BEST PRACTICES IN HEARINGS BEFORE DEPUTY COMMISSIONERS

INTRODUCTION

Winning is the goal of any lawyer trying a case before the Workers' Compensation Commission. Remember that you are an advocate for your client's position. To win, an advocate must clearly and concisely present the best evidence supporting his client's position and address the evidence that undermines that position.

On the other hand, rendering a fair and accurate decision as promptly as possible is the goal of any Deputy Commissioner hearing your case. As with other tribunals, docketing statistics monitor the speed with which Deputy Commissioners hear cases and issue opinions. As a result, the Commission has attempted to streamline our procedures so that the average case can be tried in thirty minutes or less.

This seminar seeks to convince you that you can achieve your goal while helping us achieve ours. Whether representing a claimant or an employer/insurer, we will highlight procedures that you can follow to streamline your case, both to shorten the hearing in your case and to create a sharper, more persuasive impact on the Deputy hearing your case. Our advice represents our experience as practicing attorneys and Deputy Commissioners as well as discussions with other hearing officers and judges. Thus, as a bonus, you will find that much of the advice given here applies when you try cases in other forums.

IF YOU LEARN NOTHING ELSE FROM THIS SEMINAR, HEED THIS ADVICE!

Almost all advice about trying cases before the Commission can be reduced to one maxim: Narrow the focus of your case. You are an advocate. It is difficult, however, to be an effective advocate if you do not have a clear, concise position to advocate.

In Hollywood, many successful movies and television shows are developed around this principle. Producers persuade television networks and studios to make television shows and movies by using simple, one-sentence concepts. Gene Roddenberry pitched Star Trek as "Wagon Train to the stars," in reference to a popular Western show of the 1950s. Using this concept, he was able to convince executives at NBC, who were skeptical that anyone would understand a sci-fi series that he could present a show with characters with whom the average person could identify.

You will similarly find that you advocate best when you advocate a position that can be described clearly and simply. In an era of fifty-page "briefs," the truth remains that you should be able to explain why your client should win his case in several sentences. As in other areas of life, the more explanation you need, the less likely you are to convince anyone of your position.

HOW DO YOU NARROW THE FOCUS OF YOUR CASE?

To narrow the focus of your case, you must do something that sounds contradictory: you must learn everything about your case. This advice sounds simplistic. As Deputy Commissioners, however, we see that most mistakes arise because an attorney does not know some fact that he should know about his client's case.

For instance, every one of us has witnessed the following scenario: The parties enter the hearing room. We call the hearing to order. We then ask the claimant's attorney to specify the benefits he is seeking. In far too many cases, the claimant's attorney leans over and asks his client what days he missed from work. While this might be understandable if your client retained you five minutes before the hearing, it is never acceptable under any other circumstance.

Think of the repercussions of failing to learn this information before you get to the hearing. Can you be sure you have medical records that support all of the claimed periods of disability? Do you know whether your client is under a duty to market his residual earning capacity? If so, do you know what marketing efforts your client made?

On the other side of the aisle, defense attorneys frequently request leave to submit a wage chart from the employer after the hearing. Of course, the Commission will grant such a request, but why make it necessary? Requesting wage information should be the first thing you do when

an insurer refers you a case file. You can then review the information to see if the average weekly wage appears to be a simple issue where the claimant has a full year of earnings before the date of his alleged injury or whether it is possible that you will need to use one of the alternative methods of calculating an average weekly wage, such as the earnings of a similarly situated employee. The earlier you make this determination, the more time you have to find a truly representative employee for the calculation of an average weekly wage rather than finding that you're stuck with the claimant's assertions that he earned a much higher wage.

These are just a couple of examples; however, each Deputy Commissioner could tell you horror stories about claimant's attorneys who did not know their clients' average weekly wage, the names of their treating physicians, and any injuries they had suffered both before and after the accident for which they are seeking benefits—or the occasional defense attorney who fails to raise a valid defense that can be waived, such as the statute of limitations in § 65.2-708. Your chances of winning a case decline commensurately with your lack of knowledge about your client's case.

THE ROLE OF THE INITIAL INTERVIEW

From the time a client or an insurer retains you to the time you try the case, you must attempt to learn everything you can about everything about the case. Why?

1) Most cases that are tried revolve around witness credibility.

2) Many credibility issues arise because your witness said something that he must retract later.

Think about the average hearing. A claimant, who alleges a back injury in an industrial accident, testifies at a deposition that he never suffered back problems before this accident. He reiterates this testimony at a hearing. Then the defense attorney pulls out records showing two prior back surgeries or complaints of back pain three weeks before the accident. Now, you must have your client explain the inconsistency.

The same phenomenon occurs with employers. An employer asserts that he hires only independent contractors, but all of the witnesses, even including the employer, may state that he controlled important aspects of how work was done that precedent says establishes an employer/employee relationship. As a result, many other statements the employer makes during his testimony do not make the impact they might since his credibility is already undermined.

Which is better: an explanation or no inconsistency in the first place (ask Bill Clinton)?

As soon as you take a case, you must make every effort to learn the relevant facts about your client's case. You start this process by getting as much information as possible from in the initial interview with a claimant or the initial contact with an adjuster about the facts of a claimant's injury, any witnesses to his injury, his earnings in the year before his injury, including the availability of tax records and check stubs, if you represent the claimant or wage records if you represent the employer/insurer. You need to get records of all of the medical treatment the claimant has received for his injury since his accident as well as all medical treatment for any similar injury before the accident and determine what written or recorded statements the claimant has made about his accident or his injuries.

One very good way to organize this information is to imagine that you've already been served discovery by the opposing party. Review the discovery filed in ten of your compensation cases that went to a hearing; before you reach the fifth case, you will see the same questions asked repeatedly.

Create your own set of "opposing party" interrogatories. If your case must proceed to a hearing, you know that you will probably receive many of these interrogatories anyway. In addition, if you do not receive these interrogatories, you will still have important information that will help you prove or defend your case and avoid unnecessary contradictions in the evidence

presented at the hearing.

Emphasize to your client that it is best to reveal to you all information requested. Your clients may or may not believe you, but you know from experience that clients hurt themselves by denying information that must eventually must be revealed.

After this initial contact, it's time to secure all of the records from the claimant's treating physicians. Once you have these records, read and understand them. After reviewing these records, you can determine whether you need to get further information from the doctors regarding history, causation, or extent of disability. As you are undoubtedly aware, the Commission will generally allow the parties to submit new medical records at the time of the hearing, but why wait? You are also undoubtedly aware that the Commission receives these records with the provision that the other side may take the deposition of the doctor. Thus, when you submit a record close to the hearing date, you are almost certain to prompt such a request that will lead to a delay in the closing of the record and a delay in the ultimate resolution of the claim. And whether you're a claimant's or defense attorney, that means a delay in getting paid.

THE ROLE OF PREHEARING DISCOVERY

After your client has given you all the information in his control, you should issue a set of interrogatories and requests for production to the other side. Do not wait until the Commission sends you a notice of hearing; you should issue these interrogatories as soon as you receive a notice of referral to the hearing docket. You want the information from the other side with plenty of time to prepare for hearing. In some cases, a notice of hearing is issued no more than six weeks before a hearing date. By the time you receive responses to your discovery, the hearing date presses upon you, and you cannot follow up on the information you received from the other side.

Please heed these cautionary notes regarding motions to compel. Discovery before the Commission attempts to accomplish two goals:

Operation without constant supervision from the Commission.

The exchange of information between parties in order to encourage the parties to identify the truly disputed issues.

Keeping these goals in mind, you should realize that before you make a motion to compel, good practice dictates that you contact the other side to determine whether there is a problem that may be resolved. Perhaps opposing counsel needs a short extension of the deadline for answering

interrogatories. In many cases, you may find that opposing counsel already has a draft of the answers and simply needs a few more days to put them in final form. Unless time constraints require immediate answers, agree on an extension of the deadline. In this informal manner, you reach the same result as making a motion to compel since the Deputy Commissioner will simply enter an order setting a deadline anyway.

Remember that the Commission hopes to try the average case in thirty to sixty minutes. Given the money value of many cases before the Commission, that ideal is becoming harder to reach; on the other hand, allowing broad discovery undoubtedly streamlines cases and reduces the time needed to try a case. Keep this principle in mind when discussing disagreements about discovery with opposing counsel. If the defendants object to portions of your discovery, you should attempt to reach a compromise regarding the information sought. It is a waste of time to make a motion to compel answers to interrogatories when you may be able to resolve any differences without the intervention of a Deputy Commissioner.

Furthermore, you should keep in mind that a Deputy Commissioner's discovery ruling, although seemingly significant at the time, rarely leads to a reversal of a case by either the Full Commission or the Court of Appeals. There is little doubt that the broad scope of discovery reduces reversals. These facts reinforce the principle that in many cases you should try to compromise a discovery issue.

THE ROLE OF A REVIEW OF THE LAW AND THE COMMISSION'S FILE

You should review the relevant statutory sections in the Virginia Workers' Compensation Act. If you practice regularly before the Commission, you may feel you know the Act thoroughly. Although Deputy Commissioners concentrate solely on this law, we still occasionally learn something new. A quick review of the statutes and relevant case law insures that you do not miss something in your case. Read the cases, read the Act, and read the Commission's Rules.

As soon as you are retained, go into the Commission's electronic claims file. In this file, you may find medical records relevant to your client's claim, an Employer's First Report of Accident that may include the names of witnesses, or an employer's wage chart. As a defense attorney, you may find in a review of the claimant's claim the names of relevant witnesses.

PREPARING FOR A HEARING

Now you have all the information you need. What do you do with it? Use these principles to narrow the focus of your case:

NOT ALL INFORMATION YOU HAVE GATHERED IS ADMISSIBLE EVIDENCE

NOT ALL ADMISSIBLE EVIDENCE THAT YOU HAVE GATHERED IS RELEVANT EVIDENCE

NOT ALL RELEVANT EVIDENCE IS PERSUASIVE EVIDENCE

In other words, you must cull the information you have gathered in order to determine the persuasive evidence you should present at the hearing.

In evaluating your case, look for consistency. Review the first report of accident, the histories recorded by the emergency room physician and the initial treating physician, any statements given by the claimant, and the information provided to you by your client or, if you represent the defendants, provided to your employer or insurer by the claimant. If you represent the claimant and these items are inconsistent, your client's case has flaws that you must address in the presentation of your client's case. For instance, if the medical histories are silent on an

identifiable incident and the employer challenges the compensability of your client's injury, you should contact the treating physicians to determine if they have an independent recollection of the history your client describes. On the other hand, if you represent the defense, you have your first advantage, and you should structure the presentation of your case so as not to lose it.

Furthermore, you should insure that all medical opinions are based on a complete and accurate history. If you suspect that an opinion that is favorable to your client's case is based on a deficient history, contact the doctor to make certain that he is aware of the all of facts regarding a claimant's injury or disability. Then, if necessary, request a corrected report based on these facts. Remember that a medical opinion based on an inaccurate history has little probative value.

As soon as possible, you should determine the facts you and the other party do not dispute. Thus, you should communicate with the other attorney as soon as possible. The two of you should determine whether there is any disagreement concerning the claimant's average weekly wage. If there is, you should be prepared to present wage stubs, tax information, a wage chart, and testimony about this issue. You should never come to a hearing without having an exact position on the claimant's average weekly wage.

Accept any stipulation that eliminates proof in your case. For instance, if you represent the claimant and the other side agrees that your client suffered a compensable injury by accident, do not go into detail about the mechanism of your client's injury at the hearing. Given the potential

pitfalls of the definition of an injury by accident in § 65.2-101, you should not tempt fate and risk the withdrawal of a stipulation by mistakes in testimony by your client. An obvious exception to this rule arises if the other side disagrees that your client suffered a particular injury in this accident; under these circumstances, you need to describe what happened in the accident so that you can show that your client injured his back, knee, arm, etc.

On the other side of the aisle, if you intend to submit a transcript of a recorded statement, find out in advance whether the claimant or, if represented, the claimant's attorney disputes the statement. If so, you can request the original recording of the statement or get the testimony of the adjuster who took the statement.

Once you know the undisputed facts and issues, you are ready to develop the presentation of your case by focusing on contested factual and legal issues. Every Deputy at the Commission finds that the best attorneys focus their cases on important issues rather than taking a "shotgun" approach to claims and defenses. Although occasionally a claim presents multiple complex issues, we know that generally these attorneys will not waste hearing time on facts or issues that are minimally relevant to their cases. Deputy Commissioners appreciate these attorneys.

You may believe you are doing your client a favor by raising every possible issue; however, most good trial practitioners understand that raising weak issues undermines their strong points. From the point of view of a Deputy Commissioner, an attorney who fails to focus on relevant

issues and facts simply appears unwilling to commit to any particular position and is just hoping that the Deputy will find some reason to rule in his client's favor. Recall the advice given at the beginning, however: It is difficult to be an effective advocate if you do not have a clear, concise position to advocate. And without a clear, concise position, an attorney may occasionally lose the way and forget to cover an important area of the evidence.

Furthermore, if you represent the claimant, remember that you will be requesting that the Deputy Commissioner award a fee for your services. A Deputy who sees that you did nothing to emphasize the truly strong portions of your client's case may not feel that you are entitled to as much of a fee as other practitioners who make this effort.

The same approach should be taken when selecting witnesses to call at the hearing. Most cases do not require the testimony of any witnesses other than the claimant and the employer's representative. Other cases may require the examination of more witnesses to bolster your position. It is rare that an attorney calls too few witnesses; it is much more common for an attorney to call too many. For example, attorneys too frequently call witnesses who profess not to know anything about a claimant's case, who do not help your case, or who may actually hurt your case.

The following rule is a corollary of the basic principle to narrow the focus of your case: YOU SHOULD NEVER CALL A WITNESS WHO DOES NOT ADVANCE YOUR CLIENT'S CASE. Failure to follow this rule will only hurt your client's case and is a waste of hearing time.

Another waste of hearing time is calling a treating physician to testify at the hearing. Given that the Commission's procedure allows the submission of medical records in lieu of live testimony and that the Commission freely grants leave to take the deposition of treating physicians, the live testimony of any physician is generally required only if the employer/insurer has contested the reasonableness of a physician's charges or perhaps when the injury at issue is outside of the orthopedic/neurological issues the Commission regularly addresses. And even in the latter case, bringing a treating physician to a hearing simply gives the other side a free opportunity to cross-examine a physician that you may be paying to attend the hearing.

On a related subject, please make sure you inform the Commission as soon as you are aware that a scheduled hearing may need more than thirty minutes. This direction is included in every hearing notice. Nevertheless, attorneys do not always follow this direction.

Because of the nature of our hearing dockets, it is not always possible to grant more than thirty minutes for a hearing. Notifying the Commission that a case may exceed thirty minutes, however, may allow us to make adjustments to other cases on the docket to create the extra time that is needed to try your case. It also reminds the Deputy that you are attempting to consider the needs of our dockets.

TRYING YOUR CASE

You have gathered information from your client and the other side, you have entered stipulations and determined your central issues, and you have decided which witnesses to call. You are ready to go to hearing. What do you do when you get there?

Of course, you will want to take advantage of Rule 2.2 of the Rules of the Commission by presenting a Designation of Medical Records. Given that we do not allow opening or closing argument at our hearings, you should view a Designation as one method of arguing your case.

Pick the medical records that help you prove your main points: medical histories that corroborate or undermine the claimant's description of his injury and reports or notes that establish or refute the causal connection between an accident and a claimant's injury, the nature and extent of disability, and the reasonableness and necessity of the medical care received. Brevity in your Designation is again perceived as a virtue. Would you rather look through a stack of hundreds of pages of records, many of which contain little relevant information, or review twenty-five pages of records, each one proving an essential point?

The advice given regarding the development of issues also applies to the organization of your Designation: do not take a "shotgun" approach to the medical records you include. Do not submit every medical record ever generated regarding a claimant's medical care. If the claimant

underwent surgery, consider submitting the admission history and the operative note only instead of burying this information in a one-hundred page stack of hospital records that includes every lab test performed during the admission.

If you have time, you should get together with counsel for the opposing party and review the medical records in the Commission's file. You may find that you and the other counsel can agree on the records to be designated. In this way, you can avoid submitting duplicate copies of medical records.

Now, you are ready to examine witnesses. If you have done all the work necessary to prepare your case and keep in mind the advice to narrow the focus of your case, you will find it easy to do the following that will clearly endear you to the Deputy Commissioner hearing your case:

KNOW WHAT YOU'RE TRYING TO PROVE

PROVE IT

MOVE ON TO THE NEXT POINT

In your newfound zeal to streamline your case, however, remember that the Deputy Commissioner hearing your case does not know your case as well as you do. In order to present persuasive evidence, you must present understandable evidence. Therefore, it may be helpful to

provide some brief background information through the testimony of your witnesses.

For instance, if you represent the claimant and need to prove that your client suffered a compensable accident, you must ensure that the Deputy Commissioner understands how your client was injured. If your client tripped and fell or something else fell on him, it is generally not necessary to produce much background information. On the other hand, if your client was injured using a piece of equipment or machinery, you may find that the Deputy will appreciate a few questions designed to elicit a description of the equipment or machinery. Likewise, you should make sure that your client defines in lay terms words that may be unique to his trade. The same principles apply to the testimony of an employer representative or some of the employer's employees who may testify against the claimant.

In certain circumstances, demonstrative evidence will offer a simple method of illustrating your case. Photographs of the equipment or machinery involved at the time of his injury will prove the old adage; "A picture is worth a thousand words."

Always think of ways to present your evidence in the briefest, most dramatic way possible. For instance, in a hearing loss case involving an orthopedic surgeon, the surgeon alleged that working around saws used to cut bones during surgery produced his hearing loss. The surgeon could have described the noise in oral testimony; however, he instead brought in one of the saws and turned it on. Within five seconds, he had made his point.

Don't waste your time asking a claimant questions about his medical care that are not at issue, that the Deputy can find in the medical records, or that the claimant is essentially unqualified to answer. For instance, if you represent the claimant, asking, "What did Dr. Jones do for you?" will generally not add anything that cannot be found during the Deputy's review of the medical records after the hearing. Instead of asking detailed questions of your client about his medical care, rely on the medical records. If you feel you must give the Deputy background information about the medical care your client has received, consider asking only the following questions:

> After your injury, were you transported to the emergency room at City General Hospital?
>
> After you were released from the hospital, whom did you next see for medical attention?
>
> Did Dr. Jones refer you to any other health-care providers?
>
> When did you last receive medical treatment?
>
> Which doctor saw you last?

These questions help you quickly move through your client's medical care. Since the claimant is (generally) not a trained physician, he is unqualified to describe the medical attention he received or the opinions physicians have expressed about the cause of his injury or the extent of his disability. As a result, a client who is asked extensively to describe his medical care may

exaggerate or misquote his treating physicians. The Deputy will realize this during the review of the medical records, and if your client's credibility is an issue in the case, his exaggerations or misquotes may have some effect on the Deputy's decision about the reliability of his testimony.

There are two obvious exceptions to this rule. First, in occupational disease cases, you must ask your client questions relating to the communication of diagnosis of disease. Second, you must develop the history your client gave to a physician when the history recorded in the medical records undermines your client's testimony about his mechanism of injury and your client disagrees with the accuracy of the history recorded. Under the circumstances, you should elicit testimony from your client describing his disagreements with the recorded history. Although you face an uphill battle, you must put in this evidence and then hope that the Deputy Commissioner finds your client to be a credible witness.

In conducting cross-examination of the opposing party's witnesses, beware the temptation to argue your case through the questions you ask. It is much better to follow the old maxim, "Don't ask a question to which you do not know the answer." The same rule that applies on direct examination about examining witnesses concerning information that can as easily be found in the medical records applies on cross-examination. If you start questioning a witness about some statement that he or she has written on a document and the written statement is favorable to your case, you risk getting a withdrawal or unfavorable explanation of that statement.

Unless a witness has contradicted a statement in a document and that contradiction undermines your case, you should simply allow the document to speak for itself. Otherwise, you may find that a fact that would have stood uncontradicted in a document before the questioning of a witness may now be at issue. Although the Deputy Commissioner may resolve credibility issues in your favor so that the fact is still proven, there is no reason to take this risk.

Keep in mind that asking leading questions of your own witnesses concerning contested issues is generally poor form for two reasons. First, leading questions are subject to objection from opposing counsel. Second, multiple leading questions suggest to any fact finder, including a Deputy Commissioner, that the witness's testimony and credibility are suspect.

When the other party is examining witnesses, keep in mind that because of the liberal nature of our proceedings, most evidentiary rulings do not lead to a reversal of a Deputy's decision by either the Full Commission or the Court of Appeals. Therefore, consider objections only to the most critical or prejudicial testimony or pieces of evidence.

On the other hand, do not assume that all hearsay is admissible before the Commission simply because some forms of hearsay are admissible in our proceedings. Remember that although we allow medical records instead of live testimony from physicians, we do not allow rehabilitation reports to substitute for live testimony from vocational rehabilitation counselors.

You have completed presentation of your case. The hearing is over. Is there anything else you can do? Although closing argument is not accepted in our streamlined procedure, a Deputy Commissioner will not reject citation to certain cases that support your position. Simple citation of the cases is sufficient; it is not necessary to submit a written brief or position statement. If you have a copy of the case, the Deputy will appreciate a copy.

Finally, you should consider submitting to the Deputy Commissioner a petition detailing the time you have spent on your client's case. If you win and your client receives a substantial amount of back compensation, the Deputy Commissioner may be able to award you a fee that properly represents the work you have performed if he has a summary of your efforts.

A SUPPLEMENTAL NOTE REGARDING CIVILITY

The more time a Deputy spends with the Commission, the more likely he is to see the uselessness of petty battles between opposing counsel before or at a hearing. Discussions with other hearing officers and judges reinforce this point. Although you may get some immediate gratification from needling another attorney or attempting to make him look bad, these efforts only consume extra hearing time and may detract from the critical focus you must have on the position you are advocating.

Treat opposing counsel and the Deputy Commissioner with respect, and you will find that

your reputation rises proportionately. Representing your client zealously does not mean yelling and screaming at opposing counsel or trying petty tricks to make the other counsel look bad. Zealous representation of a client means using every ethical tool available at your disposal to gather and present evidence that proves and wins your client's case. We have frequently found that the effort expended on petty squabbles has led otherwise qualified counsel to overlook important points that should have been proven in testimony.

CONCLUSION

This advice may not help you win any individual case. This advice, however, will help you establish a reputation with the Deputy Commissioners who hear your cases as a practitioner who may be relied upon to present his case with a minimum of irrelevant frills. In the long run, you will find that you will win more than your share of cases by keeping these hints in mind.