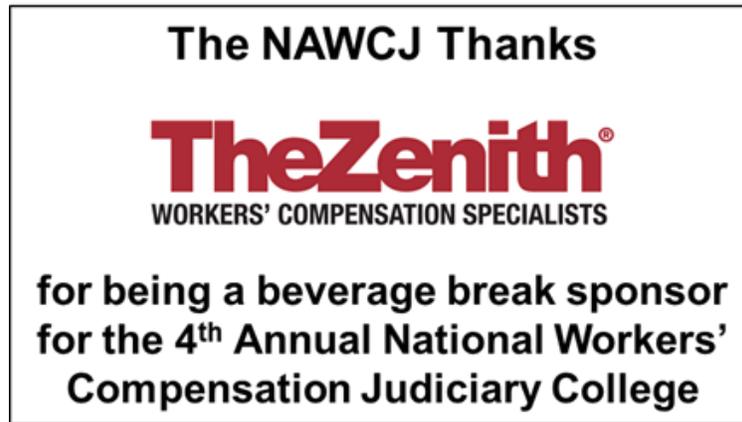


Fourth Annual NAWCJ Judiciary College

August 20-23, 2012



- I. Judicial Writing and Editing, Professor Terrel
- II. Comparative Law Panel
- III. Credibility of Medical Evidence, Professor McCluskey
- IV. Evidence
 - a. Electronic Evidence, Professor Ehrhardt
 - b. Evidence for Adjudicators, Ehrhardt
- V. Live Surgery, Biographies
- VI. To Tell the Truth, Ms. Constantine
- VII. Keeping the Case on Track, Judge Jones
- VIII. Social Networking, Rissman Wieland
- IX. Technology
 - a. Technology, Judge Rosen
 - b. Technology, I phone Article
- X. Appellate Roundtable
 - a. Appellate Roundtable, Alvey
 - b. Appellate Roundtable, Jones

Multi Jurisdictional Comparative Law Panel

Honorable Jennifer Hopens - Texas

Jennifer Hopens received her undergraduate and law degrees from the University of Texas at Austin. She was licensed to practice law in Texas in 2002. In 2007, she joined the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) as a Hearing Officer. She has traveled extensively for the Division, holding contested case hearings in workers' compensation matters in the Austin, Beaumont, Bryan/College Station, Corpus Christi, Dallas, Fort Worth, Lufkin, Missouri City, Houston East, Houston West, San Antonio, Uvalde, Victoria, and El Paso Field Offices of TDI-DWC. She attended the Judicial College of the National Association of Workers' Compensation Judiciary (NAWCJ) in Orlando, Florida in 2009, 2010, and 2011. In 2010, she was chosen to serve on the NAWCJ Board of Directors. She was previously a Hearing Officer for the Texas Workforce Commission. In her free time, Jennifer enjoys reading, traveling, genealogy, and photography.



Honorable Mike Alvey – Chair Kentucky Workers' Compensation Commission

Chairman Michael W. Alvey received his Bachelor's degree from Western Kentucky University, and his J.D. from the University of Kentucky College of Law. Admitted to the Kentucky Bar in 1988, Chairman Alvey practiced primarily defending workers' compensation, federal black lung and personal injury claims. On November 13, 2009 Chairman Alvey was appointed to serve as Chairman of the Kentucky Workers' Compensation Board effective January 5, 2010. Chairman Alvey was recently appointed to the board of directors of the National Association of Workers' Compensation Judiciary, Inc. Chairman Alvey retired from the Kentucky Army National Guard in 2000 where he served nearly 21 years as an armor officer and is a graduate of the Armor Officer Basic Course and Armor Office Advanced Course. Chairman Alvey resides in Owensboro, Kentucky where he has been involved in various church and civic activities as well as working with youth sports including both coaching and officiating.



Honorable Melba Dixon

Judge Melba Dixon graduated from Linwood Elementary School and Benton High School (valedictorian) in Yazoo County, Mississippi. She has a Bachelor of Arts degree (Magna cum Laude) in Economics with a minor in Business Administration from Tougaloo College, an MBA degree from Jackson State University, and a Juris Doctorate from Mississippi College School of Law. She has completed course work at the National Judicial College. Judge Dixon currently serves as one of eight administrative law judges with the Mississippi Workers' Compensation Commission. She is the first African American female to serve in this capacity. Prior to joining the Commission in 1997, she served as Special Assistant Attorney General with the Office of the Attorney General for the State of Mississippi. She served as key advisor to the State Personnel Board and state government agencies in the area



of labor and employment law. She has also worked as a staff attorney for Central Mississippi Legal Services, where she provided comprehensive legal services to indigent clients in civil cases. She was employed in the area of Personnel and Human Resource Management with the Mississippi State Personnel Board and the Mississippi Library Commission for approximately ten (10) years prior to entering the legal profession. Judge Dixon is a member of the Mississippi Bar, the Magnolia Bar Association, the Capital Area Bar Association, and the Mississippi Women Lawyers' Association. She is also a member of Beta Delta Omega Chapter of Alpha Kappa Alpha Sorority Inc., a local/international community service organization. She formerly served as Secretary/Treasurer for the Association of State Personnel Administrators, was on the Board of Directors of the Mississippi Association of State Personnel Administrators, and was a member of the Charles Clark Inn of Court. She has also served on the Board of Directors of the Middle Mississippi Girl Scout Council. Judge Dixon is among those featured in *The 2010 Inaugural Edition of Who's Who in Black Mississippi*.

Honorable Sylvia Medina-Shore

Judge Medina-Shore began her legal career as in-house counsel for the Florida Department of Insurance Insolvency Division. After serving one year as in-house counsel, Judge Medina-Shore joined the law firm of Almeyda & Hill and represented injured workers, employers and insurance carriers in workers' compensation and health insurance cases. Judge Medina-Shore was an associate and partner of same Miami law firm for 5 years. For the following 5 years, Judge Medina-Shore worked at the law firm of Conroy, Simberg, Ganon & Abel in West Palm Beach, Florida representing employer and insurance carriers. In March of 2000, Governor Bush appointed Judge Medina-Shore to the Miami-Dade and Monroe County District. She was reappointed by Governor Bush in March of 2004 and by Governor Crist on 2008. To that extent, Judge Medina-Shore has volunteered to accept college and law school students as interns for numerous Miami-Dade County and Broward colleges. For the past four years, Judge Medina-Shore has served in the executive committee of the Conference of Judges of Workers' Compensation. In March of 2006, Judge Medina-Shore was named Administrative Judge for the Miami- Dade and Monroe Counties. Judge Medina-Shore has lectured at numerous workers' compensation seminars and Miami-Dade County bench and bar conferences.



Honorable James Szablewicz – Virginia

Jim Szablewicz is the Chief Deputy Commissioner of the Virginia Workers' Compensation Commission and has been in that position since April 2004. In this capacity, he supervises the Judicial Division of the Commission, including the functions of the Commission's Clerk's Office, six Regional Offices and all of the Deputy Commissioners state-wide. Prior to becoming Chief Deputy Commissioner, Jim served as a Deputy Commissioner for two years, and was engaged in the private practice of law on Virginia's Eastern Shore for eleven years, primarily representing injured workers. Jim received his B.A. in Political Science from Yale University in 1984 and his J.D. from the University of Virginia School of Law in 1987.



**NATIONAL ASSOCIATION
OF WORKERS' COMPENSATION JUDICIARY**



**2012 NATIONAL WORKERS' COMPENSATION
JUDICIARY COLLEGE**
Orlando, FL

MULTI-JURISDICTION COMPARATIVE LAW PANEL
August 20, 2012

Hon. Jennifer A. Hopens, Texas Department of Insurance, Division of Workers' Compensation
Moderator

Hon. Michael Alvey, Kentucky Workers' Compensation Commission
Hon. Melba Dixon, Mississippi Workers' Compensation Commission
Hon. Sylvia Medina-Shore, Florida Office of Judges of Compensation Claims
Hon. James Szablewicz, Virginia Workers' Compensation Commission

TOPICS

- I. Workers' Compensation Agency Structure
- II. Hearing Process: Discovery, Medical Reports
- III. Appellate Process: Levels and Standards of Review
- IV. Settlement Process: Scope, Criteria, Hearing
- V. Judges and ALJs: Hiring, Evaluation, Numbers



FLORIDA

1) Agency make-up/structure

In Florida, the report of an accident/injury is made by the employee to the employer, who in turn reports the same to the Division of Financial Services. The dispute resolution is handled by the Office of Judges of Compensation Claims (OJCC) by the Judges of Compensation Claims which is part of the Division of Administrative Hearings (DOAH) headquartered in Tallahassee, Florida.

Appeals from the Judge of Compensation Claims are to the First District Court of Appeal, located in Tallahassee, Florida.

2) Hearing Process:

a. Time to Hearing

To commence the dispute requiring adjudication the claimant must file a petition for benefits (PFB) with the OJCC. In turn by statutory deadline that PFB triggers an assignment to a Judge of Compensation Claims in the district where the accident occurred. Some districts cover multiple counties and may or may not have more than one judge. The case however is assigned to a particular judge who keeps the case for the entire duration of the litigation. Recently, however, because of the advent of technology in the form of electronic filings and video teleconferencing, some of the high volume districts are having a percentage of their cases assigned to other districts with less volume and the proceeding physically takes place in the venue of the accident, however with the judge appearing remotely via teleconference (VTC).

Each case is additionally assigned to a state mediator who sits in the office of the judge of compensation assigned to the judge, except if it is a VTC case, then the mediator sits in the division office of the venue.

The case must be mediated within 130 days of the filing of the PFB. A pretrial is then set giving the parties no less than 14 days' notice, and finally a final hearing which must take place within 210 days of the filing of the PFB.

A particular case may have multiple separate PFB's filed, and in some cases as many as 40 PFB's have been filed over the course of years. Every PFB filed up to the time of mediation is mediated, so mediation can cover several PFB's and then those set for mediation are tried. Therefore it is not unusual to have multiple mediations and final hearing taking place at one time in a given case.

b. Number of hearings per judge

There is no limit to the number of hearings per case per judge. The overall assignment is dependent on the new case volume for the given district, which rule is now modified by the VTC use.

c. Use of Discovery

Request to produce documents as well as deposition are the sole discovery permitted. There are no interrogatories or request for admissions permitted. In some cases the evidence package may include multiple depositions in addition to the oral testimony and other documentary matters.

d. Admissibility of Medical Reports

The statute has carved an exception to the hearsay rule and permits medical reports to be admitted without testimony if the report is first shown to the opposing party 30 days before they are offered. This does not preclude, however, the other party from deposing the physician/medical provider if so desired.

Not all medical testimony is admissible whether by report or otherwise. The statute limits the admissible medical testimony to only the authorized medical providers, independent medical examiners and expert medical advisor (a physician designated by the JCC to break the tie in opposing medical opinions).

e. Awards and their structure

The award is in the form of an order granting or denying the claimed benefits. The order must adjudicate all issues which were tried, and cannot exceed of the issues delineated by the parties. The order's findings must be based upon competent substantial evidence with the exception of some issues like defenses to intoxication which can only be overcome by clear and convincing evidence.

The order usually lists the issues to be tried from the pretrial and amendments, the evidence presented and the findings of fact. A JCC can choose one expert's opinion over another without going into minute detail as to the reason as long as from the body of the order it does not appear that some of the evidence was overlooked. The end of the order contains the decretal portion which is the actual mandate.

An order must be entered as required by law within 30 days from the conclusion of the trial. As workers' compensation can have many ongoing issues, it is not unusual for there to be multiple orders in a single case.

f. Use of Mediations

Mediations are mandatory on every PFB filed before it can be tried. The state provides state mediators free of charge and these mediations must be held within 130 days of the date of the PFB. Private mediations can be a substitute if held within the 130 day deadline. The state mediators are set in the heavy volume district with 10 mediations a day every half hour. The reality is that a portion cancels so the average number of mediations in those heavy workload districts ranges from 3-5 per day.

3) Appellate Process

a. Levels of review

All review of a JCC order is to the First District Court of Appeals. An appeal must be filed within 30 days from the entry of an order. A motion for clarification/rehearing or otherwise does not toll the 30 day time period. The appeal to the First District Court of Appeals is a matter of right. Further review by the Supreme Court is discretionary by that Court and is sporadic on issues of great importance or constitutionality.

b. Standard of review

The First District Court of Appeals has multiple possible panels and therefore there is no uniform consistency in their standard of review. Typically the review is to determine whether the order meets the requirements of competent substantial evidence and that there is no departure from the essential requirements of law. However, in cases such as the FRYE test the review is de novo. A non final order is not reviewed, with the exception of an unusual writ of certiorari showing irreparable harm, and those are the small exception to the rule.

c. Volume of cases appealed

In calendar year 2011 a total of 323 notices of appeal were filed. To compare this to this date, it is noted that during the first six months of calendar 2011 a total of 177 notices of appeal were filed, and this year during the first six months a total of 165 notices of appeal were filed.

4) Settlement process-

a. Permitted?

Total settlement of claims, vernacularly referred as "washout" are permitted and encouraged, but is at the same time totally voluntary between the parties.

b. Settlement of medical allowed?

Not only is a total settlement to include past, present and future medical allowed, but those constitute almost all of the settlements presented as the carriers do not want to leave the medical open and have to continue to manage a case. The statute, however, does permit settlement where the medical is left open, but those are less than one percent of one percent.

c. Review required

1. Criterion of approval, and 2. Types of settlements

Under the statutory scheme the JCC does not approve the settlement insofar as the amount or the terms in cases where the claimant is represented by counsel. The scope of the approval is limited to the attorney's fees paid by the claimant on the settlement as well as a confirmation that the claimant is not responsible for past due child support. The review of the documents on a represented settlement only include a motion for approval of attorney's fees and allocation of child support which sets forth the amount of the settlement and the fees and costs approved. The fee must comply with the statutory scheme applicable to the date of accident. Costs paid by the claimant are also approved or rejected as the case may be if excessive.

On some settlements a separate E/C paid fee is also part of the deal, and that separate fee must be also approved.

In short, the function of a JCC in a settlement is to ensure that the fee paid meets the statutory guidelines and that if any child support is due, that it is paid. No review of the consideration is given if the claimant is represented.

In an unrepresented claimant, there is a hearing with the claimant present, where the total medical paid, date of maximum medical improvement and other data is considered to ascertain that the settlement amount is in the best interest of the claimant. Only in this case is the underlying basis for the settlement considered.

5) Judges and ALJs

a. Hired v. appointed

While Florida has both ALJ's as well as JCC's, in the workers' compensation administration only JCC's play a part. The JCC's are first nominated by a Judicial Nominating Commission special to workers' compensation and three names are submitted to the governor for his/her selection which lasts 4 years. Thereafter the JNC must re-nominate a JCC for the name to be submitted to the governor for reappointment, again a 4 year process. There is no term limit.

b. Evaluated

On an annual basis the members of the bar are given the opportunity to do a survey which includes over ten criteria on the judges' performance and conduct.

c. Continuing Ed requirements

JCC's have the same CLE requirements as other members of the bar, 30 hours over a three year reporting period.

d. Territories

Until several years ago a JCC was assigned to a district which both covered one county or multiple counties, and only heard cases arising out of the districts territory. With the advent of teleconferencing now this rule is modified such that out of district JCC's may hear VTC (video teleconferencing) a case if there is a particular problem with scheduling, overload etc.

e. Numbers

There are two sets of numbers which apply. Each accident is assigned a case number (OJCC number) and assigned to a JCC. However that case may involve multiple PFB's filed, so a case can have need for multiple mediations, pretrials and final hearings. At the peak volume, JCC's in Miami were receiving close to 500 PFB's monthly, and while that number has declined because of the changes in the law and the reduction in the workforce due to the economy, in the last several months it has again started to climb.



KENTUCKY

1) Agency make-up/structure

a. Commission Structure

The Kentucky Department of Workers' Claims ("DWC") is the agency charged with the administration of the Kentucky program and has exclusive jurisdiction over workers' compensation claims. The DWC employs 16 ALJ's, one of which serves as the Chief ALJ, who are responsible for claims resolution. ALJ's are compensated at the same pay as that of a Circuit Judge.

ALJ decisions may be appealed to the Workers' Compensation Board which consists of three members, one of which serves as Chairman. The Workers' Compensation Board is an independent body attached to the DWC for administrative purposes only. Board members are compensated at the same pay as that of a Court of Appeals Judge.

Decisions by the Workers' Compensation Board may be appealed to the Kentucky Court of Appeals. Decisions by the Kentucky Court of Appeals may be appealed to the Kentucky Supreme Court.

- b. Neither the ALJ's nor the Board members are part of a multiple-agency structure, and only decide workers' compensation claims.

1) Hearing Process

a. Time to hearing

1. Once the claim application has been filed with the DWC, the employee, employer and the employer's insurance company will be notified the claim has been assigned to an Administrative Law Judge. This notification of assignment letter will also include information regarding the time frame for presentation of proof.

2. Within forty-five (45) days of the date of this notice, the employer and/or its insurance company is required to file with the Department a Notice of Claim Denial

or Acceptance. This notice should state specifically the issues of the claim which are acknowledged and those denied.

3. After a claim has been assigned to an Administrative Law Judge, both sides may submit evidence (evidence such as medical reports and depositions) for sixty (60) days. After the 60 days pass, only the defendants may submit evidence during the next thirty (30) days. After the defendants' 30-day period, only the plaintiff can submit evidence for the next fifteen (15) days.

4. A scheduling order is mailed by the DWC to all involved parties; this notification includes the date, time and location of the benefit review conference ("BRC"), which is essentially a pre-trial, or settlement conference. Although the BRC is informal and no evidence is presented or testimony offered, all parties are expected to attend. The BRC is scheduled for the purpose of defining and narrowing the issues, discussing a settlement and considering other relevant matters that may aid in the disposition of the case.

5. If no settlement is reached during the BRC, the ALJ will schedule a formal hearing, which is usually held within two weeks after the BRC. The hearing is formally recorded by a court reporter after witnesses are sworn.

6. At the conclusion of the hearing, the ALJ may entertain oral arguments, or may allow the parties to file briefs. By statute, the ALJ is required to issue a written decision within sixty (60) days following the hearing.

7. Within 14 days after the entry of the judge's award, order or decision, any party may file a Petition for Reconsideration to request a correction of patent errors. The petition must clearly state the reasons and arguments for reconsideration.

8. No filing fee is required for filing a claim.

b. Number of hearings per judge

ALJ's are located throughout the state. BRC's and hearings are conducted at twelve hearing sites located around the state. Dockets are randomly assigned, and no ALJ has a docket at a particular hearing site in successive months. BRC's are generally held during the second week of the month, and hearings are generally held during the fourth week of the month. Dockets consist of 30 cases on average.

c. Use of Discovery.

Regulations regarding the procedure of adjudication of injury, occupational disease and hearing loss claims govern the specific procedures regarding introduction of evidence, proof times, discovery, required filings, and appellate procedure before the Workers' Compensation Board. These are set forth in 803 KAR 25:009 and 803 KAR 25:010. The Kentucky Civil Rules are applicable to workers' compensation claims except for rules 27, 33 and 36 which are specifically excluded by regulation. The Kentucky Rules of Evidence are also applicable.

Parties are required to file Witness/exhibit lists and proposed stipulations no later than ten (10) days prior to the BRC. The witness lists must include a summary of the anticipated testimony of each witness. Failure to disclose a witness, or to list an exhibit, may prevent the introduction of such evidence, absent agreement by the opposing party.

d. Admissibility of medical reports

Parties are prevented, both by statute and regulation, from filing evidence from more than two physicians absent a good cause showing. Medical reports are admissible, and must be type-written. While narrative reports are admissible, reports submitted on forms provided by the DWC are preferred. Vocational reports are also permitted. Parties are also permitted to file as evidence relevant portions of hospital, educational, Social Security, Vital Statistics, Armed Forces and other public records, and any physician opinion expressed in those records shall not be considered a violation of the two physician rule.

e. Awards and their structure

ALJ's must render decisions within sixty (60) days after the hearing. The opinions must provide determinations of all issues preserved at the BRC, and are based upon the evidence of record. Awards may consist of temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, permanent total disability ("PTD") benefits, medical benefits, and vocational rehabilitation benefits. Other issues may include causation, apportionment, credit, compensability of medical treatment, and extra-territorial jurisdiction, among others. PPD is determined based upon impairment ratings derived from the American Medical Association, Guidelines to the Evaluation of Permanent Impairment, 5th Edition, multiplied by certain factors set forth by statute. If the disability rating is 50%, or below, after application of the factors, the payout period is 425 weeks extended by any period of TTD. If the disability is in excess of 50%, the compensable period is 520 weeks, extended by any period of TTD. PTD awards terminate when the injured worker qualifies for normal old-age Social Security retirement benefits.

f. Use of mediation.

Mediation is voluntary, and rarely utilized.

3) Appellate Process

a. Levels of review

Three levels of review exist after the adjudication at the ALJ level. The first is before the Workers' Compensation Board described above. Board decisions may be appealed to the Kentucky Court of Appeals, and parties have a direct right of appeal to the Kentucky Supreme Court. Roughly a third of the decisions rendered by the Workers' Compensation Board are appealed to the Kentucky Court of Appeals, and roughly a third of those are appealed on to the Kentucky Supreme Court. No filing fee is required

for appeals to the Workers' Compensation Board, but filing fees are required for appeals to the Court of Appeals and Supreme Court. Decisions from the Board must be issued within sixty (60) days after the last brief is filed.

b. Standard of review

The ALJ is the finder of fact. All appellate levels review for substantial evidence/error of law. No new evidence may be submitted before the Workers' Compensation Board except as to fraud or misconduct of some person engaged in the administration of the claim affecting the order, ruling or award.

4) Settlement Process

a. Permitted?

Yes. Settlement agreements are submitted on a standard form, and must be approved by an ALJ. Only items covered by the Kentucky Workers' Compensation Act may be approved for settlement by the ALJ. It is impermissible for the ALJ to approve settlement of extraneous employment issues.

b. Settlement of medical allowed?

Yes, subject to approval by CMS. Other items which may be subject of the settlement include vocational rehabilitation, and right to reopen the claim.

c. Review required.

1. Criterion on approval

Injured workers must certify full understanding of the terms of the agreement. No hearing is required, but the agreement is not effective until approved by the ALJ.

2. Types of settlement

Claims may be settled either for a lump sum or periodic payments.

5) Judges and ALJs

a. Hired v. appointed.

All ALJ's and Board members must be attorneys, duly qualified, and in good standing with the Kentucky Bar Association. ALJ's and Board members are appointed for four year terms. Initial appointments for ALJ's require an application process and review by the nominating commission. The nominating commission recommends to the Governor three individuals for the position. The Governor selects from the list, or rejects the list in its entirety, which restarts the application process. Once selected, the ALJ must be confirmed by the Senate. ALJ's are subject to re-appointment. This process involves the nominating commission recommending retention. If the

Governor agrees, the ALJ is re-appointed to a four year term, again subject to Senate confirmation.

Like ALJ's, Board members are appointed to four year terms, and subject to re-appointment. The same process occurs with the nominating commission submitting a list of three names to the Governor, with subsequent Senate confirmation. Unlike ALJ's, Board members must submit to the application process for each appointment.

b. Evaluated

No formal annual evaluation is utilized, however this is done informally through review of reports.

c. Continuing ed requirement.

Not for ALJ's, although all participate annually in conferences, seminars and annual training conducted by the DWC in conjunction with the Workers' Compensation Board. Board members are required to obtain 12.5 CLE hours per year, of which two must be ethics, which is the same requirement for all practicing attorneys.

d. Territories

All ALJ's travel throughout the state to the various hearing sites, and are not assigned to one particular area for a given length of time.

e. Numbers

Sixteen ALJ's of which one is appointed Chief ALJ, and three Board members, of which one is Chairman.



MISSISSIPPI

1) Agency make-up/structure

a. Commission Structure

The Workers' Compensation Law was enacted in 1948 to guarantee the payment of certain medical and wage loss benefits to employees injured on the job. As part of this Law, the Mississippi Workers' Compensation Commission (MWCC), with its office in Jackson, Mississippi, was established to supervise and monitor claims which arise under the Law. There are three (3) Commissioners, appointed by the Governor with the consent of the Mississippi State Senate, who serve six (6) year terms. Additionally, there are eight (8) Administrative Law Judges who are appointed by the Commissioners, with the consent of the Governor, and an executive director who serves at the will of the Commission. There are forty-nine (49) additional staff positions.

The Administrative Judges' orders are appealed to the Full Commission. Appeals from the Full Commission go to the Mississippi Supreme Court. All cases submitted for appellate review in the state are filed in the Supreme Court, which then re-directs the appropriate cases to the Court of Appeals. MWCC cases are directed to the Court of Appeals. After the Court of Appeals makes its ruling, aggrieved parties may seek further review from the Supreme Court by petitioning for a Writ of Certiorari.

b. Multiple Agency Structure

We do not have a multiple -agency structure in Mississippi. The MWCC handles the administration and adjudication of all industrial injuries and diseases occurring in the state.

2) Hearing Process:

a. Time to hearing

All cases to be heard before the Commission, whether an evidentiary hearing before an Administrative Judge or a review hearing before the Full Commission, shall be docketed

with the Commission at least twenty-three (23) days before the date set for hearing, except those cases requiring less time or notice of hearing by statute or rule. When the claim is controverted and an answer filed, the case shall be immediately assigned to an Administrative Judge and placed on the active docket.

Before a matter can be set for a hearing on the merits, each party must submit a prehearing statement, either jointly or severally, completed in all respects with appropriate documents attached. The completed statement shall follow the form prescribed by the MWCC. Within fifteen (15) days after the expiration of the discovery deadline established according to Procedural Rule 7, the claimant shall file a properly completed prehearing statement or a written request for an extension of time with reasons set forth therein. The employer and carrier shall have fifteen (15) days after the filing of the claimant's properly completed prehearing statement to file a properly completed prehearing statement or written request for an extension of time. Failure of the claimant to timely file the prehearing statement may result in the dismissal of the case or other sanctions. Failure of the employer and carrier to timely file the prehearing statement may result in a unilateral setting of the case by the claimant or other sanctions.

No hearing on the merits will be set until all desired depositions have either been taken or officially noticed. In the event a proper disposition of the cause is not made and any party desires a hearing, the Commission will give notice of this hearing at least twenty (20) days prior to the date on which the matter is to be heard. The hearing will be limited solely to the issues reflected by the pleadings, requests for admissions, and prehearing statements.

b. Number of hearings per judge

Each Administrative Judge manages a docket of 450-550 cases. Administrative Judges conduct up to three (3) evidentiary hearings a day in Jackson, MS, on Mondays and Fridays, and in the field on Tuesdays, Wednesdays and Thursdays. Except when taking personal and/or sick leave, Administrative Judges are scheduled to have hearings at least three (3) weeks of every month. There are no terms of court or vacation periods.

c. Use of Discovery

Procedural Rule 7 of the Mississippi Workers' Compensation Laws and Rules sets a 120-day time limitation for discovery. Discovery shall be completed and medical depositions scheduled within 120 days from the date of notice from the Commission that the case has been placed on the active docket. The 120-day limitation may be extended only if there is credible medical evidence that the claimant has not reached maximum medical improvement or for good cause shown in writing to the Administrative Judge handling the case.

The discovery deadline may be shortened to as few as 60 days if the claimant files a completed prehearing statement indicating that the claimant has completed discovery (depositions, interrogatories, etc.) and is ready for a hearing on the merits. The employer and carrier shall have fifteen (15) days after the filing of the

claimant's prehearing statement in which to file their completed prehearing statement or written request for additional time. Documents not disclosed may be disallowed as evidence at the hearing.

d. Admissibility of Medical Reports

Pursuant to Procedural Rule 9, the medical records of examining or treating physicians, including narrative office notes, reports dictated by the physician in the ordinary course of his or her practice, completed Commission forms, and records composed by the physician in his or her practice may be introduced into evidence in lieu of direct testimony taken at the hearing or by deposition upon the following conditions:

1. The party wishing to introduce such medical records shall notify opposing parties and the Commission by written notice served at least thirty (30) days prior to the scheduled hearing.
2. A copy of the medical records shall be attached to the written notice.
3. There shall be submitted with the medical records a sworn statement of either the physician or medical records custodian stating that the attached medical records are a true and correct copy of the medical records of the physician as kept in the regular course of physician's medical practice.
4. The contents of the medical reports shall be subject to the same objections as to relevancy and competency as the testimony of the reporting physician had he or she been personally present to testify at the hearing. Any objection to the use of an affidavit must be made with fifteen (15) days after receipt by the objecting party of a notice of intent to use such affidavit.
5. Any other party to the controversy shall have the opportunity to take the deposition of the physician and/or require the physician's presence at the hearing on the merits at the sole expense of the party who requests the deposition or appearance at the hearing. Notice of the deposition must be made prior to setting the case for hearing on the merits, and the deposition must be taken prior to the hearing.
6. If the claimant announces an intent to introduce medical records into evidence in lieu of the physician's testimony, and the employer and carrier take the deposition of that physician, the employer and carrier may be reimbursed \$200.00 from the administrative expense fund upon the filing of the deposition with the Commission with a request for reimbursement. Likewise, if the employer and carrier announce an intent to do so and takes the deposition, the claimant may be reimbursed.

7. The affidavits shall not contain opinions or other matters composed by attorneys for the signature of physicians.
 8. The affidavit used for the introduction of medical records shall be in the form prescribed by the Commission.
- e. Awards and their structure

Adjudications are in the form of findings of fact and conclusions of law.

f. Use of Mediation

The MWCC does not have a mandatory mediation program. However, in October 2005, the Commission issued a *Mediation Policy Memorandum* to clarify the Commission's general position on the use of alternative dispute resolution and more specifically, mediation, as a tool to help resolve workers' compensation claims. It provides that "the Commission firmly believes that mediation is a valuable tool that parties to workers' compensation claims should be encouraged to use in an effort to resolve differences that would otherwise have to be litigated at significant expense and delay to those involved. . . Any mediation of workers' compensation claims should ultimately be the product of a purely voluntary undertaking by the parties." The Workers' Compensation Section of the Mississippi Bar has a mediation program.

2) Appellate Process:

a. Levels of review

The Administrative Judges' orders can be appealed to the Full Commission. In all cases where either party desires a review before the Full Commission from any decision rendered by an Administrative Judge, the party desiring the review shall within twenty (20) days of the date of said decision file with the Secretary of the Commission, a written request or petition for review. Any other party to the dispute may cross-appeal by filing a written cross-petition for review within ten (10) days after the petition for review is filed. Should either party desire to appeal an award of the Full Commission, the party desiring to appeal within thirty (30) days of the date of the award should file a notice of the appeal with the Secretary of the Commission. When a notice of appeal is filed with the Commission, the Secretary shall, with a proper letter of transmittal, place the matters possessed by the Commission and pertaining to the appealed case in the hands of the MS Supreme Court within thirty (30) days after such notice of appeal is received by the Commission.

*Prior to July 2011, an award from the Full Commission was appealed to the Circuit Court. Effective July 2011, the MS Legislature amended Miss. Code Ann.

§71-3-51 to allow a party 30 days to appeal to the Supreme Court without first appealing to the Circuit Court.

b. Standard of review

While the Administrative Judge conducts the hearing and hears the live testimony, the Commission itself is, in law, the finder of the facts. On judicial review the Commission's findings and decisions are subject to the normal deferential standards, notwithstanding the Administrative Judge's actions. The Supreme Court will not overturn a Commission decision unless said decision was "arbitrary and capricious." *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1224 (Miss. 1997). Stated differently, the Commission order is only reversed if it is "clearly erroneous and contrary to the overwhelming weight of evidence." *S. Cent. Bell Tel. Co. V. Aden*, 474 So. 2d 584, 589 (Miss. 1985).

c. Volume of cases appealed

In 2010: 93 ALJ orders were appealed to the Full Commission; 38 were appealed to the Circuit Court; 19 were appealed to the Supreme Court.

In 2011: 80 ALJ orders were appealed to the Full Commission; 15 were appealed to the Circuit Court; 37 were appealed to the Supreme Court.

*Prior to July 2011, an award from the Full Commission was appealed to the Circuit Court. Effective July 2011, the MS Legislature amended Miss. Code Ann. §71-3-51 to allow a party 30 days to appeal to the Supreme Court without first appealing to the Circuit Court.

4) Settlement Process:

a. Permitted?

Yes, settlements are permitted under the MS Workers' Compensation Act.

b. Settlement of medical allowed?

Yes, medical may be settled.

c. Review required

1. Criterion of approval

MWCC Procedural Rule 15 sets out the criterion regarding settlements. The proposed settlement will be explored and the medical reports will be examined to determine if the amount of the proposed settlement appears fair and reasonable. If the Commission or Administrative Judge considers

that the proposed settlement is not accurately reported, is not completely understood by the claimant, or is not in the best interest of the claimant, then approval for settlement will be withheld. If the Commission or Administrative Judge finds nothing objectionable about the terms or amount of the proposed settlement and is satisfied that the claimant understands its effect, and further believes that it would be in the claimant's best interest, a compromise settlement will be approved.

2. Types of settlements

There are three types of settlements provided for in the Workers' Compensation Act: lump-sum settlement, compromise settlement, and third party settlement.

Lump-Sum Settlement (a/k/a 13(j) Settlement)- Benefits otherwise payable over a number of weeks for permanent disability or death may be commuted to a present value lump sum if requested by the employee or beneficiary and ordered by the Commission. The claim file is examined to verify that (1) a final medical report giving the date of maximum medical improvement and the degree of permanent impairment is present, and that (2) the employer or carrier has filed the necessary form signifying their agreement to pay benefits for permanent disability consistent with the final medical report. The applicant is then asked to come in to the Commission office for an interview with a Commissioner or Administrative Judge.

Compromise Settlement (a/k/a "9(i) Settlement") - This settlement involves the payment of a lump sum of money in full discharge of the employer's and carrier's liability under the Act. This type of settlement is only appropriate when there is a bona-fide dispute between the parties over the nature and extent of permanent disability suffered by the employee or of benefits due beneficiaries in the event of death. Such settlement is presented by a petition or motion drafted by the parties. As with the lump sum settlement, the applicant's presence for an interview is not required if he or she is represented by counsel.

Third Party Settlement - This type of settlement is done in conjunction with a compromise settlement. It arises where a person or entity, other than the employer or employee, is responsible for the injury or death and that party is called upon to pay damages.

5) Judges and ALJs:

a. Hired v. appointed

The Commissioners are appointed by the Governor, with the consent of the MS State Senate, for six (6) year terms. One (1) member shall be a person who by reason of his or her previous vocation or affiliation can be classed as a representative of employers; one (1) member shall be a person who by reason of his or her previous vocation or affiliation can be classed as a representative of employees; and one (1) member shall be an attorney at law of recognized ability with at least five (5) years' active practice in Mississippi prior to his or her appointment. The Governor shall designate the Chairman of the Commission, whose term shall run concurrently with his or her appointment as a Commissioner. *Miss. Code Ann. §71-3-85 (1972).*

The Administrative Law Judges are appointed by the Commissioners with the consent of the Governor. *Miss. Code Ann. §71-3-93 (1972)* provides that "an Administrative Judge shall be a member of the Mississippi State Bar and shall have a minimum of three (3) years' experience in the practice of law."

b. Evaluated

Monthly reports are compiled by the Commission Chairman showing the following work completed for each Administrative Judge:

1. Current cases in hearing status
2. Current cases in record closed status
3. Number of dismissal orders entered
4. Number of denial orders entered
5. Number of cases closed by settlement
6. Number of merit hearings held
7. Number of merit orders entered
8. Number of discovery extensions granted
9. Number of motion hearings held

c. Continuing ed requirements

Yes, 12 hours of CLE are required annually. One (1) hour must be in Ethics.

d. Territories

The MWCC office is located in Jackson, Mississippi. However, each Administrative Judge maintains a personal vehicle and travels extensively a district which spans an average of 19.7 counties to hear cases in the counties where the injuries occurred. Hearings are typically held at the courthouses in those counties.

e. Numbers

The state is divided into four districts with two (2) Administrative Judges per district. Judges rotate clockwise every two years. Each Administrative Judge manages a docket of 450-550 cases.



TEXAS

1) Agency make-up/structure

a. Commission Structure

The Texas Department of Insurance (TDI), Division of Workers' Compensation (DWC) regulates workers' compensation in Texas. Though DWC is actually part of TDI, DWC has its own Commissioner, who is appointed by the governor. The DWC Hearings section oversees most types of dispute resolution in workers' compensation cases in Texas. Benefit Review Conferences (BRCs), which are essentially mediations between the parties, fall under DWC dispute resolution, as do contested case hearings (CCHs). BRCs are overseen by Benefit Review Officers, who provide mediation, and CCHs are presided over by Hearing Officers. The judges of the DWC Appeals Panel, which is also part of DWC Hearings, review appeals of CCH decisions in indemnity cases (e.g., compensability, disability, extent of injury, maximum medical improvement, impairment rating, etc.). Benefit Review Officers, Hearing Officers, and Appeals Panel Judges are employees of TDI-DWC. Appeals going beyond the Appeals Panel go to District Court. DWC hearing officers also may hear medical necessity disputes and medical fee disputes over which they have jurisdiction. These medical contested case hearings (or MCCHs) are not preceded by a BRC and are appealed directly to District Court from an MCCH.

b. Multiple Agency Structure

The Division of Workers' Compensation (DWC) is part of the Texas Department of Insurance (TDI). Both TDI and DWC have commissioners appointed by the Governor. Eleanor Kitzman is the Commissioner of TDI and the Commissioner of DWC is Rod Bordelon.

2) Hearing Process –

a. Time to hearing

Pursuant to 28 Texas Administrative Code Section 142.6, DWC must set a CCH no later than 60 days from the date of the BRC or, if DWC determines that an expedited setting is appropriate, no later than 30 days from the date of the BRC.

b. Number of hearings per judge

This tends to vary depending on volume. Typically, hearing officers are assigned to hear two to three CCHs per day.

c. Use of Discovery

28 Texas Administrative Code Section 142.13 contains rules guiding discovery in CCHs. Discovery includes, according to 28 Texas Administrative Code Section 142.13(a):

- (1) parties' exchange of documentary evidence;
- (2) interrogatories, as prescribed by §142.19 of this title (relating to Interrogatories); and
- (3) witness depositions, as follows:
 - (A) a health care provider may be deposed only on written questions; and
 - (B) other witnesses may be deposed within their county of residence or employment, orally or on written questions, if the hearing officer determines the party has good cause to request such testimony.

Pursuant to 28 Texas Administrative Code Section 142.13(f), a hearing officer may grant additional discovery upon a showing of good cause at a hearing held for that purpose.

According to 28 Texas Administrative Code Section 142.13(a), if evidence is not produced voluntarily, the party may request a subpoena, as provided in 28 Texas Administrative Code §142.12.

Per 28 Texas Administrative Code Section 142.13(c)(1) and (c)(2), "Parties' exchange of documentary evidence.

(1) Except as provided in subsection (g) of this section, no later than 15 days after the benefit review conference, parties shall exchange with one another the following information:

- (A) all medical reports and reports of expert witnesses who will testify at the hearing;
- (B) all medical records;
- (C) any witness statements;

(D) the identity and location of any witness known to have knowledge of relevant facts; and

(E) all photographs or other documents which a party intends to offer into evidence at the hearing.

(2) Thereafter, parties shall exchange additional documentary evidence as it becomes available.”

d. Admissibility of Medical Reports

Pursuant to Texas Labor Code Section 410.165(b), a hearing officer shall accept all written reports signed by a health care provider. Therefore, subject to the timely exchange rules of 28 Texas Administrative Code Section 142.13(c)(1), (c)(2), and (g), medical reports are admissible.

e. Awards and their structure

Following a contested case hearing, the DWC Hearing Officer issues a written Decision and Order (D&O). The D&O follows a standard format, which includes findings of fact and conclusions of law.

f. Use of Mediation

In most circumstances prior to proceeding to a CCH, parties must go through a BRC, which is a mediation process. Parties are limited to two BRCs before proceeding to a CCH. At the conclusion of a BRC, the benefit review officer prepares a written report outlining the disputed issues and indicating whether any issues were resolved. The undisputed issues are sent up to a CCH for resolution.

3) Appellate Process –

a. Levels of review

The DWC Appeals Panel reviews indemnity CCH decisions of DWC Hearing Officers. The next step after the Appeals Panel is District Court. Pursuant to Texas Labor Code Section 410.205(b), a decision of the Appeals Panel that is appealed for judicial review is binding on the parties during the pendency of the appeal in judicial review. Decisions arising out of contested case hearings in medical necessity and medical fee matters are appealed directly to District Court.

b. Standard of review

Most cases are reviewed in court under a modified de novo standard. See Texas Workers’ Compensation Comm’n v. Garcia, 893 SW 2d 504 (Tex. 1995). Issues other than compensability of the injury, eligibility for income and death benefits and the amount of those benefits are reviewed without a jury under the substantial evidence test (see Garcia, above).

c. Volume of cases appealed

According to DWC statistics, in Fiscal Year 2011 (September 1, 2010 through August 31, 2011), there were 2,050 appeals filed with the Appeals Panel from CCHs. Thus far (from September 1, 2011 through June 30, 2012) in Fiscal Year 2012, there have been 1,965 appeals filed with the Appeals Panel. In Fiscal Year 2011, 162 appeals to District Court of Appeals Panel Decisions were filed. So far in Fiscal Year 2012 (from September 1, 2011 through June 30, 2012), 147 appeals have been filed in District Court of Appeals Panel Decisions.

4) Settlement Process –

a. Permitted?

Yes, but they are limited under Texas Labor Code Sections 408.005 and 410.256.

Under the “new” workers’ compensation law (i.e., the 1989 Texas Workers’ Compensation Act), settlements are permitted. Settlements may not provide for payment of income benefits in a lump sum except for future impairment income benefits in certain cases.

b. Settlement of medical allowed?

Not under the “new” workers’ compensation law (i.e., the 1989 Texas Workers’ Compensation Act), which applies to dates of injury on and after January 1, 1991. “New law” settlements are limited to specified future income benefits only, not medical benefits.

c. Review required

1. Criterion of approval,

Texas Labor Code Section 408.005 and 410.256 specify criteria for agency and/or court approval of a proposed settlement.

2. Types of settlements

Settlements may involve medical and/or income benefits, though, as written above under 4b, settlements of medical benefits are not permitted under the “new law” in Texas (for dates of injury on and after January 1, 1991).

5) Judges and ALJs

a. Hired v. appointed

Hearing Officers and Appeals Panel Judges are hired by TDI-DWC and are at-will employees of TDI-DWC. Both Hearing Officers and Appeals Panel Judges are required to be licensed to practice law in the state of Texas. There is no civil service component to these positions.

b. Evaluated

Hearing Officers are evaluated based on performance on a yearly basis for such criteria as knowledge of work, work quality, communications, etc.

c. Continuing ed requirements

There are no formal CLE requirements for DWC Hearing Officers and Appeals Panel Judges in the Texas Workers' Compensation Act or Rules, but all Texas lawyers must complete a minimum number of CLE hours annually in order to maintain their licenses to practice law.

d. Territories

There are currently 22 TDI-DWC Field Offices located throughout the state of Texas. In most of the offices, a Hearing Officer is permanently assigned to hear cases in that office. There are also 2 satellite offices (located in Uvalde and Mount Pleasant) where office space is leased for TDI-DWC hearings purposes, but no other TDI-DWC agency business is conducted.

e. Numbers

There are currently 31 Hearing Officers with DWC Hearings, 4 of whom are traveling Hearing Officers who travel into the field as needed to hear CCHs. There is a Hearing Officer Manager assigned to the TDI-DWC central location in Austin. The current head of the DWC Hearings department is the acting Deputy Commissioner for Hearings.



VIRGINIA

1) Agency make-up/structure

a. Commission Structure

The Virginia Workers' Compensation Commission is an independent, self-funded state agency which processes all workers' compensation claims and monitors compliance with workers' compensation insurance requirements in the Commonwealth of Virginia. Funding comes from a tax imposed by the Commission annually on workers' compensation insurance premiums and on self-insured employers. The Commission does not fall under the Executive branch of government. The Commission is headed by three Commissioners who are elected to six-year terms by the state legislature. The Commissioners select one of them to serve as Chairman for three year terms. The full Commission exercises regulatory authority, establishes policy for the entire agency and is the definitive appellate body within the Commission. The Chief Deputy Commissioner manages the judicial aspects of the agency while the Executive Director manages the various administrative departments.

The Commission hires the Deputy Commissioners, who are the trial level judges, and the Chief Deputy Commissioner. The Judicial Division adjudicates all disputes arising in workers' compensation cases, including disputes between medical providers and insurers over the cost of medical services, and enforcement actions regarding employers' failure to maintain workers' compensation insurance. The Judicial Division also adjudicates claims made against the Birth-Related Neurological Injuries Compensation Program, and appeals of decisions of the Criminal Injuries Compensation Fund. A number of deputy commissioners are certified as mediators by the Supreme Court of Virginia and conduct mediations of certain disputed cases.

The Claims Services Department processes and administers new claims and applications, processes agreement forms that result in the issuance of awards, and

monitors existing claims and awards. The Claims Services Department determines whether claims, Employer's Applications for Hearing, and medical providers' applications are properly filed; attempts to resolve disputed issues without a formal hearing if possible; determines whether contested matters require evidentiary hearings or involve issues that can be resolved on the record and without a full evidentiary hearing, and refers those disputed cases to the appropriate hearing docket. The Department also monitors payment information submitted electronically by employers and insurers and determines whether such payments are consistent with previously entered awards. When payment information is received in cases where there is not an outstanding Award or a pending claim, the Claims Services Department will contact the parties to seek the filing of agreement forms so that an Award may be issued.

The Quality Assurance Department is responsible for administering and enforcing the Commission's data interchange and electronic filing requirements. The Quality Assurance Department monitors accident reports and benefit payment information filed electronically by insurers and self-insured employers via EDI or the Commission's WebFile system, and acts to ensure data quality and accuracy.

The Insurance Department determines whether an employer against whom a claim has been made has workers' compensation insurance coverage for the injury or occupational disease claimed. The department also monitors whether employers in Virginia who are required to maintain insurance under the Act do so, and institutes corrective action against those employers who do not.

b. Multiple Agency Structure

Virginia does not have a multiple agency structure for workers' compensation with the exception that the Virginia State Corporation Commission regulates workers' compensation insurance products (rates, etc.).

2) Hearing Process –

a. Time to hearing

With the exception of disputes that qualify for an expedited hearing under Commission Rule 2.3, there are no time frames specified by statute or formally adopted rule or regulation. Upon receipt and initial processing of a claim, the Claim Services Department will issue an Order to the employer/insurer requiring that it identify its position with respect to the claim within 20 days. If the response indicates that the claim is disputed or if there is no response, the claim will be referred to the appropriate docket for adjudication. Current Commission policy generally requires that cases referred to the evidentiary hearing docket be set for a hearing to be conducted within six months from the referral date. The Commission's goal is for all disputed cases to be heard within three to four months from referral and for decisions to be issued within 21 days after the record

is closed. The Commission does not use centralized docketing procedures. Rather, each Deputy Commissioner's office is responsible for scheduling and setting his or her own dockets.

Change in condition claims and other disputes not involving initial compensability that the Claims Services Department determines do not require a full evidentiary hearing are referred to a Deputy Commissioner for an on-the-record adjudication. Upon such referral there is a 25-day briefing period during which the parties are required to submit written position statements concerning the disputed issues, after which the record is closed and the dispute proceeds to a decision.

An employee may request an expedited hearing under Commission Rule 2.3 for certain disputes not involving initial compensability. To qualify for an expedited hearing, the employee must demonstrate that he or she will be caused to suffer severe economic hardship without an expedited proceeding to determine the merits of the dispute or that disputed medical treatment must be performed on an emergent basis and failure to do so will threaten the employee's life or result in immediate and severe deterioration of the employee's physical or mental condition. Expedited hearing requests are referred to a Deputy Commissioner who will schedule an informal conference with the parties, typically by telephone, and determine if the request qualifies for an expedited hearing. If a disputed case is found to qualify it must be set for a hearing to occur no less than 10 days and no more than 28 days after being granted. A decision must be rendered within 14 days after the record is closed.

b. Number of hearings per judge

In general, Deputy Commissioners are assigned 500 to 600 cases for hearing per year, about half of which actually result in a hearing. They are expected to conduct hearings on at least 8 days each month. The number of cases heard per day varies based on the length of time needed for each hearing, but each established docket generally starts with 6 to 12 scheduled cases.

c. Use of Discovery

By statute (Va. Code Sec. 65.2-703) and Rule (Commission Rule 1.8), parties are permitted to propound interrogatories and requests for admission and production of documents; may take the deposition of parties and physicians without leave of the Commission and of other witnesses with leave of the Commission; and may request subpoenas for witnesses or documents. A party's failure to respond to or cooperate with discovery may result the imposition of sanctions, including the striking of evidence or the dismissal of the pending claim. Discovery is permitted in any case where a claim is pending or an award exists, regardless of whether such case is on a docket pending adjudication of a dispute.

d. Admissibility of Medical Reports

Medical records and reports are admissible without authentication. Per Commission Rule 2.2(B)(2), “Reports and records of physicians and reports of medical care directed by physicians may be admitted in evidence as testimony by physicians or medical care providers. Upon timely motion, any party shall have the right to cross-examine the source of a medical document offered for admission in evidence.” Rule 2.2(B)(3) requires parties to specifically designate medical reports and records to be received into evidence, which requirement is generally waived for pro se claimants.

e. Awards and their structure

Decisions are issued in the form of written opinion, which typically include a procedural history of the case, a description of the present proceeding, the defenses, an evidentiary summary, the issues presented, findings of fact and conclusions of law and an award or denial of benefits. Deputy Commissioners are permitted to issue decisions from the bench provided they state the basis for the decision on the record and ratify it by summary written opinion.

f. Use of Mediation

Mediation is voluntary and any disputed issue may be mediated with the exception of initial compensability. Mediations are conducted by Deputy Commissioners who are certified mediators. Parties are offered a choice between either a neutral facilitative mediation approach or a neutral evaluative mediation approach. An overwhelming majority of parties seeking mediation choose the latter and most mediations result in a full and final settlement of the claim.

3) Appellate Process –

a. Levels of review

Parties have an appeal of right (a “Request for Review”) of a Deputy Commissioner’s trial-level decision to the full Commission. The three Commissioners sit as a panel on all appeals. Where a Commissioner has a conflict or when otherwise designated, the Chief Deputy Commissioner or a Deputy Commissioner will sit in place of a Commissioner on the appeal panel. Parties have a further appeal of right of full Commission decisions to the Virginia Court of Appeals. Decisions of the Virginia Court of Appeals in workers’ compensation cases may be appealed to the Supreme Court of Virginia, but such appeal is by writ and is not of right.

b. Standard of review

The full Commission has authority to hear a case on appeal *de novo*, but Commission Rule 3.1 provides that “a request for review should assign as error specific findings of fact and conclusions of law.” The Commission will generally defer to a Deputy Commissioner’s credibility determinations unless clearly contrary to the evidence. The Commission’s findings of fact are conclusive and binding on appeal to the Court of Appeals if supported by credible evidence.

c. Volume of cases appealed

Approximately 20% of trial-level decisions are appealed to the full Commission and approximately 15% of full Commission decisions on review are appealed to the Court of Appeals. In 2011, 1392 cases were referred to the full Commission for review and 158 cases were appealed to the Court of Appeals.

4) Settlement Process –

a. Permitted?

Yes.

b. Settlement of medical allowed?

Yes.

c. Review required

1. Criterion of approval,

All settlements must be reviewed and approved by a Deputy Commissioner who may approve the proposed settlement only if he “...is clearly of the opinion that the best interests of the employee or his dependents will be served thereby.” (Va. Code Sec. 65.2-701).

2. Types of settlements

Most settlements are lump sum, full and final settlements of all benefits to which the employee may be entitled. However, settlements can take many other forms, and may include provisions keeping medical benefits open for limited periods of time or for certain treatments and procedures, annuities and other forms of structured settlements and Medicare set-aside provisions.

5) Judges and ALJs

a. Hired v. appointed

The three Commissioners are elected by the state legislature to six-year terms. The Commissioners hire the Deputy Commissioners, who are at will and serve at the pleasure of the Commission. They do not have a term.

b. Evaluated

There is no formal evaluation or performance assessment system for Deputy Commissioners. The Chief Deputy Commissioner monitors performance and productivity of the Deputy Commissioners on an on-going basis and makes recommendations to the Commission for corrective action if necessary.

c. Continuing ed requirements

None. Commissioners and Deputy Commissioners are issued judicial licenses by the Virginia State Bar and no one with such a license (including the judges of all civil courts) has a CLE requirement.

d. Territories

The Commission's main office is in Richmond and it maintains Regional Offices in Fairfax, Harrisonburg, Lebanon, Manassas, Roanoke and Virginia Beach. In addition, the Commission conducts hearings in 21 satellite locations throughout the state. The Chief Deputy Commissioner assigns Deputy Commissioners to one or more territories which assignment is reviewed annually and may vary from year to year. Ideally hearings will be held in the county or city where the work accident or in a contiguous county or city.

e. Numbers

The number of Deputy Commissioners is determined by the Commission and is not established or limited by statute, rule or regulation. Currently there are 21 Deputy Commissioners plus the Chief Deputy Commissioner.