Trial Litigation of New York Workers' Compensation Claims.

On May 28, 2013 the Board announced "process improvements" including the introduction of a new "specialized part" (court) designed to address "Loss of Wage Earning Capacity" (permanent partial disability in non-scheduled loss of use cases).[1] In doing so, the Board has administratively expanded on the paths a disputed case can take. This article provides an overview of the practice and procedure of the most common hearing types and describes the specific rules for each type of proceeding.

In 2011 (the most recent year for which there are published figures) the Board held 179,236 hearings. The vast majority of hearings before the Board (greater than 90%) are proceedings designed to either establish a claim or to narrow the issues in dispute on an existing claims. Approximately 7.2% of the hearings were "Pre-Hearing Conferences" on disputed claims, in which the employer/carrier denies compensability.

This article is an overview of the various litigation types available, which include: regular hearings on admitted claims to narrow the issues, Expedited Hearings, hearings in controverted (denied) cases, and now, proceedings in the "specialized part" to address permanency.

1. Hearing Basics.

A. Hearings can be scheduled by the Board (without request by either party).
The Board will schedule hearings on its own initiative. The goal of every hearing is transmitted to the parties of interest on Form EC-16.1. Initial hearings are held to address the establishment of a case: parties must be prepared to discuss the particular facts of the accident, notice, and the causal relationship of the alleged injuries to the employment.

In an admitted case, defense counsel will rely on handling instructions, the Form C-669 ("Notice to Chair of Carrier's Action on Claim for Benefits"[2]) filed by the carrier, the return-to-work information contained in Form C-11 ("Employer's Report of Injured Employee's Change in Status or Return to Work"[3]), the wage information contained on Form C-240 ("Employer's Statement of Wage Earnings Preceding Date of Accident"[4]),

---

[1] For more on the elements of proof and practical approaches to defending claims for permanent disability, see my article from February 21, 2013. LINK: http://greglois.com/files/LWEC.html

[2] LINK: http://www.wcb.ny.gov/content/main/forms/c669.pdf

[3] LINK: http://www.wcb.ny.gov/content/main/forms/c11.pdf

[4] LINK: http://www.wcb.ny.gov/content/main/forms/c240.pdf

and the information contained the "Employer's Report of Work Related Injury/ Illness" (Form C-2[5]). Statements contained in the filings (particularly, the Form C-2) may be considered stipulations and binding (on the part of the employer).

Prior to any regularly-scheduled hearing (particularly in an established case) the issues facing the carrier/employer should be well understood. Hearing notices are prepared and mailed to all parties by the Board approximately 21 days prior to the date of hearing. Defense counsel should supply the employer with an action plan for upcoming hearings and request any necessary documents/information in preparation for the listing.

B. Requesting hearings.
Any party can request a hearing as per WCL §20, which states

> [The Board] upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the chair. Immediately after such filing the chair shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel.[6]

A carrier requests a hearing by filing Form RFA-2 ("Request for Further Action by Carrier/Employer").[7] The most common Request for Further Action filed by employers is a request to stop or reduce benefits in a case where ongoing benefits have been ordered by the Court. A carrier/employer can not simply stop paying benefits because an IME physician says the claimant has reached "MMI" or has a reduced level of disability - there is no "self help" allowed and the case must be heard by a Law Judge before benefits can be stopped or reduced.[8]

As per 12 N.Y.C.R.R 300.23[9],

---

[5] LINK: http://www.wcb.ny.gov/content/main/forms/c2.pdf

[6] WCL §20, LINK: http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$WKC20$$@TXWKC020+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=38897891+&TARGET=VIEW

[7] LINK: http://www.wcb.ny.gov/content/main/forms/rfa-2.pdf

[8] Unless the claimant has returned to work or where the claimant's treating physician has released the claimant to full duty or regular duty work without restrictions.

[9] Practice tip: older practitioners and some judges still refer to hearings where the issue is the degree of disability as "22(b)" hearings in reference to a now superseded section of the regulations and the old form for requesting a hearing on this issue (was "Form C-22-b," now we use "Form RFA-2").

> (b) In any case where the board has made an award of compensation for a temporary total or temporary partial disability at an established rate of compensation, and there is a direction for continuation of payments, the employer or carrier shall continue payments at such rate, and such payments shall not be suspended or reduced until:
> (1) there is filed with the chair in the district office where the case is assigned, a notice of intention to suspend or reduce on a prescribed form accompanied by supporting evidence justifying such suspension or reduction together with proof of mailing of copies thereof upon the claimant, his/her doctor and his/her representative.

Our practical advice for requesting hearings before the Board is to include (as an attachment) the documentary evidence in support of the relief requested. Another common employer request is to address ongoing benefits in cases where an IME physician has found the claimant to have reached MMI or where there is an issue as to degree of disability. We strongly recommend that a copy of the IME report or medical records to be relied upon be attached to the RFA-2 form.

2. Trial on limited issues - non-expedited.

In an established cases issues arise that must be resolved by way of trial. Typical trial topics in an established (or admitted) case include: nature and degree of temporary disability, disputes about medical treatment issues, attachment to the workforce, reduced earnings, and employee fraud. Less commonly, trials can be held on issues including establishment of an average weekly wage, concurrent employment, wage expectancy, or any other issues in dispute.

Parties will often bring the disputed issue to the attention of the Law Judge by filing an RFA-2 (by the employer) or RFA-1LC (on behalf of the claimant). Once the issue is raised, the Board will set the matter down for a hearing before a Law Judge. If the issue can not be resolved, it may be set down for a trial on the issue, by way of a Notice of Decision (Form EC-23).

Trial proceedings are non-continuous. Most medical testimony is produced by way of deposition rather than live testimony.[10] The parties will coordinate the schedule of physician testimony in accordance with the schedule set by the trial judge. Nearly all physician testimony take place by telephone deposition.

---

[10] Depositions are authorized by WCL §121. As per the New York Civil Practice Law and Rules ("CPLR") Section 3117(a)(4) "the deposition of any person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances, subject to the right of any party to move pursuant to Section 3103 to prevent abuse." CPLR §3103 ("Protective Orders") allows for an objection be made for "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person."

All non-medical testimony must be presented before the Law Judge, with rare exception for witnesses who reside out of state. Typically, the testimony of the claimant will be presented last, after medical testimony has been produced.

Each case set down for trial will have a date in which all depositions transcripts must be completed. Extensions of time can be granted by the Court for good cause shown, but the Affidavits in support of a request to extend time must be filed ten (10) days prior to the date the depositions transcripts were to be submitted.

Following the submission of all testimony, the Law Judge will issue a decision from the bench or make a reserved decision. It is the practice of my office to always request an opportunity to submit a memorandum of law and summation of facts to aid the Judge in reaching their final decision.

In my office, simple trials on issues represents approximately 50% of our overall trial practice (with the other 50% being expedited proceedings, generally for denial/ controverted claims).

3. Expedited hearings.

WCL §25(3)(d) applies to all cases where "issues have not been resolved within one year after such issues were raised before the Board, or if multiple claims arise from the same accident or occurrence, or if all parties agree to an expedited hearing, or where a notice of controversy has been filed, or if the chair otherwise deems it necessary, the chair may order the case transferred to the special part for expedited proceedings."[11]

The "Special Part for Expedited Proceedings" simply refers to a case being set down for a trial, with a date certain as to the decision. The case is not actually transferred to a new judge or into special courtroom. The goal of transfer to an Expedited Hearing calendar is "for all issues to be decided in one hearing."[12]

The Regulations which govern practice in the Expedited Hearing part are set forth at 12 N.Y.C.R.R. 300.34. A case is moved to the expedited part by way of an Order, issued after a hearing.[13] Within 20 days of transfer to the expedited part, both parties must file a "Pre-hearing Conference Statement" (Form PH-16.2)[14] if one was not previously filed.

---

[11] These requirements, set forth in the Statute at WCL §25(3)(d), are mirrored in the Regulation at 12 N.Y.C.R.R. 300.34.

[12] See WCL § 25(3)(d).

[13] 12 N.Y.C.R.R. 300.34(b).

[14] LINK: http://www.wcb.ny.gov/content/main/forms/ph16_2.pdf

An initial hearing must be scheduled within 30 days after the Order of transfer to the expedited calendar is issued.[15]

Adjournments by the defense may be granted for no longer than 30 days. If the adjournment request of the defense is deemed "frivolous" the attorney who makes the request shall be personally liable for a $1,000 penalty.[16]

Only the final decision of the Law Judge in a case assigned to the expedited part can be appealed; all orders concerning the proofs, testimony, or evidence are "interlocutory" and not subject to appeal. Only a final decision, or an interim determination of accident or occupational disease, notice, causal relationship or monetary award can be appealed.[17]

4. Expedited Trial in Controverted Claims.

Because ALL controverted (denied) cases, with rare exceptions for death claims, occupational, and "complex" cases, are automatically assigned to the expedited hearing part, we will explore the rules surrounding these trials. These "hurry up" trials require tight coordination between defense counsel and employer to prepare and present all viable defenses.

We continue to recommend that all denied cases are discussed with counsel before a denial is issued; we also recommend that counsel file the C-7 denial pleading and Pre-hearing Conference Statement.

A. The Pre-hearing Conference.

Upon a Notice of Controversy being filed (Form C-7) the case will be scheduled for a Pre-hearing Conference *but only where the claimant has filed supporting medical.* A Form PH-16.2 "Pre-Hearing Conference Statement" must be filed 10 days prior to the Pre-Hearing Conference.[18] Failure to file this form timely may result in defenses being waived![19]

At the pre-hearing conference, the defense's attorney must be prepared with the following[20]:

---

[15] 12 N.Y.C.R.R. 300.34(d)(3).

[16] 12 N.Y.C.R.R. 300.34(g).

[17] 12 N.Y.C.R.R. 300.34(h).

[18] LINK: http://www.wcb.ny.gov/content/main/forms/ph16_2.pdf

[19] 12 N.Y.C.R.R. 300.38(f).

[20] 12 N.Y.C.R.R. 300.38(f)(2) & 12 N.Y.C.R.R. 300.38(f)(3).

- an offer of proof for every affirmative defense raised;
- statutory and case citations for all leal defenses;
- a list of medical witnesses that the employer wishes to cross-examine;
- any additional parties to add to the litigation;
- a plan for any additional discovery necessary.

The Law Judge can order cross-examination of the claimant's treating physician by either deposition or live testimony at a scheduled hearing. Defense counsel should have a plan for requesting whichever mode of cross-examination bests serves the needs of the employer (note that if the medical witness fails to appear at the scheduled hearing, the Judge will authorize a subpoena and give the doctor a "second chance" to appear).

At any pre-hearing conference, the case may be settled under Section 32. 10 days before the pre-hearing conference, claimant's attorney must file forms C-3 and make sure at least one C-4 (medical record) – failure to do so can result in the case being thrown out by the Law Judge. The case can then be re-opened if claimant's attorney files the appropriate forms. Failure by the claimant to proceed (or appear) will result in the case being closed.[21]

If the claimant is represented, a Form PH-16.2 ("Pre-Hearing Conference Statement") must be filed 10 days before the hearing, *or claimant's counsel is not entitled to a fee*.

The pre-hearing conference may result in the Judge issuing Orders or directions to the parties. These orders or directions are not appealable (under WCL § 23) until the controverted issues in dispute are resolved.

If everything has been presented and prepared correctly, the Judge will then set the matter down for an Expedited Hearing. Although this sounds "singular" (i.e., one hearing) it actually includes out-of-court proceedings (usually medical witness depositions). Similarly, there is nothing that prevents the parties from scheduling necessary depositions or testimony in the absence of specific judicial direction to do so.

In cases where medical proofs are going to be required, and the claimant has already produced medical records which will likely be considered prime facie medical evidence, defense counsel may immediately proceed to scheduling necessary medical testimony (by way of subpoenaed deposition) and collecting relevant medical records (through the use of executed C-3.3 "Limited Release" procedures on an expedited basis). These activities may be necessary where the ability of the defense to get organized and present a meaningful defense would be severely limited by the scheduling requirements of the expedited hearing process, which requires a hearing on the lay proofs (with testimony completed) within 30 days of the Pre-Hearing Conference, an IME for the

[21] Subject to re-opener for any good faith reason.

employer completed and served within 27 days of the Pre-hearing COnference, and all medical proofs concluded (including deposition testimony of the claimant's treating physicians and the IME doctor) within 60 days of the Pre-hearing Conference.[22]

Because the specific timelines differ slightly depending on whether or not medical proofs will be needed and whether or not the claimant is represented, we will discuss these three separate scenarios, below.

B. The Expedited Hearing process for represented claimants.

The Regulations (12 N.Y.C.R.R. 300.38) require that any IME report must be filed and served pursuant to Section 137 no later than 3 days from the date of the initial expedited hearing. In practice, this will be extremely difficult to do if the IME has not already been scheduled by the time of the Pre-hearing Conference, as the minimum time (unless the claimant waives notice) that must elapse before the IME is ten days, and scheduling any such IME on short notice is difficult. We recommend that if medical testimony on behalf of the employer is going to be necessary to controvert a claim, an IME be scheduled at the time of denial (concurrent with filing the Form C-7).

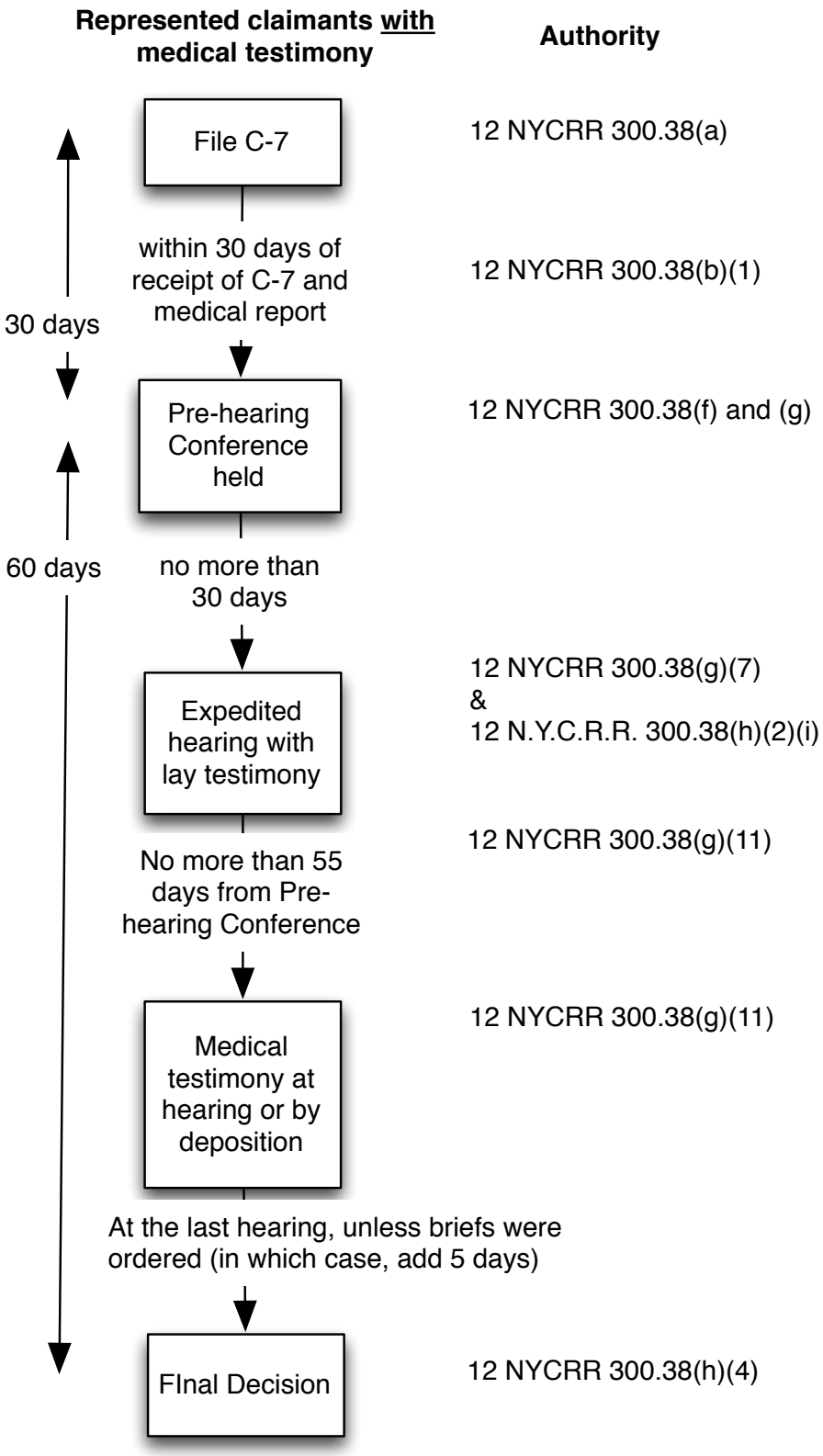
i. Hearing Process where medical testimony must be taken

Medical testimony will usually be obtained by deposition. All depositions must be completed and transcripts submitted to the Board within 85 days of the filing of the C-7 denial pleading.[23] Defense can object to any establishing questions (direct testimony) directed to the treating physician, as their reports are deemed to be in evidence as a direct examination.

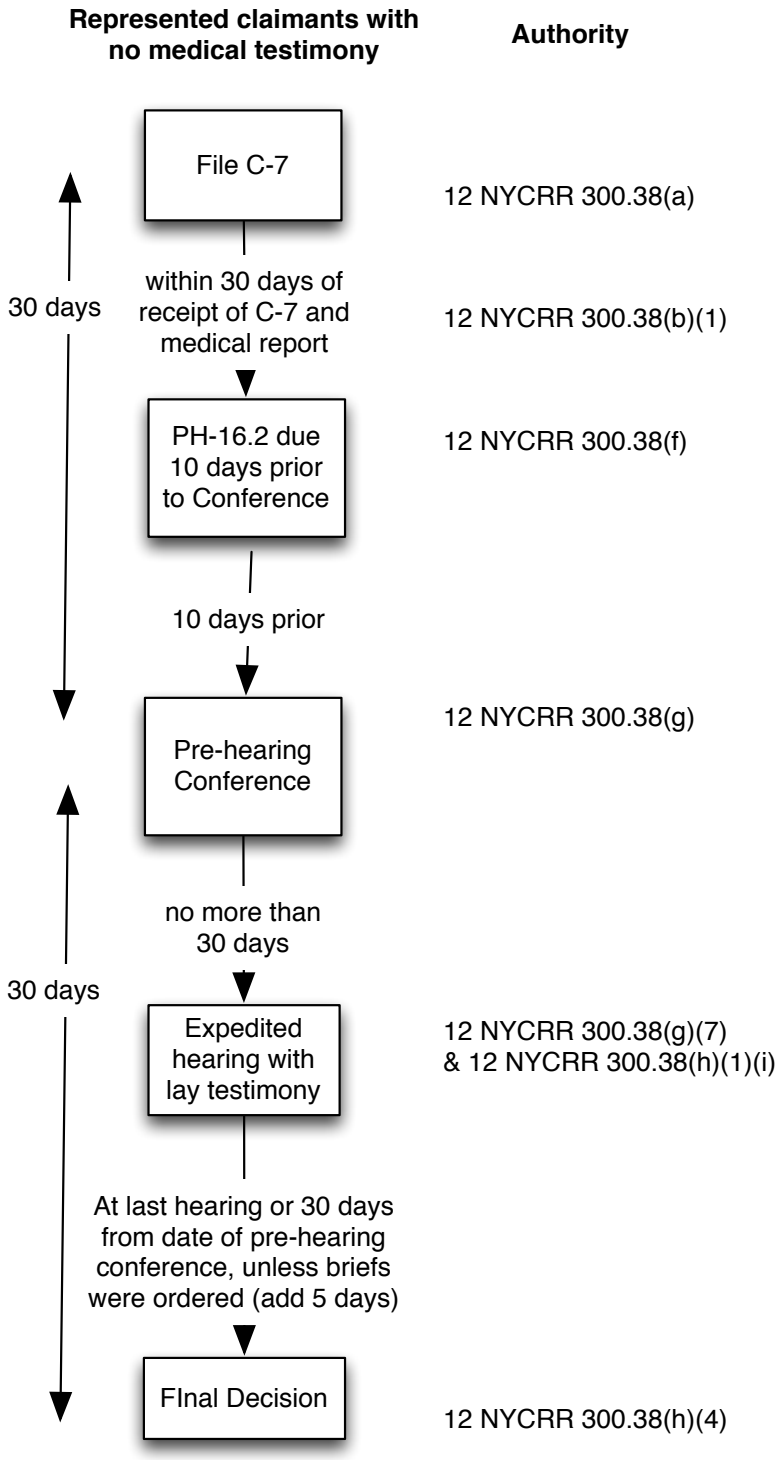
---

[22] See generally 12 N.Y.C.R.R. 300.38.

[23] 12 N.Y.C.R.R. 300.38.



ii. Hearing process where medical testimony will <u>not</u> be taken.
Essentially, the following is the hearing process where the defense is purely legal or factual.



C. Hearing Process for unrepresented claimants.
In the case of an unrepresented claimant, the rules allow for all testimony to take place at a single hearing, including medical witnesses to appear, within 60 days of the Pre-hearing Conference.[24] In practice, a judge of compensation will usually encourage an unrepresented claimant to obtain counsel, and the matter will not be set down for an expedited hearing until counsel is chosen.

D. Impossibility of getting an adjournment.
Adjournments to a Pre-hearing Conference, Expedited Hearing, or deposition of a medical witness in a controverted case will only be granted for "an emergency."[25] An "emergency" is defined by the rules as " a serious event" that includes a death in the family, a serious illness, significant prior professional or business commitment, and inclement weather that prevents travel. It does not include any even that could be mitigated "by the timely taking of reasonable action."[26]

Defense counsel that makes a frivolous request for adjournment can be fined $1,000 (personally). Claimant's attorneys who request a frivolous adjournment can be fined $500. Unrepresented claimants are not subject to any penalty.

5. *NEW* - Trial on Permanent Partial Disability following referral to "Specialized Part" using Classification Process.

On May 28, 2013 the Board announced the creation of the "specialized parts" in each district to handle permanent partial disability (non-scheduled loss of use) claims.[27] As per the Board's recent practice, in cases where one party has obtained a finding of "MMI" and a permanency rating (medical impairment) the Board is issue "scheduling orders" to require that the party without an IME or opinion of medical impairment submit one.

This is essentially a "regular hearing" in which the "Classification process for All Claimants," first revealed in a November 3, 2011 bulletin from the Chair[28] will be

---

[24] 12 N.Y.C.R.R. 300.33(f).

[25] 12 N.Y.C.R.R. 300.38(j).

[26] 12 N.Y.C.R.R. 300.38(j)(5).

[27] See Subject Number 046-548, MAy 28, 2013, "Chair Announces Efforts to Promote Permanency Classifications," LINK: http://www.wcb.ny.gov/content/main/SubjectNos/sn046_548.jsp

[28] See Subject Number 046-472, November 3, 2011, "Workers' Compensation Board Announces 2012 NYS Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity," Chairman Beloton. LINK: http://www.wcb.ny.gov/content/main/SubjectNos/sn046_472.jsp

followed. The Board also published a schematic/flowchart as to how hearings and determinations on classification would be made.[29]

Step 1: Receipt of Medical Report with opinion on MMI/Medical Impairment.
When the Board receives a medical opinion(s) from either the carrier or the injured worker's health care provider that indicates that the claimant has reached maximum medical improvement (MMI) and has a permanent, non-schedule medical impairment. The medical opinion(s) from either or both medical "parties" should also include the claimant's impairment rating and functional abilities/losses. The Board will then issue Form EC-81.8 "Scheduling Order" stating that the party without a medical opinion on "MMI" and assessing impairment can (1) accept the original medical opinion or (2) submit conflicting medical evidence on any of the issues. The Board will also schedule a hearing for medical development/scheduling of testimony.

Step 2: Initial Hearing:
If the Board receives conflicting medical opinions on MMI and/or Non-schedule Permanency, the Board will calendar an initial hearing for medical development and to set down a schedule for the scheduling of medical and lay testimony. If medical development is necessary and the claimant is unrepresented, the WC Law Judge will schedule a subsequent hearing with live medical testimony in lieu of directing depositions.

Step 3: Final Permanency/Classification hearing.
The WC Law Judge will schedule a Permanency/Classification hearing (with medical evidence and lay testimony regarding vocational factors) within 90 days from the date of the initial hearing.[30] During this 90 day period, the parties are expected to depose the medical witnesses and submit deposition transcripts.

At the Permanency/Classification Hearing the Law Judge will take live lay testimony on vocational factors and hear summations. After considering all the medical and non-medical evidence, the judge will issue a decision on loss of wage earning capacity. For more on the legal standards and practical tips for handling litigation on LWEC, see my prior article.[31]

---

[29] The "Classification process for All Claimants" flowchart is here: http://www.wcb.ny.gov/content/main/hcpp/ImpairmentGuidelines/ProcessModelAll.pdf

[30] This 90 day time period is not taken from case law or regulation. This 90 day period comes form the "Subject Number" guidance issued by the Board.

[31] LINK: http://greglois.com/files/LWEC.html

Questions?

About Greg Lois

Gregory Lois is a Partner at Weber Gallagher Simpson Stapleton Fires & Newby LLP and practices in the Firm's Workers' Compensation Department. Greg regularly appears in New York and New Jersey workers' compensation courts and in Federal courts on Longshore and Harbors' Workers Compensation matters (including claims under the Defense Base Act).

Greg manages the firm's New York and Federal workers' compensation practice. Greg is active in the New York State, Massachusetts, and New Jersey State Bar Associations.

About Weber Gallagher:

We are more than 120 lawyers providing legal counseling and representation to businesses, with 40 attorneys focusing on the defense of workers' compensation matters. The firm maintains 10 regional offices in Pennsylvania, New York, New Jersey and Delaware.

Contact:

Please feel free to contact me with any questions you may have or if you would like to schedule a complementary seminar for your office.