented worker cases
  - A. Lack of employment documentation
  - B. Lack of documentation supporting average weekly wage
  - C. Lack of employer cooperation
  - D. Lack of coworker/witness cooperation
  - E. Lack of cooperation from contractor/statutory employer
  - F. Employee fear of employer retaliation/immigration concerns
  - G. Employee fear/distrust of court system
  - H. Employee distrust of attorney: failure to disclose pertinent info
  - I. Misrepresentation/lack of credibility
  - J. Language barriers
  - K. Different expectations driven by cultural differences
  - L. Difficulty clarifying claimant's physical capacity with treating physician
- IV. Opportunities presented when assessing undocumented worker cases
  - A. Cash earnings difficult to disprove, may turn on credibility determination
  - B. Average weekly wage issues - due to lack of deductions some employers may pay undocumented works less since taxes aren't deducted and/or because employers know that their workers aren't documented and have limited leverage
  - C. Failure of employer to cooperate may lead to uncontradicted testimony
  - D. Undocumented workers do not qualify for SSDI/Medicare
  - E. No vocational rehabilitation
  - F. No marketing
  - G. Due to lack of qualification for additional benefits, case may be easier to evaluate/settle
  - H. Discovery considerations
- V. Future considerations facing undocumented workers in Virginia
  - A. Change in immigration policy
  - B. Economic downturn
  - C. Increased opportunity to utilize ADR
  - D. Increased employer scrutiny in the hiring process