

## Chapter 8

# HEARINGS

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### § 8.01 **What To Do When You Get The Hearing Notice.**

When a hearing notice is received, there are several things the attorney must do as soon as possible. The Administrative Procedures Act and regulation 67-607 provide that the parties to a hearing shall be given at least thirty (30) days written notice. However, under regulation 67-213, if the claimant is represented, only the attorney is served with the hearing notice.

The following are just a few of the things that should be done once the hearing notice is received. Not all items apply in every case.

#### **Hearing Preparation Checklist.**

- Notify client of the date and time of the hearing.
- Make the client an appointment to come in and see you as soon as possible.
- Review your file, the Form 50, Form 21, and other pleadings to determine if anything has changed and/or needs to be amended.
- Determine what medical records, documents, witnesses, and other evidence you will need to prove your case.

- Send medical authorizations and/or subpoenas to medical providers. Ideally, most of the medical records should have been obtained well advance of the hearing notice.
- Schedule an appointment to meet with and/or take depositions of doctors, if necessary.
- Schedule other depositions, if necessary.
- Schedule second opinion, time permitting. Once again, this should have been done well in advance of the hearing. In most cases you will not have time to get the client evaluated and the report submitted prior to the APA deadline.
- Send a subpoena to the employer for the claimant's personnel file, etc.
- Subpoena other records if needed. E.G. the Employment Security Commission file.
- Prepare and serve APA submissions ten days before hearing. Serve a list and actual records on defense attorney. Serve only a list of records on commission.
- Prepare and serve Pre-Hearing Brief ten days before hearing. Be sure and list all witnesses. The brief should also contain a reference to "all witnesses listed in defendant's pre-hearing brief." Some commissioners will not allow you to call a witness who is not listed in your brief. Brief must be served on the commission and opposing counsel.
- The attorney should consider attaching a summary of the medical records to either the APA submission or the pre-hearing brief.
- Prepare and serve subpoenas on all witnesses you intend to call.
- Review defendant's Pre-Hearing Brief. Do this as soon as the brief is received. Review names of all listed witnesses with the claimant. If neither you nor client can identify a listed witness, call defense counsel and ask who the witness is and what he/she will testify to. Most private investigators are discovered via defendants pre-hearing brief. Check to see if the claimant has been videotaped. If so, call and request a copy of the tape. Confirm your request in writing. Review the tape with your client.

- Review defendant's APA Submissions. Check for previously unseen medical records. Watch for improper submissions such as claimant's discovery deposition, SLED records, credit reports, etc. Discovery depositions may only be used for impeachment.
- Prepare joint APA Submission (if you are the moving party). Regulation 67-612(G).
- Prepare client for hearing. Review hearing format, compensation rate, and medical records with client. Make sure the client knows he/she generally will not be allowed to say what the doctor told him/her. Make doubly sure that the client is prepared for the key questions going to the disputed issues in the case.
- Contact opposing attorney to discuss stipulation of issues such as average weekly wage, witness testimony, etc.
- Prepare notes/outline for hearing.
- Prepare a list of claimant's contentions. Go over this list with your client to make sure he/she knows exactly what you are asking the commissioner to order. In most cases you will be asking for defendants to be ordered to pay for medical treatment, temporary total, permanent or partial disability, or some combination of the above. However, do not forget to mention unpaid mileage, unreimbursed medication expenses and other unpaid medical bills. This list will help the commissioner understand what is owed. It will help you to prepare the order.

**ALWAYS REMEMBER, THIRTY DAYS IS NOT A LOT OF TIME TO PREPARE.  
DO AS MUCH AS POSSIBLE BEFORE RECEIVING THE HEARING NOTICE.**

The commission is currently in the process amending regulation 67-612 dealing with submission of records. Under the current regulation the parties send each other their proposed APA submissions ten days before the hearing. The moving party then prepares a joint submission. See Appendix 7. Under the proposed regulation, the moving party would have to submit proposed APA submissions to the nonmoving party fifteen days before the scheduled hearing. The nonmoving party would then, at least ten days before the hearing, provide the moving party with copies of any report not included in the moving party's original proposed

submission. The proposed regulation also sets forth the manner in which reports would be indexed and numbered. See Appendix 8.

**§ 8.02 The Hearing-Pre-testimony.**

You should always try to arrive at the hearing early. This gives you a final opportunity to go over your file, talk to the client, and discuss the case with defense counsel.

Most commissioners begin the hearing with a preliminary statement. Unless there is an objection, the commission's file is made a part of the record. The attorney should arrive early in order to review the file and make sure there is nothing objectionable in it. Occasionally the file contains items that are actually helpful. Because materials are constantly being added to the file, it should be reviewed even if the attorney previously obtained a copy of it.

Most commissioners allow a preliminary statement in which the attorneys state their contentions for the record. This statement can set the tone for the entire hearing. The attorney should be prepared to state what the client contends happened and the relief sought. Some attorneys prepare a written list of contentions to read at the hearing. Others simply spell their contentions out fully in their pre-hearing brief. The attorney should also make notes of the defendant's contentions, in case the claimant's attorney is asked to draw an order.

Commissioners frequently ask the parties to stipulate certain issues such as venue, jurisdiction, average weekly wage and compensation rate. If a Form 20 has not been filed (and sometimes if it has), the attorney should make sure the average weekly wage is accurate before making such a stipulation.

Most commissioners will ask the parties for the reports which they intend to submit under the APA and regulation 67-612. Even if the commissioner does not ask for them, it is the attorney's duty to make sure that these reports are tendered and admitted into evidence.

Try to make sure you have defined and refined your issues before going to the hearing. Hearings go much more smoothly if the issues are clearly stated and the evidence is offered in a clear and concise manner.

**§ 8.03 The Hearing-Claimant's Testimony.**

The testimony of the claimant in a workers' compensation case follows much the same pattern as in a civil personal injury case. Appendix 8 contains a sample outline of a claimant's testimony. In general, special emphasis should be placed on testimony regarding the claimant's educational background, work history, how the accident happened, and the continuing problems from which he suffers as a result of the injury.

In admitted cases, much of the testimony regarding how the accident happened can be dispensed with. Testimony about medical treatment often does not need to be covered in detail because the medical records speak for themselves.

If there is a video of your client, do not ignore it. Deal with it during direct examination. If there was a problem between your client and the treating physician, let the client testify about the problem. Most problems are better handled during direct than in cross-examination. It also helps your client to feel that he has had his day in court if he/she is allowed to tell his side of the story on such issues.

**§ 8.04 Corroborating Witnesses.**

Most attorneys are predisposed to calling more witnesses than just the claimant. In cases of disputed liability additional witnesses can be crucial. However, when the only issue is disability they should be used sparingly. Commissioners work on a tight schedule. Unless the corroborating witness is a good one, the testimony could hurt more than it helps.

Be wary of calling witnesses who still work for the company. These witnesses tend to have memories that wax and wane. Never call a witness unless you have spoken to that witness and know exactly what he/she will say.

Ask your client to furnish names and phone numbers or addresses of witnesses he thinks will corroborate his testimony. Keep your client advised of your efforts to contact the witness and what the witness tells you. Clients are often surprised when a co-employee or other witness does not want to get involved or gives a negative statement. Warn your client to be very cautious about asking co-workers to help.

Remember that you cannot contact a current employee of the employer who is in a supervisory position. Whether other non-supervisory employees can be contacted is debatable.

Defense lawyers will sometimes agree to stipulate the testimony of some corroborating witnesses. The commission encourages such stipulations. If the potential witness is not a particularly good one, it may be better to enter into the stipulation. Likewise, if the opposition has a witness whose testimony may be compelling, you may want to consider stipulating that witness' testimony.

**§ 8.05 Hostile Witnesses.**

Many employers send their personnel managers to the hearing. The personnel managers invariably bring the claimant's personnel file. Hoping to take advantage of the element of surprise, some attorneys call the personnel manager as a witness in order to look at the personnel file. This strategy can be quite risky, especially if defense counsel has properly prepped the witness. It is preferable to subpoena the employer's files on the claimant well in advance of the hearing.

When defense counsel puts up a hostile witness, listen to the testimony carefully. If you hear anything that helps your client, reemphasize that point on cross-examination and sit down. Try to ask questions with which the witness must agree. If you review the defense's pre-hearing brief with your client, he may tell you something that can be used to discredit the witness. However, generally the best thing you can do is keep cross-examination short and simple.

**§ 8.06 Hearing Record.**

The attorney should make notes or some sort of record of what transpired at the hearing. This should be done either at, or immediately after the hearing. If you keep detailed notes, you may be able to prepare a proposed order without ordering a transcript of the hearing. This can put money in your client's pocket much more quickly than if you have to wait for a transcript.

If the case involves more than just a question of the amount of disability, you will probably need to order the transcript. Be sure and note the name of the court reporter at the time of the hearing. Quote from the transcript in the order.

The commission frequently uses independent court reporters. Transcripts from independent reporters are expensive. The attorney ordering the transcript pays for the original and a copy.