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WILL WE NEED A DEPOSITION?

WHAT EXACTLY IS A DEPOSITION?

A deposition is sworn testimony of a witness, most commonly the applicant in a litigated workers' compensation case. Deposition testimony is taken before a court certified stenographer, and the testimony given is in response to questions posed by one or more attorneys representing parties to the litigation. In a workers' compensation case, the deposition is commonly taken by one or more of the defense attorneys in the case.

WHY SHOULD WE WANT ONE?

There are any number of reasons why a deposition may be helpful to the process of discovery and the ultimate resolution of issues in a workers' compensation case. The most common reason depositions are sought is to discover basic information which a claims examiner needs in order to make reasoned determinations regarding a host of potential issues. In a typical civil case, this type of discovery is usually accomplished early in the discovery stage by means of written questions and written answers called *interrogatories*. This may be supplemented later by other forms of

written discovery such as a "*Request for Admissions*."

The avenues of discovery open to litigants in compensation cases is much more limited than in civil matters, and the deposition of the injured worker provides the quickest and most direct avenue of discovery on factual matters that will shed light on such matters as earnings, job duties, the claimed mechanism of an injury, the existence of prior injuries and impairments, the identity of potential witnesses, claimed impairments, and the identity and location of medical providers both concurrent with and prior to the injury in question.

Depositions of injured workers are not always appropriate, and some consideration must be given to an expected goal for the undertaking. Much will depend on the factual circumstances of the claim. In an obvious admitted multiple fracture case involving a 21 year old roofer who fell off a roof, there may be no likely benefit in a fact finding deposition early in the case. On the other hand, a 58 year old construction worker with a continuous trauma claim to the back may

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offer the potential of a rich medical history that could give rise to medical facts and records supporting an apportionment of permanent disability, and possibly even the joining of additional defendants.

Injured workers are not the only potential subjects for deposition. Probably the second most common deponent in a workers' compensation case is a QME or AME and possibly even a treating physician. Doctors are deposed so that gaps in the medical record can be "filled in" and, where desired, testimony can be strengthened (or weakened) in support of disability or apportionment. While it is often suggested that these goals be accomplished by means of written interrogatories to the doctor (a much less expensive procedure) often the questions go unanswered or partially answered, leaving the parties further down the road and still needing further testimony from the physician. The subject of suitable goals for a doctor deposition and the techniques that may be employed is beyond the scope of this article but may be explored in a future edition of *Legal Briefs*.

Sometimes, there is concern that valuable witness testimony may be lost due to the fluid nature of the workforce in a particular industry (car dealerships and agriculture are prime examples) or because of health concerns involving a particular witness. If the testimony is crucial, consideration should be given to deposing the witness to preserve the testimony in case that witness is legally unavailable or cannot be located at time of trial.

WHEN SHOULD WE WANT ONE?

The answer to this question is closely tied to the reasons why a deposition is to be undertaken. In the most common situations, depositions should be done early in the development of the case

since the goal is to accomplish basic discovery, locate medical records and identify potential witnesses. The same holds true in situations where depositions are done to preserve testimony.

In some cases, initial medical reports may provide a rich history with enough details to identify the existence and probable location of other records that will reflect on such issues as causation and apportionment. In such cases, it is usually better to obtain the records before a deposition is undertaken, as these documents will help your counsel focus the course of questioning.

If enough information can be developed through investigation and records to suggest that the claim be contested or that apportionment is a considerable factor, a deposition in the later stages of discovery may be helpful to "lock in" the applicant's story. This may be extremely useful for your counsel, who may use the deposition testimony to impeach the credibility of the applicant at trial when trial evidence belies the deposition testimony, or when a less than credible witness changes his story when testifying before a judge.

WHAT ARE THE BASIC RULES?

Normally a deposition is undertaken either in the office of defense counsel or in the office of applicant's counsel, by agreement. A shorthand court reporter is present who records everything said on the deposition record, and then it is reproduced in the form of a deposition booklet. The Code of Civil Procedure outlines the custodial rules and rules for review and subsequent changes to the testimony, but in most instances in a Workers' Compensation case the parties agree to waive the formal rules, and the original transcript is left in the custody of the attorney who took the deposition. The deposition

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witness will be provided a copy and time (usually 30-45 days) to review and sign the booklet under penalty of perjury, and to make any changes or additions to the testimony the witness feels should be made for the sake of accuracy.

Unlike testimony at trial which is subject to certain basic evidentiary rules, deposition questioning can be rather far reaching. Objections may be lodged for the record to potentially prevent the answers from coming into evidence at trial, but only in rare instances will a witness be admonished not to answer a question. If a crucial dispute breaks out over non-cooperation of a deposition witness, the procedural law provides a means whereby the deposition can be adjourned and re-convened at a later date before a judge.

WHAT WILL IT COST?

Labor Code 5710 provides that when the injured worker is deposed, the attorney for the injured worker is entitled to reasonable attorney fees including preparation time spent with the applicant prior to the deposition, and travel time. LC 5710(b)(4) gives the judge the discretion to set the hourly rate, but in practice the Presiding Judge at each regional office typically provides guidelines to the local practicing community. These rates often vary by locale and may reflect, to some extent, the local costs of doing business.

In November, 2007 Presiding Judge Susan Hamilton of the San Francisco regional office issued guidelines which provided a sliding scale of hourly rates, depending on years of experience of applicant's counsel. The low end, for attorneys of 1-3 years of experience, was \$175-\$200 per hour. For experienced attorneys with 15 years or more of experience, \$350 per hour was recommended. In Orange County, experienced lawyers are currently requesting and receiving up to \$300 per hour.

Requests for preparation time vary, but usually one-half hour to 45 minutes is considered normal, and up to an hour for complex cases or difficult deponents. Travel time is paid at the full hourly rate.

Payment of fees should be made within 30 days of receipt of the fee request. The defendant has the right to object to some part of the request, pay what is not disputed, and have a judge determine the balance. However, in many circumstances the cost of such a dispute may exceed the amount of the disputed fee, so careful consideration should be given before deciding on this course of action. When possible it is recommended that counsel attempt to agree on a fee before the deposition adjourns.

Note that LC 5710 only applies when injured workers are deposed. If the deposition is of a doctor, the doctor will request advance payment of one hour of expert witness fees, but the applicant's counsel will not recover attorney fees. Court reporter time and the costs of the deposition transcripts is payable by the defendant.

As you can see, depositions are likely to be expensive. Careful consideration therefore should be given to whether, and when, a deposition will be of benefit to your case.

Article by Howard Stevens, Orange Office

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