

The following document is offered to PBI faculty as a sample of good written materials.

We are proud of the reputation of our “yellow books.” They are often the starting point in tackling a novel issue.

From Handling the Workers’ Compensation Case

PBI Course #7268

Published March 2012

Copyright 2012 PBI and the author. All rights reserved.

Part B

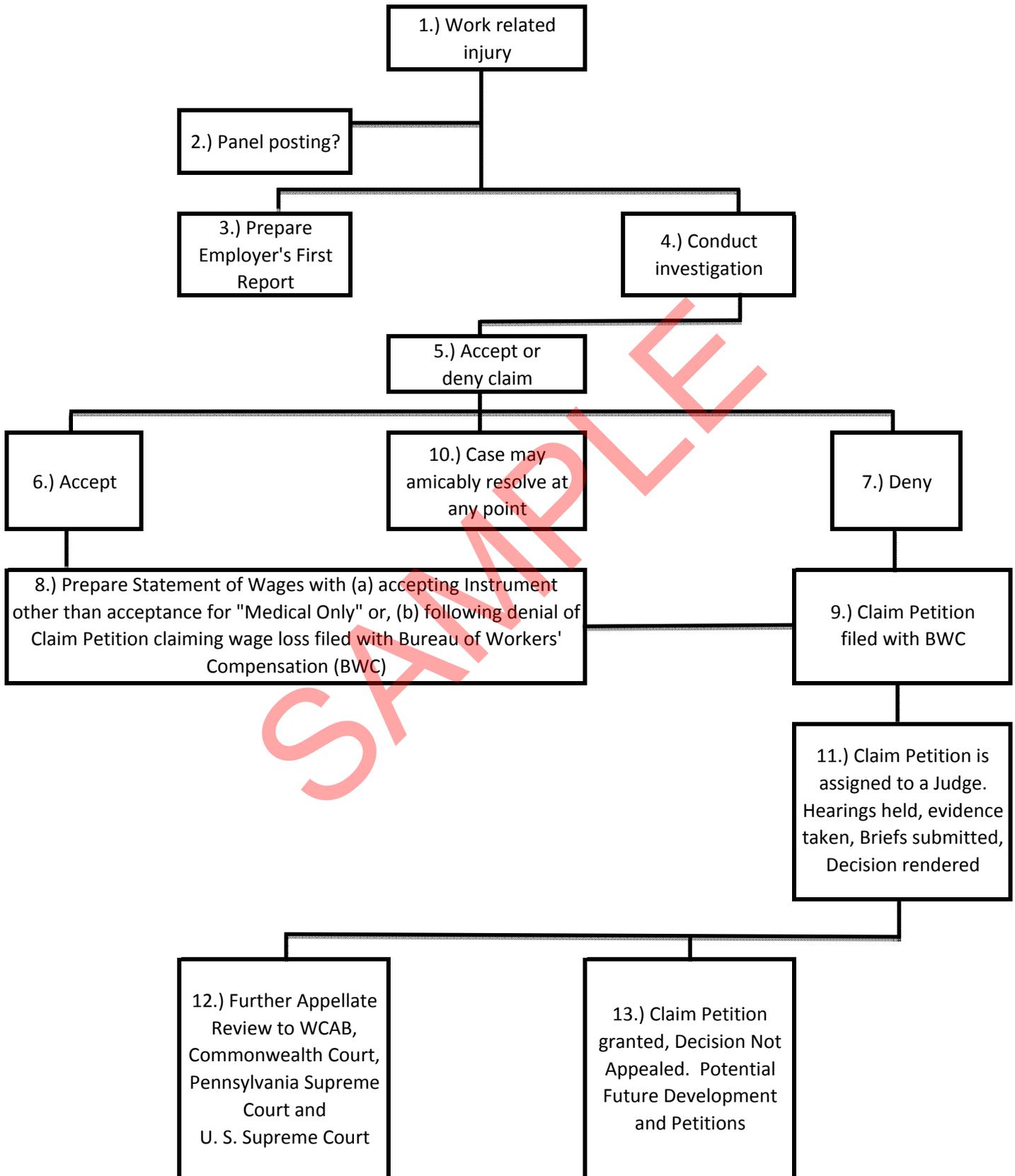
Appendix Two:
**Pennsylvania Workers' Compensation
Flowchart & Guidelines**

Jeffrey D. Snyder, Esq.
The Chartwell Law Offices, LLP
Valley Forge

SAMPLE

Pennsylvania Worker's Compensation Flowchart

This is a general overview. Box numbers below correspond to appended numbered Guidelines which should be utilized in conjunction with this Flowchart.



SAMPLE

Guidelines:

For use with Pennsylvania Workers' Compensation Flowchart

1. Work related injury (also see #4 below regarding the investigation of a claim).

- Was the injury incurred in the scope of employment?

An employee is generally considered to be within the scope of employment when (1) furthering the business interests of the employer or (2) otherwise is on premises and is required to be on premises and is injured due to a condition of the premises or by business of the employer being conducted on those premises. (*WCAB (Slaughaupt) v. U. S. Steel Corp.*, 376 A.2d 271 (Pa. Cmwlth., 1977))

- Is the claimant potentially an illegally employed minor?

A minor is someone under the age of 18. A minor performing illegal work and injured in the scope of employment is entitled to an enhancement of 50% of the compensation rate. The enhancement may not be paid by the carrier – it must be paid by the employer. In such a circumstance, the employer needs to be made aware of the issue and asked to consider the retention of separate legal counsel for its uninsurable interest. (*Section 320 of the Pennsylvania Workers' Compensation Act (WCA)*)

- Is the employment relationship "casual"?

Casual employment is excluded from coverage under the WCA. The term casual does not refer to irregularity of service alone, the work activity also must be incidental to the employer's ordinary mission. (*Section 104 WCA*)

- Is there a traveling employee situation or injury in a parking lot?

For traveling employees, the test is whether the employee is furthering the business of the employer. Any deviation from employment must be substantial to interrupt scope of employment.

Parking lot cases typically involve an interpretation of "premises".

Issues of deviation from employment as a traveling employee and parking lot issues tend to be quite fact sensitive and often require an expert legal opinion as to potential compensability.

- Was the claimant commuting?

For a non-traveling employee in particular, going to and from work is considered commuting and not covered under the WCA. Exceptions allowing coverage may include a roaming employee, reimbursement for the 'commute', special assignment and/or otherwise furthering the business of the employer at the time. (*Peterson v. WCAB (PRN Nursing Agency)*, 597 A.2d 1116 (Pa., 1991))

- Is the claimant a temporary employee placed by a third party? An independent contractor?

Temporary employees are classified if applicable as 'borrowed employees' under the PWA. The 'borrowing' is necessarily from a third party which is typically an employment agency or the like. The issue to be resolved is which entity actually or constructively directs and controls the employee. The more skilled the employee, the less likely that there is on premises direction and control. (*Accountemps v. WCAB (Meyers)*, 548 A.2d 703 (Pa. Cmwlth., 1988))

- Did the injury physically happen in Pennsylvania? If not, is there extra-territorial jurisdiction?

The WCA allows coverage for injuries physically occurring in Pennsylvania as well as for injuries physically occurring outside Pennsylvania, the latter under certain circumstances. Jurisdiction over injuries occurring outside Pennsylvania is called extra-territorial jurisdiction which is also referred to as long arm jurisdiction. Extra-territorial jurisdiction attached where the employment is principally localized in Pennsylvania or the employee is working under a contract of hire made in Pennsylvania and:

(1) the employment is not principally located in any State, or

(2) the employment is principally localized in another State where the employee does not have workers' compensation coverage or

(3) the employee is working under a contract of hire in Pennsylvania and works outside the U. S. or Canada. (*Section 305.2 WCA*)

- Is there a notice and/or statute of limitations defense? Is the issue one of alleged cumulative trauma?

There is a seven (7) day waiting period for wage loss benefits. If appropriate time, place and manner notice of a work injury – to an immediate supervisor or agent of the employer - is given within twenty one (21) days of the injury wage loss benefits are payable retroactively to day one if there are more than fourteen (14) days of lost time, and if less than fourteen (14) days of lost time payable from day eight (8). If such notice is not given within twenty one (21) days, wage loss benefits are not payable prior to the date of notice. If such notice is not given within one hundred twenty (120) days, the claim is barred. Medical records are often considered adequate notice. A discovery rule sometimes applies to the one hundred twenty (120) day requirement. Notice must include a reasonable description of the mechanism of injury (*Gentex v. WCAB (Morack)*, 975 A.2d 1214 (Pa. Cmnlth., 2009)).

In cases of cumulative trauma, the date of injury is typically fixed as the last day of work, or sometimes the date of diagnosis (for notice purposes) and the notice period runs accordingly. (*Sections 311, 312, 313 WCA; City of Philadelphia v. WCAB (Williams)*, 851 A.2d 838 (Pa., 2004))

- Are there defenses such as personal animosity, intoxication, and/or violation of positive orders of the employer or violation of law?

Personal animosity exists where an employee is injured because of who they are, not what they are. If anyone in the claimant's position would have been injured (e.g., a robbery), the matter is potentially compensable. (*Section 301 WCA; M & B Inn Partners v. WCAB (Petriga)*, 940 A.2d 1255 (Pa. Cmnlth., 2008))

Intoxication may be a defense where there is a causal connection between the intoxication and the injury. (*Section 301 (a) WCA*) The same causal connection is required where there is a violation of law, except for summary offenses alone which are not a bar. (*Burns v. WCAB (State Pipe)*, 654 A.2d 81 (Pa. Cmnlth., 1995))

Violation of positive orders of the employer means that the employee has so far deviated from employment and the employer's instructions that the employee is essentially a trespasser removing the employee from the scope of employment. (*Sysco Food Services of Philadelphia v. WCAB (Sebastiano)*, 940 A.2d 1270 (Pa. Cmnlth., 2008))

- Is there a definite (medical) causal connection between event(s) at work and the claimed injury? Remember: in Pennsylvania the aggravation of a pre-existing condition resulting in a substantial and material change is treated as a new injury with a baseline.

Examine what the medical records state as to causation if the injury is not obvious. Determine whether the language in the medical records on causation is equivocal (e.g., could be, perhaps, maybe, might be). Determine whether the causative tie between work and the condition is being made based on a 'rule out' diagnosis and/or a temporal relationship. A temporal relationship is a relationship that is time based – two things are considered related not on a scientific basis but because the events occurs at the same or nearly the same time. Consider whether the pre-existing condition has been aggravated in a substantial material way – and not simply on the basis that the claimant was working and now is not working.

Many cases discuss equivocation in medical opinion. Questions in this regard should be directed to legal counsel.

2. Panel posting of designated medical providers.

- Is the Panel list properly posted and the required acknowledgment documented so that medical care will be directed for 90 days (at the risk of non-payment)? If the claimant is not bound to (payment of) treatment by a Panel provider, has the non-designated physician provided notice of treatment within five days of its inception?

The list of Panel providers must be conspicuously posted at the workplace, **and** there must be an acknowledgment by the employee of the obligation to utilize the Panel at the time of hire **and** immediately or as soon as practical after the alleged work injury.

- Is there a sufficient diversity of specialties as to the designated medical providers? Is a chiropractor on the Panel?

The Panel list must contain at least six (6) providers, three (3) of which must be physicians. No more than four (4) of the providers may have the same address. No more than one (1) provider can be a part of a coordinated care organization. Changes to the Panel list once the ninety (90) days begins to run does not

impact the employee's right to treat under the prior Panel list. (*Cost Containment Regulation 127.752*)

If the Panel list does not contain a chiropractor and the injury is amenable to such treatment, the employer is responsible for chiropractic care that would have otherwise been the financial responsibility of the employee. (*Martin v. WCAB (Emmaus Bakery), 652 A.2d 1301 (Pa., 1995)*)

3. The Employer's First Report of Occupational Injury or Disease.

- Has this Form been properly and timely completed?

Complete all requested information. In particular, date of hire and demographics may become important years later.

4. The investigation.

- Is the investigation on a sufficiently fast track to be timely completed?

Remember that the period within which to accept or deny is twenty one (21) days from notice of the injury and that a penalty may be imposed if this deadline expires without acceptance or denial of a claim. (*Orenich v. WCAB (Geisinger Wyoming Valley Medical Center), 863 A.2d 165 (Pa. Cmwlth., 2004)*)

- Is there any psychological/psychiatric aspect to the claim? If so, is the claim one of derivation from a physical injury or one that it is derived from a mental insult alone?

Mental claims can take the form of 'physical injury causing mental injury' or 'mental disturbance causing mental injury'. The difference in the burden of proof is substantial. A physical/mental injury requires a causative tie, while a mental/mental injury requires a causative tie **and** abnormal working conditions. There are many cases in this area. Legal counsel should be consulted as necessary.

- Has a complete copy of the claimant's personnel file and any other materials pertaining to the claimant been reviewed? Is there a written job description, and if not should one be prepared?

Review these materials with an examination of wage and attendance/reliability, job duties and potential viable accommodations to the regular job, and for any conduct or performance issues. Prepare a written job description as appropriate.

- Has the direct supervisor been interviewed?

Discuss the allegations with the direct supervisor and document as appropriate.

- Have eyewitnesses been interviewed along with any other appropriately identified individuals surrounding the alleged work injury or attendant circumstances?

Again, discuss the allegations and document as appropriate.

- Has a recorded statement been taken from the claimant?

Take the claimant's recorded statement.

Have the claimant describe the circumstances and mechanism of the alleged injury. Identify eyewitness and those with knowledge.

Has the claimant worked anywhere since this alleged injury?

Ask for the names and addresses of all medical providers, including past providers and any family doctors/chiropractors. Solicit details of prior accidents, injuries and/or medical history.

Ask about any support or lien issues.

Ask questions about credits (unemployment compensation, short term and/or long term disability, severance, Social Security benefits, pension).

Verify the claimant's legal right to work in the United States, as well as any other names or social security numbers.

Explore the potential for subrogation, and if any such potential exists be certain not to ask questions that may impact an assessment of liability in a third party claim or case.

If the claimant responds "I don't know" or the like, clarify whether the answer is 'no' or 'I don't remember'.

- Have authorizations for the release of employment, military, immigration, insurance and medical records been obtained from the claimant?

Obtain and utilize these authorizations.

- Has an ISO Claim Search been requested?

Obtain Search result.

- Has a criminal background check been done?

Obtain result. Request authorization to obtain Court records as appropriate.

- Has an appropriate Internet search been completed?

Do not take any steps to initiate contact with or on behalf of the claimant. Be careful to stay in the public domain.

- Does the injury appear to be limited to a specific loss?

Specific losses are scheduled, with applicable healing periods, in the WCA. Where there is no separate and distinct injury, the scheduled amounts payable are exclusive in lieu of wage loss. Whenever confronted with an injury to an extremity or for scarring (head, face, neck above clavicle), consider the potential application of specific loss. (*Section 306 (c) WCA*)

Where there is a pre-existing specific loss (for any reason) and the work injury itself is a specific loss and overall the result is total disability, the employer is responsible only for the scheduled payment for the subsequent injury and then the Subsequent Injury Fund thereafter pays total disability benefits. The claimant is bound by the same period of limitation against the Subsequent Injury Fund as on an original Claim Petition. (*Section 306.1 WCA*)

- Does the preliminary medical documentation as available indicate the ability to do some work where the injury does not appear to be limited to a specific loss?

Identify the availability of suitable work at the time of injury employer where capacities are issued by any provider and obtain/prepare a written job description.

- Has a Notice of Ability to Return to Work form separately associated with each medical opinion of the ability to perform some work (or any work) been provided to the claimant? Remember: The Notice of Ability to Return to Work form should be provided to the claimant preferably before the job offer letter is sent, or, second best but still viable, with the job offer letter or, finally, to be viable sent at least prior to the expiration of the job offer. (See, *Secco, Inc. v. WCAB (Work), 886 A.2d 1160 (Pa. Cmnwlth., 2005)*)

Each and every time any provider/IME issues physical capacities, provide a copy of Notice of Ability to Return to Work to the claimant with a copy of the subject medical record by certified and regular mail.

- Has proper notice of the availability of accommodated work (i.e., a job notice/offer letter) been provided to the claimant?

On (preferably, see above) a date after the provision of the Notice of Ability to Return to Work with the supporting medical record, prepare a job offer letter outlining the available accommodated work, provide a written job description for it, advise that it is within the capacities set forth by the subject provider, provide the hours and rate of pay, set forth a specific date and time that the claimant is to return to work, the person the claimant should report to at that time and a contact phone number/e-mail. Send the job offer letter to the claimant certified and regular mail.

- What is the projected date of the cessation of the immediate acute phase of the injury? Should a Nurse/Case manager be retained?

Evaluate the projected seriousness/duration of the injury and disability. Consider the use of a Nurse/Case Manager as appropriate.

- Should an IME be scheduled?

Where causation rather than disability is medically in dispute, you may wish to consider the immediate scheduling of an IME. Where one/the issue is disability, you may wish to defer the IME until the projected end of the acute phase/anticipated recovery date.

- Has surveillance been considered?

Always consider surveillance, whether the issue is causation, disability or both.

- Are there subrogation and/or credit issues?

What is the mechanism of injury? Is there responsibility on a third party? Consider the typical types of insurance coverage that might apply (homeowners', auto including underinsured and uninsured motorist, premises, product liability) compared to the facts.

What credits may be available? Look for unemployment compensation, short/long term disability, social security retirement, severance, pension.

- Should defense counsel be consulted in the course of investigation?

Most defense counsel are willing to respond to general inquiries on the application of the law to a hypothetical set of facts. If you need specific guidance in a particular case, consider the immediate retention of counsel so that the attorney client privilege attaches to pertinent communications.

5, 6 and 7. Should the claim be accepted or denied? [Do not pay wage loss benefits other than under a Notice of Temporary Compensation Payable unless there is a definite intention to accept the claim as compensable until otherwise altered by Agreement or Order.]

- In what direction does the investigation point? Are there red flags?

What is the overall reaction to the initial evaluation? Was the claimant evasive in the recorded statement? Is the claimant a recent hire with a choppy work history presenting with soft tissue complaints? Are there suggestions of a concealed prior relevant medical history? Did the claimant know that there was an imminent termination or lay-off? Was the alleged injury un-witnessed, in particular on a Friday afternoon or Monday morning? How long after the alleged injury was the first medical treatment? What feedback are you getting from the employer?

- What instruments accept a Claim?

If the claim is determined compensable, it can be accepted under an Agreement for Compensation, a Medical Only Notice of Compensation Payable, a 'regular' Notice of Compensation Payable or a Notice of Temporary Compensation Payable. A Notice of Temporary Compensation Payable converts to a 'regular' Notice of Compensation Payable unless properly and timely revoked. Specific requirements for revocation are set forth in *Section 406.1 WCA*.

- What instrument should be used to deny a claim?

The form Notice of Workers' Compensation Denial is used to deny a claim. Carefully choose the reason(s) for denial, noting that as progression is made from reason #1, there are increasing degrees of admissions.

8. Statement of Wages.

- Is the claimant a seasonal employee?

The Average Weekly Wage (AWW) of seasonal employees is based on previous four quarter earnings divided by 50.

- Are there any special considerations that should be given to the calculation of AWW?

Section 309 WCA provides methods of calculating AWW where there are less than four completed quarters or where fairness dictates an AWW not strictly based on the arithmetic calculation. Lump sum payments like bonuses and vacation pay properly allocated to the entire base earnings shall be accordingly prorated.

- Has the last pay period been dropped from the calculation of AWW if the alleged date of injury falls in the midst of a pay period that was not completed?

If the date of injury falls within an incomplete pay period, that period is disregarded for the calculation of AWW and the indicated base for calculation will then extend back in time accordingly. (*Connors v. WCAB (B. P. Oil)*, 663 A.2d 887 (Pa. Cmwlth., 1995))

**9. Claim Petition filed with Bureau of Workers' Compensation (BWC).
[Remember: Petitions are filed with the BWC, Answers are filed with the assigned WCJ.]**

- Has the courtesy copy of the Claim Petition, if any, been appropriately answered with the filing of an Answer with the Office of Adjudication where the assignment of the Petition is anticipated based on the claimant's address?

A courtesy copy received should be answered without waiting for the circulated copy of the Claim Petition from the BWC. There is a time limit of twenty (20) days from the date of circulation of the Claim Petition by the BWC to file a timely Answer – do not allow time to run unnecessarily.

- Has the Answer been filed/re-filed once the Claim Petition has been circulated to a Workers' Compensation Judge (WCJ) with amendment as appropriate based on investigation?

Always provide the assigned WCJ with a copy of the Answer as filed to the courtesy copy of the Claim Petition – do not assume that it will be immediately matched to the Judge's file.

- Does the Answer admit averments that are known to be undisputed (or indicate 'denied pending verification'), reflecting a thoughtful Answer? Does this matter when the WCJ needs to decide whether there has been a reasonable contest?

A blanket/boilerplate denial is not recommended unless absolutely necessary. If the Answer is being prepared solely based on a faxed or e-mailed copy of the Claim Petition, say so. WCJ's will review an Answer when determining reasonable contest.

- Have all potentially applicable defenses been specifically raised in the Answer?

Raise all potentially applicable defenses, in particular affirmative defenses. If you can definitively rule out a defense, do not raise it. Reserve the right to amend the Answer based on investigation and/or discovery.

- Has a Statement of Wages been prepared for submission to the WCJ?

AWW will be dictated by the claimant without the submission of a Statement of Wages to the WCJ.

10. Resolution versus litigation.

- Does sufficient information exist to evaluate the case for potential resolution? Can/should the case be resolved earlier rather than later?

Most cases do not become less expensive with age. The time to evaluate the case for potential resolution is as soon as there is sufficient information to do so. Projected expenses as well as policy consideration may apply to the analysis. Mandatory mediation is appropriate for those cases where a party may be over or under evaluating the case where there is an uncertain outcome (i.e., credibility) rather than a question of law. Be proactive.

11. The litigation process before the Judge.

- What happens once a Claim Petition is listed for a hearing?

The process varies between WCJs, but typically there is either a brief pre-trial conference at the first listing and a trial date set, or the case is listed serially with the expectation of the completion of certain interim events. Witnesses are presented live or, with the Court's permission and the agreement of counsel, by deposition. Witnesses may include the claimant, fact witnesses supporting the claimant, expert witnesses and employer witnesses. Deposition objections may be preserved for later ruling within the body of the deposition.

The Judge is not bound by the Rules of Evidence, but the rules are generally enforced.

Once the Record is complete, it is closed, a Briefing schedule provided by the WCJ, Briefs are submitted and the WCJ renders a Decision.

12. The appellate process.

- What is the time line, and what can the parties expect on Appeal?

The Workers' Compensation Appeal Board (WCAB) hears appeals from WCJ's Decisions, and has some original jurisdiction. The parties have twenty (20) days from the circulation date of a WCJ's Decision to perfect an appeal to the WCAB. Any issue not raised directly in the Appeal papers may be considered waived.

The parties have thirty (30) days from the mailing date of the WCAB Opinion to perfect a Petition for Review to the Commonwealth Court, again raising all issues in that Petition or risking waiver.

The parties have thirty (30) days from service of the Opinion and Order of the Commonwealth Court to perfect a Petition for Allocatur (Allowance of Appeal) to the Pennsylvania Supreme Court.

13. What further potential development is available to the parties after the establishment of compensability?

- What Petitions/procedures are available to the parties to correct a prior mistake, address medical treatment and/or to seek a change in status?

Claim Petitions are a relatively small part of day to day workers' compensation practice. There are many available Petitions and procedures to change status and address medical issues. The major avenues are:

Petition to Terminate:

This Petition is used where a claimant has fully recovered. Supersedeas may be requested, and that request is a prerequisite to reimbursement from the Supersedeas Fund for any resulting overpayment. Medical expense may not be superseded, but is subject to reimbursement.

Petition to Suspend:

This Petition is used where there is residual of the work injury but either no actual loss of wages or the refusal of suitable employment that would result in no loss of wages. Available work can be actual or developed through an Earning

Capacity Assessment/Labor market Survey (EPA/LMS). An EPA/LMS is available where the date of injury is on or after June 24, 1996 and where there is no suitable work at the time of injury employer (The establishment of this prerequisite is waived if not raised prior to the close of the Record before the WCJ. *Rosenberg v. WCAB (Pike County), 942 A.2d 245 (Pa. Cmnlwth., 2008)*). Supersedeas may be requested as above. This Petition may also be used when requesting forfeiture such as when reasonable medical services are refused or there is a voluntary withdrawal from the pertinent labor market.

Petition to Modify:

This Petition is used where a full indemnity Suspension is inappropriate due to a partial wage loss or where a claimant seeks increased wage loss benefits. It may also be used for an 'out of time' Impairment Rating Evaluation (see below, Request for Designation of a Physician to Perform an Impairment Rating Evaluation). Supersedeas may be requested as above.

Notification of Suspension or Modification:

This Notice acts as a Supplemental Agreement to the extent of actual earnings if a copy is provided to the claimant within seven (7) days of the return to work and the form is filed with the BWC, absent a successful Challenge.

Petition to Review:

Either party can utilize this Petition to review AWW, the characterization of the work injury or other components of a compensable claim. Certain time limitations or preclusion may apply. (*Weney v. WCAB (Mac Sprinkler Systems, Inc.), 960 A.2d 949 (Pa. Cmnlwth., 2008)*, held claim preclusion on the basis of prior litigation/stipulation of a Petition to Review characterization of injury)

Petition to Reinstate:

This Petition is used by a claimant to change the status of indemnity payments, typically based on a worsening of the condition.

Petition to Set Aside Final Receipt:

This Petition can open a Final Receipt. The applicable time limitation is three (3) years from the date of last payment of indemnity benefits.

Petition to Seek Approval of Compromise & Release Agreement:

This Petition places a Compromise & Release Agreement before a WCJ to consider approval. A Compromise & Release Agreement can be tailored to fit the needs of the parties in structuring the resolution.

Petition to Compel Physical Examination or Expert Interview:

A claimant is required to undergo periodic examination of a medical or expert nature (e.g., IME., Impairment Rating Evaluation, Expert Interview) with a provider of the employer's choosing. This Petition compels the evaluation on the claimant's failure or refusal to attend without adequate excuse. Once an Order is issued on this Petition, further non-compliance may result in the Suspension of indemnity benefits.

Reporting Forms:

Reporting forms (LIBC 750, 756 and 760) may be provided to a claimant every six (6) months. Failure to timely return the form LIBC 760 can result in a self-executing Suspension on proper filing. Benefits are to be reinstated on return of the completed form following a period of non-compliance but the reinstatement is not retroactive.

Request for Utilization Review Determination:

This request to the BWC results in the BWC's designation of a Utilization Review Organization (URO). The URO assigns its reviewer and a Utilization Review (UR) report is generated addressing the reasonableness and necessity of medical care. The request for designation admits relatedness.

Petition to Review Utilization Review Determination:

This Petition results in assignment of the Utilization Review issue to a WCJ. The burden of proof at this level is generally on the employer regardless of which party took the appeal.

Request for Designation of Physician to Perform Impairment Rating Evaluation:

A Request for Designation may be made within sixty (60) days of the payment of one hundred four (104) weeks of total disability benefits, not before or after for self-executing relief on receipt of an impairment rating of less than 50% with proper filing. A Request for Designation after the expiration of the sixty (60) day window is permitted, but there is no self-executing relief but rather it is necessary to file a Petition to Modify. A Request filed before the sixty (60) day window is a nullity.

Petition for Penalties:

Penalties for up to 50% may be awarded for a violation of law. This relief is only available to a claimant.