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JUDGES' PANEL
NATIONAL ASS'N OF WORKERS' COMPENSATION JUDICIARY MEMBERS:

HOW JUDGES JUDGE AND WHY (IN SHORT, WHY YOU LOST OR WON: A PEEK AT THE JUDGE'S NOTES AND THINKING)

Observations of
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I. *How do Workers' Compensation Judges assess the credibility of the injured worker and other non-expert lay witnesses?*

A. Demeanor: "Carriage and Deportment"

Most veteran judges believe that demeanor, or the manner in which the witness carries and deports him- or herself, can be a reliable – though at times a hazardous – basis to judge credibility. This is my belief as well. A witness who is evasive, consistently hesitant, aloof, or inappositely nervous, raises an eyebrow.

Still, I agree with commentators who observe that the formal environment of court is artificial, and that people called to testify may, as a result, be nervous or acting unnaturally. They may also be angry and/or depressed, as is the case with a class of people who are by definition injured and often without money. This problem is compounded further in compensation, because we are dealing with a clientele which (at least in my state, Pennsylvania), is largely composed of the working class and the working poor. Many of our claimants have never been to a business meeting – or even worn a tie – never mind having gone to court.

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Aspects of demeanor and deportment do exist which, I admit, at times can throw me. These include gross exaggeration, crying, excessive anger or obsequiousness, aloofness, and grandiosity. These types of behaviors have the potential to put off *anyone* who is in the role of fact-finder. What I do, as all fact-finders must, is set aside the prejudice that is raised by such behaviors and wait until *all* the evidence is in before judging credibility.

In any event, I am a believer that the judge of credibility should see and hear the witnesses. Only in this way can the mysteries of intuition, as some have put it, be operative.

B. Plausibility

Jurors are routinely instructed to use their "acquired experience," or common sense, with regard to whom to trust, in their own lives, as they deliberate on the issue of witness credibility. The same admonition might be applied to the comp judge. One such common-sense response to a disputed account is whether the story is "plausible," given one's everyday experiences. I have found one federal judge's explanation of this basic concept compelling. Writing in an ABA publication, he states, "[I]nternal coherence is critical in evaluating credibility. When the actions of the person involved are shown to be in accordance with their nature or characters, when they do the kind of things people will do (consistent with probability or necessity), credibility is enhanced. A causally connected string of actions and behavior not shown to be motivated by psychological norms convinces no one."[1]

C. Corroboration

When the claimant's credibility is at issue, corroboration can make a significant difference. When question exists as to the incurrence of an accident, I will want to see what the claimant, in the immediate aftermath of the event, has told the EMT and ER. We all know that the "history" portions of hospital and medical records are not perfect, but a statement in such records corroborative of the testimony can be of significant weight.

When an injury or disability is contested, and credibility is at issue, objective verification via diagnostic tests is also critical. If claimant complains of chronic pain down the leg, but the MRI is negative for nerve compression, an eyebrow is raised. When claimant says that he cannot return to work even at light duty, but he has, via FCE, shown functional capabilities, a question of credibility has likewise been raised. If claimant says that he has such chronic pain from alleged spinal damage that he can tell when the weather is changing, and his x-rays show no arthritis, claimant's credibility is certainly in question. In other words, subjective complaints that far outweigh the objective findings raise an issue with regard to credibility.

Surveillance films showing the claimant undertaking tasks significantly at odds with the impairment or disability complained of in court can be damaging to a claimant's credibility.

[1] John L. Kane, "Judging Credibility," in *Litigation*, Vol. 33, No. 3 (ABA Spring 2007), available on-line at http://apps.americanbar.org/abapubs/lrc/pdfs/kane.pdf.

Most judges, including myself, are only persuaded of claimant misleading when the activity depicted is *significant* and *continuous*.[2]

D. Consistency

Consistency of account is also important to the credibility determination. If the claimant gives inconsistent accounts of what allegedly happened, credibility may be questioned. This aspect of judging credibility is very important in the Pennsylvania "serial hearing" system, where I will hear the claimant testify an average of three times in the typical case.

E. Evidence of secondary gain

The cynical might argue that secondary gain is always a question in disability cases, because if the claimant wins his or her case, he will be able to stay at home yet receive a weekly check. Such a simple, devious subjective desire to mislead is unfortunate but hard to detect. A secondary gain motivation can be more *objectively* determined by a showing that claimant needs to be at home because of (1) pressure from a spouse; (2) childcare responsibilities; or (3) senior care responsibilities.

F. Collateral support

A claimant who has other forms of wage replacement, like short-term disability, long-term disability, Sickness & Accidents benefits (S&A), and/or insurance for motor vehicle payments, may be in a position to exaggerate his or her condition during the prosecution of the workers' compensation case. (It may be that fewer workers have such "collateral benefits" than in years gone by. The most frequently encountered of late is *unemployment* compensation.)

G. Pendency of Third-party Litigation

Workers' compensation litigation may be time-consuming. Still, such proceedings usually are more expeditious than those in the civil courts. When a claimant eligible for compensation sues a third party (like the manufacturer of a machine involved in an accident) in civil court, he may be tempted to continue to exaggerate his pain and disability pending the trial date. To return to work, disavow disability, and sign off of compensation can be inconsistent with a continuing demand for damages.

H. Treating with an "Over-treater"?

I often raise an eyebrow at a claimant who is attending frequent medical care with a known over-treater. If the claimant also tells me that the care affords her no improvement, I raise my eyebrow even higher.

[2] *See infra* Part III.

I. Tests Such as MMPI and the "Fake Bad Scale"

The legal literature is full of references to scientific methods of assessing credibility. Some psychologists have used the MMPI-2 test, for example, to try and detect malingering. More recently, psychologists have argued for a test known as the "Fake Bad Scale." In the Pennsylvania workers' compensation practice, defendants have not employed these tests to try to prove malingering. This is so, perhaps, because their relatively significant cost is out of proportion to compensation liability.

J. Motivation to Return to Work

A worker's willingness to return to work can operate as powerful indicia of credibility. Many credibility disputes in workers' compensation have their genesis, after all, in the anxiety over whether the injured worker is an authentic case. Once the claimant evinces a willingness to return to work, or actually returns to work during the litigation, much of the tension is dispelled.

K. History of Prior Claims

The fact that an injured worker has had prior workers' compensation claims may have an effect on credibility. Still, this factor must be approached with caution. Workers' compensation is, after all, a form of health insurance, and we *want* workers who suffer injuries arising in the course of their employment to utilize such coverage. Thus, I probably would not be impressed with a print-out showing that a veteran construction laborer has filed a number of medical-only claims over his long career. On the other hand, a pattern of disputed lost-time claim filings ending in the inevitable compromise settlement may raise an eyebrow.

L. Credibility and Other Lay Witnesses

The considerations with regard to credibility noted above apply equally to other lay witnesses. In the workers' compensation realm, the range of such witnesses is very wide. Typical witnesses include eyewitnesses to a contested accident, co-workers who corroborate the rigors of the worker's pre-injury labor, management or other witnesses who contest that an injury occurred, and supervisors who verify the availability of modified duty. When a lay witness testifies, I also listen to see if some bias is present. This may be reflected by the witness having a close family or social relationship with the claimant. Management employees, of course, are often depicted on cross-examination as necessarily biased toward the employer-defendant – certainly so when they continue employment with the defendant. Thus, this challenge to credibility must be considered very carefully.

Often, the lay witness who is testifying has not so much a credibility problem as what is called a "competence" problem. In this regard, the witness lacks personal knowledge about what he is being asked about. This occurrence is nothing new in court proceedings. Still, an especially frustrating response from an employer witness in the present day is that he cannot answer a question on cross-examination, as the file is exclusively on the computer and/or that all communications were by non-retained e-mails: "Oh, no, I don't recall – we're paperless!"

II. *What is the effectiveness of surveillance evidence?*

My book co-author Andrew Greenberg has posited: "Perhaps the one aspect of workers' compensation practice that makes it so interesting is its fact-intensive character. In this regard, a single fact, properly presented, can significantly alter the outcome of a given case. Indeed, virtually every compensation case involves a fundamental credibility question that the parties must explore and analyze thoroughly so as to enhance the possibility of success before the WCJ."[3]

Surveillance evidence, therefore – in the form of personal observations made by an investigator and/or in the form of film or videotape – can have significant impact on the credibility question at issue. Such evidence can obviously "carry the day" before the WCJ, by refuting the claimant's supposed physical condition or by revealing the claimant's surreptitious return to the work force.

In the *actual return to work* situation, surveillance film is most effective when submitted in conjunction with the analysis of a vocational specialist or business analyst – such as a forensic accountant – who, through an assessment of the claimant's job itself or through an assessment of the local business market, "imputes" wages to the claimant in the particular capacity.

As posited in the previous section of this paper, surveillance films showing the claimant undertaking tasks significantly at odds with the impairment or disability complained of in court can be damaging to a claimant's credibility. Most judges, including myself, are only persuaded of claimant misleading when the activity depicted is *significant* and *continuous*.

Although surveillance film often is devastating to the claimant's claim, claimant's counsel should not automatically assume that its existence will necessarily undermine the claimant's effort to obtain or to continue to receive workers' compensation benefits. Indeed, surveillance evidence is, quite often, strikingly ineffective in establishing anything of any real significance. Rather, it very often demonstrates what the claimant usually maintains – that he or she is not a complete invalid, but, because of his or her work-related injury, is incapable of returning to work in a physically demanding capacity.

A perfunctory surveillance effort or a poorly conceived surveillance effort will very often have little impact on the claimant's claim. Thus, from this WCJ's point of view, defense counsel is best advised to undertake surveillance with the following thoughts in mind:

1. Attempt to obtain multiple days of coverage during various times of day in order to obtain a complete, fair, and accurate picture of the claimant's physical capabilities and activity level.

2. Make certain that the injury/disability at issue is correctly understood and properly addressed by the surveillance investigator.

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[3] DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 19:3 (Thomson Reuters/West 3rd ed. 2008).

3. Make certain that a complete and accurate description of the claimant is provided to the investigator along with a correct home address and thoughts on how the claimant spends his or her time.

4. Review the film carefully in order to make certain that it actually depicts the claimant.

5. Provide the film to the defendant's medical expert or claimant's treating physician for comparison to the claimant's contemporary physical examinations of the claimant.

6. Prepare a "highlight film" for the assigned WCJ while simultaneously retaining the complete film for viewing, if requested.

7. Have the appropriate surveillance investigator available and prepared to authenticate both the surveillance film and the edited "highlight film."

8. Make certain that the WCJ's surveillance procedures are determined and followed.

9. Make certain that the hearing room is equipped with the necessary viewing equipment or that the surveillance investigator brings with him or her the necessary viewing equipment.

10. Make certain, if appropriate, that the surveillance investigator testifies, from a factual – not medical – standpoint that the claimant does not exhibit any physical abnormality consistent with the alleged injury/disability.

III. *What behaviors of counsel can actually hurt his or her client's chance of success in a case?* (A Top Ten List).

Most lawyers who have the privilege of sitting as judges will posit the same thing: while certain lawyer behaviors are annoying, the judge must put subjective *feelings* about counsel out of his or her mind when it comes to actually adjudicating cases.

A venerable Pennsylvania judge states, "If I am writing *against* [a] disliked lawyer`s client I set the opinion aside for a week and then reconsider. Nobody should lose because the judge can't stand his lawyer!" This seems the preferred approach.

Another colleague states, "arrogant, argumentative and unprofessional behavior isn't helpful, but this isn't generally counted against the Claimant or Defendant." She identifies, however, an ominous, unintended, consequence: "sometimes when the attorney acts this way, the client does too, and this can hurt the client."

These views simply state the obvious: the essential virtue of the individual who sits as judge is his or her impartiality. A senior Pennsylvania judge sums it up: "I believe that a WCJ, throughout his/her career, should make a conscious effort to form no strong personal feelings with respect to counsel appearing before her/him. While this may be a difficult aspect of this position, it is important and will contribute to producing what we should all strive to be – an impartial adjudicator and fact finder."

With this imperative in mind, here are a number of behaviors that my colleagues and I have nevertheless identified as harmful to a client's chances of success in case.

1. ***Lack of preparation.*** For example, a neglect to have prepared witnesses before the hearing and having exhibits ready in logical order. An unprepared direct examination of a key witness can almost ruin such testimony.

Some attorneys, meanwhile, may rely on their previous reputation and simply try to "wing it," and this approach may sometimes make a case crash and burn. That attitude, according to one of my correspondents, "mixed many times with showing a lack of respect to the judge, can hurt a client's case."

2. ***Ignorance of the applicable law.*** The failure to understand the law can be deadly. In a recent case handled by this writer, an attorney revealed himself as not knowing the meaning and import of the phrase, "affirmative defense." Thus, he misperceived which party had to move forward first with the proofs. He then argued with me about the very definition of the phrase.

Missing important elements in the prima facie case, or misperceiving (as above) the burden of proof, can be pivotal errors.

Incorrect citation, or mis-citation of the law is, to this writer, intolerable and places counsel's position in a case in a very bad light. This can hurt a litigant's case. In a petition twenty years ago, a lawyer for the Commonwealth argued to me that, as the purported custodian of one of the state funds, I had the duty to protect the same from attempts by claimant at compensation. This assertion was so misconceived that, lo these many years, I still remember my dismay and his derailed defense.

3. ***Violating the code of civility.*** Some judges may become disturbed when attorneys start insulting the opposition and submitting briefs full of sharp comments. A belligerent and bullying attitude, lack of decorum and, talking too much (*i.e.*, not knowing when to stop beating a dead horse), all are risky. It is possible that some behaviors are so over the top that the party's substantive case is hopelessly poisoned despite the fact that the case was originally a winner.

4. ***Failure to formulate a strategy and choose your issues carefully at the hearing and in the brief.*** As appellate judges have asserted similarly for decades, too many issues can lead to the conclusion that there is no merit to any of them.

5. ***Engaging in the misconceived crusade.*** Effective defense counsel always avoids dead-end strategies which may (fortunately only on very rare occasions) be promoted by insurance adjusters or human resources folk. Such a strategy is typically reflected by a petition or defense which has no legitimate basis in the facts or the law. Strategies which are inherently bound to be ineffective work to deconstruct a properly operating system, breed distrust in the mind of the WCJ, and are self-defeating.

6. ***Not having doctors explain why they hold the opinions they give.*** Most administrative law systems require the judge to provide reasons for their decisions. Indeed, books have been written

on the subject.[4] In workers' compensation, reasons must be provided, in particular, about the credibility determinations the judge has made with regard to expert testimony. The lawyer who wants both to win – and equip the WCJ with the information to perform his job – must have the expert physician explain the reasoning behind the opinions he expresses.

The Logistical Defaults (Claimant's Case)

One of my colleagues, who represented claimants for many years, identified to me what I would term "logistical defaults." These behaviors are lawyer or system driven and can hurt a client's chances for success. These items for the most part reflect the modern-day challenge that claimants' attorneys (particularly those in Pennsylvania) face in the prosecution of cases.

7. ***Worrying too much about litigation costs – trying to find the cheapest route rather than the most legally sound route.***

8. ***Holding up litigation and not scheduling depositions because the Claimant can't afford to pay the costs.*** In these instances counsel should either advance the costs or refer the Claimant to someone who will front the same.

9. ***Taking too many depositions – because the different medical opinions tend to start contradicting, rather than supporting, each other.***

10. ***Not spending time reading and understanding the medical records – and putting medical records into evidence that actually <u>diminish</u> the case.***

[4] Jerry Mashaw, for example, discusses the issue and asks rhetorically, "How much are good decisions worth?" JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS, p.79 (Yale 1983). *See also* Jerry L. Mashaw, *Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17 (2001).