

SAWC SAFETY CONFERENCE - 2015

WEST VIRGINIA WORKERS' COMPENSATION: The Claim Litigation Process

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Presentation Goals

- To provide a basic overview of the West Virginia Workers' Compensation claim litigation process.
 - Briefly discuss the general statutes, administrative guidelines, and other areas which regulate the litigation process
 - Overview the litigation process from the period when a claimant protests a decision and attorney representation becomes mandatory.
- Please feel free to ask questions at any time.

What laws govern West Virginia Workers' Compensation?

- Statute: West Virginia Code Chapter 23 – W. Va. Code 23-1-1 et al.
 - <http://www.legis.state.wv.us/>
- Code of State Regulations Title 85 - 85 CSR 1 et al.
 - <http://www.wvsos.com/>

- 93 CSR 1-1 et al. - Office of Judges' regulations
- 102 CSR 1-1 et al. – Board of Review regulations
 - See <http://www.wvsos.com/>
- West Virginia Code Chapter 33 – Related to Insurance
 - See <http://www.legis.state.wv.us>

- The Disability Advisor, aka Presley Reed Guidelines
- The AMA Guides to the Evaluation of Permanent Impairment, 4th ed.
- 90+ years of case law from the West Virginia Supreme Court of Appeals

Regulations

- 85 C.S.R. §1- Claims Management and Administration
- 85 C.S.R. §5 – Permanent Total Disability
- 85 C.S.R. §8 – Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics
- 85 C.S.R. §12 – Compromise and Settlement of Workers' Compensation Issues
- 85 C.S.R. §15 – Vocational and Physical Rehabilitation
- 85 C.S.R. §20 – Medical Management of Claims, Guidelines for Impairment Evaluations, Evidence and Ratings, and Ranges of Permanent Partial Disability Awards
- 85 C.S.R. §21 – Managed Health Care Plans
- 85 C.S.R. §27 – Qualified Rehabilitation Provider

The Litigation Process:

An overview

What triggers the litigation process?

- Pursuant to W.Va. Law, claims administrators must rule on certain requests through the issuance of an order containing “protestable” language.
- If a claimant files a formal protest to the order with the Office of Judges, the litigation process is initiated.
 - The claimant must file a written protest with the Office of Judges and must copy the employer and claims professional on the protest.

Employer Protests

- The employer may protest orders granting an award found by the OP Board
- Old fund claim decisions
- PPD awards granted in response to the treating physician's recommendation.

Three Levels of Review

- Office of Judges
- Board of Review
- West Virginia Supreme Court of Appeals

Who may appear before the OOJ?

- Claimants may appear without an attorney
- Employers who are natural persons may appear without an attorney
- Corporations “may be represented only by an attorney duly licensed or authorized to practice law in the State of West Virginia.” 93 CSR § 1-5.2

OOJ Acknowledgment of a Protest

- Acknowledgment and Automatic Time Frame Orders.
- Concurrent or Consecutive Time Frames – 45 days, 90 days, 180/180.
- The Office of Judges liberally allows for extensions of the time frame upon a showing of good cause.

- Each party submits evidence to the Office of Judges during its time frame.
- Evidence can include:
 - responses to discovery, medical records, other relevant records, affidavits, sworn statements, deposition transcripts, hearing transcripts, and physical evidence (photographs, videotapes, etc.)
- Evidence **MUST** be submitted to Office of Judges within time frame and copied to all parties.

Hearings

- No automatic hearing set.
- Parties are entitled to hearing if requested.
- Held before Administrative Law Judges.
- Hearings set near residence of claimant.
 - Some attorneys opt to take their client's testimony at OOJ hearings, which requires our in person attendance.
 - Additionally, when a claimant is unrepresented, we must take their testimony at a hearing rather than by deposition to ensure the unrepresented party is not prejudiced.

Following Expiration of Time Frame

- Each party has 10 days to submit a written closing argument.
- The Administrative Law Judge will review evidence and argument.
- A written decision will be issued.
- “No Evidence Rule” – if protesting party failed to submit evidence or argument in support of the protest, the order may be affirmed by rule.

Expedited Litigation Process

- West Virginia Code §23-4-1c (2005) requires the OOL afford an expedited litigation process to claimants on three separate issues:
 - 1) a claimant's protest to an order rejecting the claimant's application for benefits;
 - 2) the claimant's protest to an order which holds a claim compensable on a No Lost Time basis (essentially a denial of initial TTD benefits); and
 - 3) the denial of authorization of medical benefits.

- The OoJ regulations regarding the Expedited Litigation Process are contained in 93 CSR § 1-9 et seq.
- Claimant has 15 days from receipt of AATFO to affirmatively “opt-in” to Expedited process.
- After claimant “opts-in” the TFO is shortened and a hearing is scheduled within 25 to 45 days.

- The time frame for submission of evidence expires at the hearing.
- Once the claim is placed into the expedited process it can not be removed except by agreement of the parties for extraordinary good cause.

Following the decision of the OOJ

- Any party may appeal the decision of the Office of Judges to the Workers' Compensation Board of Review.
- A Notice of Appeal must be filed with the Board within 30 days of receipt of the Office of Judges' decision.
- In some cases, we can obtain a stay of indemnity benefits during an appeal by the employer.

Workers' Compensation Board of Review

The Board of Review is a full time Board made up of three judges who are appointed to six year terms by the Governor.

Appeal Procedures

- After the Board of Review receives a notice of appeal, an “acknowledgment of appeal” will be issued.
- Appellant – party who filed appeal; has 60 days to submit a written brief.
- Appellee – has 30 days from receipt of Appellant brief to file written brief.
- No reply briefs are permitted unless requested by the Board of Review.

- Once briefs are received, the Board notifies the parties of their right to present oral argument.
- If a party requests oral argument, a hearing will be scheduled and the parties notified.
- Board of Review hearings are also set for the same time as all hearings on the docket.
- Oral Arguments have a reasonable time limit.
- Thereafter, an order will be entered affirming, reversing, modifying or remanding the decision of the Office of Judges.

Appeal of Board of Review Order

- Any party who disagrees with the Board of Review's order can appeal to the West Virginia Supreme Court of Appeals within 30 days of the date of the order.
- Typically decided in memorandum decisions and usually are decided without oral argument.
- It is taking the Court approximately 2 years to issue decisions in WC cases.

Rulings

- Claims professionals must comply within 30 days of receipt of an OOJ, BOR, or Supreme Court order unless required to act sooner or if order is subject to stay.
- The BOR orders have recently required compliance within 15 days.

Managed Health Care Plans

- 85 C.S.R. §21 authorizes private carriers to employ the use of a Managed Health Care Plan.
- Includes minimum plan standards and requirements.
- Contains a “grievance” procedure.
- While not a formal aspect of litigation which requires an attorney for the employer, it is worth a quick discussion as it has similarities to the litigation process.

The Grievance Process

- When a managed health care plan is in place, medical service decisions are issued by “grievable” order rather than a “protestable” order.
- When the claims professional receives a written request for medical services, the professional must enter an order with language noting a grievance may be filed within thirty days.

- The managed health care system shall render a decision regarding the grievance within thirty days of receipt of the grievance.
 - Sometimes a decision can be made through a review of documents already contained in the claim file.
 - On other occasions, it is necessary to send the request to a independent medical professional for review.
- This process allows for resolution of many medical issues without reaching formal litigation.

- Once the managed health care system reaches a decision on the grievance, the claims professional must issue an order regarding the determination which contains *protestable* language.
- If the claimant continues to dispute the decision, the claimant may file a protest with the Office of Judges triggering the standard litigation process discussed previously.

QUESTIONS?