



Workers' Compensation Report

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Commission Issues Proposed Amendments to Rules of Practice

The Workers' Compensation Commission recently issued proposals for amendments to its rules of practice. *2016 Illinois Register: Rules of Governmental Agencies*, ILL. SEC. OF STATE, vol. 40, issue 31, pp. 10149-10311 (July 29, 2016), available at https://www.cyberdriveillinois.com/departments/index/register/register_volume40_issue31.pdf. In reviewing the proposals, it is apparent that many of the changes were in order to update archaic, outdated rules. In fact, the Workers' Compensation Commission, in the introduction to the Notice of Proposed Amendments, admits that many rules are being amended to reflect today's practice and the implementation of an electronic database at the Commission. However, several proposed changes to the rules governing practice before the Workers' Compensation Commission are regarding pre-arbitration, arbitration, and settlement and should be given some attention. The Notice of Proposed Amendments was made public and published in the Illinois Register.

Pre-Arbitration

Proposal for amendment to section 9020.10 includes exclusion of all *ex parte* communication. This includes Applications for Adjustment of Claim, Attorneys' Appearances, Motions and Petitions for Review, and correspondence. In today's practice, all email communication with the Workers' Compensation Commission arbitrators, commissioners, or assistants should include a carbon copy to opposing counsel.

Section 9020.20 is being amended to include language requiring proper completion of an Application for Adjustment of Claim. The applications must now be completed in full when filed with the Commission. In practice, many applications are filed with such terms as "to be determined." It remains to be seen whether this would qualify as proper completion under section 9020.20. In practice, if the Commission does not reject the application at the time of filing, a motion to dismiss the application may be reasonable to enforce this rule and require strict compliance. The existence of a "motion practice" before the Illinois Workers' Compensation Commission is controversial to the petitioner's bar.

Section 9020.30 is being amended to require an attorney representation agreement to accompany an appearance filed by a petitioner's attorney. The amendments to this section also allow subsequent counsel to file a motion for substitution of counsel supported by a properly executed attorney representation agreement. The motion for substitution will then be set for hearing before the arbitrator. In practice, this should streamline any substitutions when there is a lack of cooperation between counsel. The arbitrator, upon a showing of proper notice to all parties and attorneys of record, may grant the motion for substitution.

The proposed amendment to section 9020.40 would allow the Commission the ability to refer individuals to the Attorney Registration & Disciplinary Commission (ARDC) for unauthorized practice of law. Representation of a party



before the Commission is limited to attorneys licensed to practice in the State of Illinois or attorneys licensed to practice in states other than Illinois with leave of the Commission. Arbitrators and Commissioners would have the ability to report any indiscretions to the ARDC for investigation.

Section 9020.50 is being amended to allow the Commission discretion to set a venue for a claim based on balancing an arbitrator's caseload. Currently, in the downstate venues, there are three arbitrators that rotate over a three-month period. The Commission would have increased discretion to assign matters to equalize caseloads.

The amendment to section 9020.60 requires that the monthly status calls be conducted by an arbitrator, not an individual designated by the Chairman. This should preclude staff attorneys or other staff members at the Commission from conducting status hearings. In practice, this should increase efficiency, as other various staff members do not have power to hear motions and enter orders.

Section 9020.70 is being amended to indicate that a notice of motion and order not accompanied by the motion shall be stricken. Further, section 9020.70 is being amended to clarify the time of notice prescribed in section 9020.70(b)(1)(A). Specifically, for all motions except petitions for immediate hearing and motions requesting a date for trial, service shall be effected five days preceding the day of the status call. If the pleading is mailed, the copy of the notice and supporting papers needs to be deposited in the post office at least ten days before the motion is to be heard. In instances of petitions for immediate hearing and motions requesting a trial date, service remains at 15 days preceding the status call date.

The amendment to section 9020.90 includes language that contested petitions to reinstate shall have a record made of the hearing. Further, the amendment now allows the respondent to file a response to a petition to reinstate; however, there is no requirement to do so.

Arbitration

Section 9030.10 is being amended to allow the Commission to assign cases on a random basis. The prior rule required a computer program to assign cases randomly. The Commission would now be able to assign cases. Further, when a petitioner files multiple claims, the subsequent claims are to be assigned to the arbitrator of the claim first filed. Previously, the new filings were randomly assigned by the computer program and rarely ended up with the same arbitrator. The proposed amendment does allow the parties to oppose such an automatic assignment together based upon a showing of good cause. Motions to consolidate multiple claims are to be heard by the arbitrator assigned to the earliest filed claim. The arbitrator assigned to the earliest filed claim would likely be the arbitrator receiving the assignment of the later filings. Additionally, this section proposes to include language that the arbitrator retains the case when it has been dismissed or otherwise closed and subsequently refiled. This should dissuade arbitrator shopping.

The amendment to section 9030.20 will clarify that any party has the opportunity to set a case for trial at the monthly status call. Further, the time for the parties to appear is now between 8:45 a.m. to 9:30 a.m., an extension from 9:15 a.m. The arbitrator is able to establish the order in which cases shall proceed to hearing. The proposed amendment will also now eliminate the mandatory requirement for bifurcated cases to conclude within three months after the first hearing. It does remain advisory, however.

The amendment to section 9030.50 will no longer require personal service of a subpoena. The amended language only requires service of a subpoena. Parties should pay the statutory fee and travel expense. In order to enforce a subpoena against anyone failing to comply, an application to the circuit court shall be served on the opposing party with a copy of

the subpoena and proof of service. The moving party shall then notice the application for a hearing before the assigned arbitrator pursuant to 9020.70.

Section 9030.60 is being amended to allow the Commission to hold a hearing and issue a *dedimus potestatem* order if there is no agreement as to a deposition. The opposing party is allowed an opportunity to object to the issuance of the *dedimus potestatem*. Again, the amendment clearly states that a *dedimus potestatem* order is used only in instances where the parties do not agree. There is no need for this to be a routine motion practice.

Section 9030.70 is being amended to state that the Illinois Rules of Evidence apply to proceedings before the Commission, Arbitration or Review, unless they conflict with the Workers' Compensation Act or the Workers' Occupational Disease Act.

Section 9030.80 deals with proposed decisions. It is the arbitrator's discretion whether to require parties to prepare a proposed decision or a brief within 14 days of closing proofs. Further, an arbitrator's written decision should now include a statement of the requirements for perfecting a review. The rule is being amended to state that proposed decisions are not considered admissions and are not part of the record.

With regard to requirements for perfecting a review, section 9040.10(a)(1) is being amended to allow the filing of petitions for review electronically. It remains to be seen when the Commission will have the technology to do so, however. The authenticated transcript can be filed in person, by mail, or by any manner provided by the Commission as set forth in the notice of the return date on review. If the Commission later has capabilities for electronic filing, this could be available with a simple change in the notice of the return date on review. If a party chooses to file the transcript by mail, timely filing is shown by the date applied by the U.S. Postal Service, not the party, to the envelope in which the transcript is received by the Commission at least two calendar days prior the return date on review. In practice, the best way to confirm compliance is still filing in person at the Commission.

Section 9040.40 concerns review hearings. The proposed amendment eliminates the opportunity to offer additional evidence. Additionally, at the time of filing the statement of exceptions, a party is allowed to file five interrogatories in which they would like the Commission to make a special finding upon questions of law or fact.

Section 9040.60 is being amended to allow for a continuance of oral argument or extensions for filing statement of exceptions only when good cause is shown.

The amendment to section 9040.70 will allow any party that files a review to file its own statement of exception(s), as well as a response, regardless of who filed first. The statement of exception(s) is to be filed within 30 days from the return date on review with the response filed within 15 days from the last day allowed for the filing of the statement of exceptions. All written briefs should be no more than 20 pages or contain no more than 5,200 words, whichever is greater. While brevity is key, the amendment proposed does not preclude parties from petitioning the Commission for an extension necessary for complex matters.

Settlement Contracts and Lump Sum Petitions

Section 9070.10 requires that settlement contracts be filed in quadruplicate. However, in instances of consolidated matters, only one additional copy needs to be provided for each additional case number listed on the settlement contract. The proposed amendments require that the settlement contract be accompanied by the attorney representation agreement, if not previously filed. This amendment may make it more difficult for respondents to present settlement contracts in matters where the petitioner is represented.



About the Authors

Bradford J. Peterson is a partner in the Rockford office of *Heyl, Royster, Voelker & Allen, P.C.* Mr. Peterson concentrates his practice in the defense of workers' compensation, construction litigation, auto liability, premises liability, and insurance coverage issues. In recent years, Mr. Peterson has become a leader in the field on issues of Medicare Set Aside trusts and workers' compensation claims. He has written and spoken frequently on the issue. He was one of the first attorneys in the State of Illinois to publish an article regarding the application of the Medicare Secondary Payer Act to workers' compensation claims, "Medicare, Workers' Compensation and Set Aside Trusts," *Southern Illinois Law Journal* (2002).

Lynsey A. Welch, a partner in the Rockford office of *Heyl, Royster, Voelker & Allen, P.C.*, and dedicates a significant portion of her practice to the defense of workers' compensation cases. She has authored a variety of articles on Workers' Compensation law and Workers' Compensation appeals. Ms. Welch is a graduate of Northern Illinois University College of Law and she received her undergraduate degree from the University of Illinois.

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