"A TO Z" WORKERS' COMPENSATION ADMINISTRATIVE & MANAGEMENT TRAINING COURSE & ANNUAL MEETING
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HOW TO BE AN EFFECTIVE WITNESS

> "Truth [is] like a torch, the more it's shook [the more] it shines."
>
> William Hamilton (1788-1856)

> "There is no worse lie than a truth misunderstood by those who hear it."
>
> William James (1842–1910)

I. INTRODUCTION

A workers' compensation claim cannot be successfully defended if the employer fails to effectively present its position to the individual responsible for adjudicating the dispute. It is a reality of life that even the best fact will not assist the advocate if, as William James observed, it is "misunderstood" by the fact finder. Indeed, the **manner** in which the fact is presented can be just as important

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as the fact itself, since it is the **perception** of the employer's position that oftentimes prompts a favorable or unfavorable result.

There are, of course, occasions when the Claims Administrator is called upon to testify on behalf of the employer in order to: (1) explain why the employer decided, from the outset, to deny the claim as non-compensable; (2) address the manner in which the claim was administered; (3) address issues such as employment termination or average weekly wage calculation; or (4) recount the employee's response to the employer's efforts to return him or her to modified work.

Many times, the Administrator who has gathered facts sufficient to justify a favorable result from the workers' compensation judge ("WCJ") will, nevertheless, lose the case because of his or her failure to present those facts in an imaginative or persuasive manner.

With that in mind, the discussion below offers a series of observations and recommendations designed to assist the Claim Administrator in testifying effectively before a WCJ.

II. THE SIX STEPS THAT A CLAIMS ADMINISTRATOR SHOULD TAKE IN ORDER TO BE AN EFFECTIVE WITNESS.

A. "MAKE CERTAIN THAT YOU ARE THE CORRECT INDIVIDUAL TO ADDRESS THE QUESTION AT ISSUE."

It may sound like a silly piece of advice, but simply assuming that a particular individual is the correct witness is never a good idea.

Example: In an effort to defend a claim, defense counsel decides to present the testimony of a Claims Administrator whom, he anticipates, will testify that immediately before the alleged work injury allegedly occurred, the employee had been informed that his disciplinary grievance had been denied and that a disciplinary action that had been proposed to be taken against him would be permitted. After counsel establishes the witness' identity, job assignment and other preliminary matters, the following question – answer sequence ensues:

BY DEFENSE COUNSEL:

Are you acquainted with John Smith, the claimant in this case?

THE WITNESS:

No.

DEFENSE COUNSEL:

Are you aware, nevertheless, with the circumstances that transpired with respect to his employment at your company immediately before his supposed work-injury occurred?

THE WITNESS:

Not personally. I was not working for the company at that time. I have since heard from others that…

CLAIMANT'S COUNSEL:

Objection. Hearsay.

JUDGE:

Sustained.

As can be seen, the witness who appeared to testify as to those facts that defense counsel wished to establish, was not, as it turns out, the correct individual to do so.

While one would expect that well before the hearing, defense counsel would determine the appropriate individual to testify, it is, nevertheless, not unusual to observe a situation such as that described above.

So, although it would appear to be a common sense suggestion, both the Claims Administrator and defense counsel should make certain that the Claims Administrator is, in fact, sufficiently knowledgeable of the facts at issue to testify on the employer's behalf.

Query what should be done if the Claims Administrator does **not** have personal knowledge of those facts that must be presented? The following suggestions should be considered:

(1) Have the appropriate individual testify – a co-worker, a supervisor, a labor relations person or other individual personally familiar with the particular facts;

(2) If a single witness cannot establish the particular facts, have the Claims Administrator do so through documents, as a custodian of "business records," e.g., submit by document the results of a disciplinary grievance or the facts surrounding the employee's dismissal or the complaints presented by the claimant at the company dispensary.

B. "KNOW THE FILE."

In order to be an effective witness, the Claims Administrator must not only be familiar with the specific facts that will be the subject of his or her testimony, but must also be familiar with other aspects of the case such as the procedural history of the claim, the testimony that other individuals have presented and any other relevant information that has been generated during the litigation process. Although the nature of the dispute between the parties will affect how the Claims Administrator prepares for his or her appearance, the following items should generally be reviewed before he or she testifies:

(1) All relevant pleadings including the claimant's Claim Petition;

(2) The claimant's personnel file;

(3) The employer's dispensary file;

(4) The claimant's testimony before the WCJ;

(5) All vocational information including any job offered to the claimant; and

(6) The relevant testimony of other witnesses.

A review of all relevant documentation/information will provide the witness a sufficient background to more effectively address any unanticipated issue raised during cross-examination. Moreover, it will provide the witness a degree of confidence that will render his or her testimony more credible.

C. "PREPARE FOR THE APPEARANCE WITH DEFENSE COUNSEL."

Fiery basketball coach, Bobby Knight of the Texas Tech Red Raiders has often observed that, "Many people have the will to win. Few, however, have the will **to prepare** to win." A witness who is eager to testify, but who has not properly prepared for his or her appearance, risks saying something that he or she did not intend to say or in some other fashion, creating a perception that he or she did not intend to create. Although overly "rehearsed" testimony is certainly not desirable, it is crucial that before testifying, the witness actively prepare with defense counsel in order to make certain that he or she is in a position to accurately convey the employer's position in the case.

The Claims Administrator scheduled to testify before a WCJ or by deposition should insist that defense counsel do the following:

(1) Outline those questions that he or she intends to ask during direct examination;

(2) Outline those questions that opposing counsel will likely ask during cross-examination;

(3) Explain precisely how the hearing or deposition will be conducted by the attorneys or the WCJ;

(4) Make clear what goals he or she intends to achieve by presenting the Claims Administrator's testimony.

Perhaps the last recommendation is the most important one. If the Claims Administrator does not know why his or her testimony is being presented or precisely what his testimony seeks to establish, he or she will be much less effective in presenting the employer's position during direct examination and much less capable of handling opposing counsel's cross-examination.

Again, testimony should never be "rehearsed" in the sense that it should never come across as contrived or fabricated. That does not mean, however, that a practice session, during which the witness is asked questions on "direct examination" and on "cross-examination", is inappropriate. Just the opposite is true. A full preparation session is vital to the process because it will allow the witness to organize his or her thoughts and better articulate his or her perceptions. Indeed, preparation will allow him or her to gain the kind of confidence that he or she will need in order to handle what can be a stressful process.

D. "ANSWER THE QUESTION."

The most frustrating witness for counsel is the individual who feels compelled, for whatever reason, to provide a paragraph answer, when all that is called for is either a "yes" or "no" answer or a one sentence answer.

On the other hand, sometimes it is necessary for the witness to provide an answer that is more detailed than that which was perhaps expected. In other words, sometimes a "yes" or "no" answer is not sufficient and should not be provided.

Regardless of the length of the answer, the witness should always attempt to **answer** the question **responsively**, while making certain that, at least during cross-examination; the questioning attorney does not confuse or cloud the record. With the foregoing in mind, the witness should be mindful of the following general rules:

(1) Do not speculate;

(2) Do not guess;

(3) Do not be afraid to say "I don't know" or "I don't remember" and

(4) Do not be afraid to ask defense counsel for guidance in addressing the question.

E. "DO NOT BE AFRAID TO SAY WHAT YOU BELIEVE TO BE TRUE."

Soon after the infamous O.J. Simpson trial concluded, I had a number of experiences where witnesses who knew certain facts to be true, refused to testify unequivocally about those facts for fear of being accused of having "rushed to judgment" or of being "biased" or of having made some type of mistake. This "O.J. Simpson Syndrome" or the unwillingness of a witness to present unequivocal, affirmative testimony became a real problem for a long time after the infamous trial concluded.

In the book that he wrote a few years after the trial, *In Contempt*, Simpson co-prosecutor, Christopher Darden, complained that during the cross-

examination process, a number of Los Angeles Police Department officials allowed Mr. Simpson's attorneys to accuse them of being liars, incompetent investigators and sinister conspirators without batting an eye. He also observed witnesses allow the attorneys to completely ignore common sense by responding to theories and questions – without indignation – that in everyday conversation, they would have undoubtedly dismissed with either outrage, laughter, or a wave of the hand and a comment such as "that's ridiculous!":

> **"I thought [Detective] Lang should react with outrage to the allegations of planting evidence**. That he should point out how impossible it would have been to plant blood on a glove. When [defense attorney Johnnie] Cochran suggested the victims' hands should have been individually bagged by the coroner, I hoped he would have let the jury know how ridiculous that was. But he didn't. **Like the cops that had gone before him, Lang answered in the monotone that lent credence to the ridiculous line of questioning.** Later, when Cochran began tossing out questions about 'Columbian neckties' – brutal throat-slashing murders practiced by drug dealers – it was too much for me. Lang answered carefully, as if there was really some chance Columbian drug lords ordered Nicole [Brown] and Ron [Goldman] killed." (emphasis supplied).

What Mr. Darden was articulating was precisely what every attorney believes – that a witness should not allow himself or herself to be manipulated – that he or she should, when appropriate, "stand up" to the interrogator – dismiss a ridiculous question as "ridiculous" and reject with understandable indignation, any suggestion of deceit on his or her part.

The Claims Administrator who is called to explain the employer's position in a workers' compensation case should never be afraid of the interrogator. If a question is ridiculous, the Administrator should politely say it's ridiculous. If the Administrator finds himself or herself in a position where he or she knows that a line of questioning is absurd, but cannot articulate **why** it is so, then he or she most likely failed to think through his or her position before coming to court. The Administrator should never allow that to occur.

If you are called to testify as the employer's Claims Administrator, always remember that there is nothing wrong with saying something that you, as a witness believe to be true. That is precisely why you are being asked to testify – to tell the WCJ what you saw, what you heard, what you think, what you feel and how you perceived whatever you are being asked to address. Too often, witnesses make the mistake of believing that because the story he or she is going to tell is being presented in the context of a legal proceeding; he or she is prohibited from telling the story in a manner that he or she would normally tell it. It is important to remember that common sense should not be left outside the hearing room, but should be integrated with the litigation precisely because facts analyzed in a vacuum – with a complete disregard for common sense – will oftentimes prompt the fact finder to draw a conclusion that, under any other circumstance, would be unreasonable or utterly absurd.

If, for example, the employer believes that the claimant's injury never occurred, there is nothing wrong with a Claims Administrator offering testimony explaining why the employer feels that way.

Indeed, one of the issues that is oftentimes raised in workers' compensation cases is why the claim was denied in the first place.

When that issue arises, the WCJ should be told **why** the employer disputes the compensability of the claimant's claim. If the employer fails to articulate its position, the WCJ will never truly grasp the employer's perspective and will be less likely to sympathize with the employer's position in the case. If properly presented, the employer's reasons for doubting a claim can be very compelling and very persuasive. Moreover, the employer's perspective can have certain legal ramifications. See Aber v. Workmen's Compensation Appeal Board (Lubrication Systems Company), 674 A.2d 353 (Pa. Cmwlth. 1996) (the lay testimony of the employer explaining why the employer does not believe that the alleged work injury actually occurred is sufficient to establish a "reasonable contest" even in the face of an unfavorable IME result).

I recall very well, a case that I litigated some time ago. The claim involved an individual who alleged to have fallen and injured her knee while on her employer's premises. Because the employer had no reason to doubt the claimant's veracity at the time the injury was initially reported, the claim was never truly investigated, but was accepted as at face value as compensable almost immediately. Approximately one year later, however, a former co-

employee of the claimant disclosed to the employer's Risk Manager that the injury had **not** occurred at work, but rather had occurred a few hours before the claimant began working that day, while she walked down a set of subway stairs on the way to work.

During his cross-examination of defendant's Risk Manager – the individual who insisted that a Review Petition be filed, challenging the compensability of the claim – claimant's counsel asked the Manager whether he believed the claimant or the co-employee.

Although he clearly believed that the co-employee was telling the truth – that claimant's injury did not occur on the employer's premises – the Risk Manager refused to say so publicly. His reluctance to take a position may very well have undercut the employer's ability to successfully prosecute its Review Petition.

Accordingly, if you, as a Claims Administrator, have authorized defense counsel to challenge a claim as non-compensable, you or your colleagues must be prepared to embrace and articulate your position before the WCJ.

Always tell the truth, but in so doing, do not become so consumed with the philosophical concept of "truth" that you become an incredible or useless witness.

F. "BE CREATIVE"

Only a few years ago, commentators were describing ours as a "television generation." If the viewer didn't like the first thirty seconds of a TV show, he or she would simply change the channel.

Nowadays we are dominated by even more technology with vast amounts of information coming at us from all directions through wireless computers, Blackberrys, cell phones, iPods and DVDs.

Because we are bombarded by so much "information" – and because we have little choice but to edit away so much of it - if the message is presented in an antiseptic manner we are more likely than ever before to ignore it, delete it or subconsciously "change the channel." In the context of this world of instant information it is a reality of life that in order to make a compelling legal presentation, the advocate bears the responsibility of "entertaining" the fact finder. It makes sense then, that in order to be an effective witness, the Claims Administrator should include in his or her testimony, any device that will grab the WCJ's attention. When preparing to testify, the Claims Administrator should consider using the following devices:

(1) Documents - If a fact has been memorialized somehow, the use of the document, along with the testimony, can be extremely compelling;

(2) Videotape Demonstrations - A device that I have used a great deal over the years. Before the hearing or deposition, the witness demonstrates or explains/demonstrates the issue on videotape while being

"interviewed" by defense counsel. Later, at the time of the hearing or at the time of the deposition, the Claims Administrator authenticates the videotape and further explains its significance;

(3) Diagrams/Maps - If the WCJ understands precisely how or where or under what circumstances the particular event occurred, he or she will be better equipped to accurately decide the case. Maps and diagrams can certainly assist in educating the WCJ; and

(4) Props - In a case that I litigated a number of years ago, one of the crucial issues is how a particular "drop safe" functioned while the claimant – a delivery driver - supposedly attempted to turn-in COD money that was later found to be missing at the conclusion of the employee's work shift. In an effort to explain to the WCJ why the employer found claimant's explanation of how he supposedly placed his money in the drop-safe that day incredible, a witness from the employer performed a demonstration before the WCJ, using the very drop safe that the claimant used. The use of the "prop" was informative and interesting and ultimately caused the WCJ to agree with the employer that the safe could not have malfunctioned in the manner claimed by the employee.

III. CONCLUSION

The process of litigation is not "rocket science." Rather, it involves organization and preparation. By knowing the facts, knowing the issues, and by preparing for the appearance, the Claims Administrator can be an effective

witness who can help prompt the WCJ to adjudicate the claim fairly, accurately and appropriately.