

RESULTS-ORIENTED HEARING STRATEGIES

**Michael Rosetti
David & Rosetti, LLP
229 Peachtree Street
Suite 950, International Tower
Atlanta, GA 30303
404-446-4488 (Main)
404-446-4483 (Direct)
404-446-4499 (FAX)
Mike.rosetti@davidandrosetti.com**

A judge rarely performs his functions adequately unless the case before him is adequately presented

- Louis Brandeis

KNOW THE RULES

Before playing the game, one must know the rules. The Georgia Workers' Compensation Act and the corresponding published Board Rules provide the rules and regulations for workers' compensation proceedings.

1. Jurisdiction

The State Board of Workers' Compensation has full authority to hear and determine all questions with respect to claims for compensation.¹ The State Board has jurisdiction to adjudicate a timely claim for benefits based on an injury or disease occurring within the State of Georgia. In addition, the Georgia State Board of Workers' Compensation may have jurisdiction over a timely claim for injuries occurring outside Georgia under certain circumstances.²

For accidents occurring in Georgia for which there is no dual jurisdiction (with another state), there is no issue. However, when the injury occurs out-of-state, or there is another basis for jurisdiction in multiple states, the attorney must decide whether the employee's best interests are served with the claim being prosecuted in Georgia. Considerations include various compensation rates, potential defenses, and case law in the respective jurisdictions.

By contrast to personal jurisdiction, issues arise as to the extent of the State Board's subject matter jurisdiction. O.C.G.A. §34-9-58 specifies that "[t]he State Board

¹ See O.C.G.A. §34-9-100 (a).

² See O.C.G.A. §34-9-242; O.C.G.A. §34-9-7.

of Workers' Compensation shall exercise all powers and perform all the duties relating to the enforcement of this chapter." Litigation over coverage issues is the most common dispute relating to subject matter jurisdiction. In *Gulf States Underwriters v. Bennett*, the Georgia Court of Appeals held that the State Board had no jurisdiction to entertain a claim for fraud against an insurance agent, but did have jurisdiction to determine the scope of the policy at issue.³ In *Builders Ins. Group, Inc. v. Ker-Wil Enterprises*⁴, the Georgia Court of Appeals adopted the opinion of Professor Larson wherein he stated "when it is ancillary to the determination of the employee's right, the [Board] has authority to pass upon a question relating to the insurance policy, including fraud in procurement, mistake of the parties, reformation of the policy, cancellation, existence or validity of an insurance contract, coverage of the policy at the time of injury, and construction of extent of coverage."⁵ The case stands for the proposition that, so long as issues pertaining to an employee's compensation is part of the hearing, issues ancillary to that, including coverage, are within the Board's jurisdiction.

To establish the jurisdiction of the Board, the employee must file a claim for benefits. Board Rule 82(b) specifies that "[a] party filing a claim should file Form WC-14 with the Board, along with five copies when also requesting a hearing and serve a copy on all other parties." The employee's attorney will certainly evaluate the case to determine the existence of any statute of limitation issue. However, in instances where a potential statute of limitation issues are not immediately apparent, the employee's attorney can serve requests for admissions seeking an admission the Board has jurisdiction to hear the claim. Christopher Daly's paper at the beginning of this book

³ 260 Ga. App. 699, 701-02; 580 S.E.2d 550 (2003).

⁴ 274 Ga. App. 522, 618 S.E.2d 160 (2005).

⁵ See *id.* quoting 9 LARSON'S WORKERS' COMPENSATION LAW SECTION 150.04 [1]-[2].

references suggested admissions, and the very first is to confirm the Board has jurisdiction. Since the statute of limitation is a jurisdictional defense, admitting to jurisdiction can be relied up by the employee's attorney to ensure there is no potential statute of limitation defense.

Board Rule 82 (a) requires that “[a]ny defense as to the time of filing a claim is waived unless it is made no later than the first hearing.” Therefore, a defense attorney must ensure the issue is raised at the hearing. As a practical matter, once the defense attorney establishes facts through the discovery process to support a statute of limitation defense, it may be prudent for the attorney to file a motion to dismiss the claim. There are several advantages to filing a pre-hearing motion. First, if the matter could properly be disposed of by motion, it can save court and attorney costs. Second, it will alert the ALJ to the issue such that, in the event the ALJ is unwilling to rule on the motion absent an evidentiary hearing, the ALJ can be prepared to address the various nuances associated with this defense. Finally, it demonstrates to the ALJ that the attorney is well-prepared to proceed with the case, a matter which is much appreciated by the Board.

2. Rules of Evidence

The Georgia Workers' Compensation Act specifies that “[t]he rules of evidence pertaining to the trial of civil nonjury cases in the superior courts of Georgia shall be followed unless otherwise provided in this chapter.”⁶ While it is commonly understood that workers' compensation proceedings enjoy a certain informality, attorneys are bound by the same rules in proffering documents and eliciting testimony.

Medical evidence can be presented by live testimony and by deposition. An ALJ is empowered to accept deposition testimony, regardless of whether the deponent is

⁶ O.C.G.A. §34-9-102 (e) (1).

available to testify at the hearing and regardless of whether the deposition was taken for evidentiary purposes.⁷ In addition, certain medical records can be admitted into evidence without an attesting witness.

For a medical report to be admitted into evidence, it must be signed and dated by an examining or treating physician or “other duly qualified medical practitioner.”⁸ The language of the statute makes clear that evidence from an examining or treating source is admissible, even in the event the treating source is not a physician. The Georgia Workers’ Compensation Act defines a “physician” as “any person licensed to practice a healing art and any remedial treatment and care in the State of Georgia.”⁹ Thus, a treating or examining source’s records may be admitted into evidence under O.C.G.A. Section 34-9-102 (e) (2) regardless of whether the individual signing the report was a medical doctor.

By contrast, in *Stevedoring Services of America v. Collins*¹⁰ the Court of Appeals of Georgia found it was error for an ALJ to admit a record into evidence under O.C.G.A. §34-9-102(e)(2) as it was unclear whether the report (which concerned the paternity of a child) was signed by a Ph.D or a M.D. Unlike when a report from a treating or examining source is tendered, a report from a non-examining/non-treating source must be signed by an “other duly qualified medical practitioner.”

The statutory language would appear to require that, for a report to be admitted into evidence, it must contain a history, examination, diagnosis, treatment, and prognosis.

⁷ O.C.G.A. §34-9-102 (d) (3).

⁸ O.C.G.A. §34-9-102(e)(2).

⁹ O.C.G.A. §34-9-201 (a).

¹⁰ 247 Ga. App. 149, 542 S.E.2d 134 (2000).

However, in *Foster v. Continental Cas. Co.*¹¹, the Court of Appeals of Georgia found the report can be admitted into evidence so long as it has any of the elements listed in the statute. This decision, along with a 1997 amendment allowing for the admissibility of medical records at trial of “any civil case involving injury or disease”¹² demonstrates both the legislature’s and the Court of Appeal’s intention to broaden the scope of the rule allowing medical records into evidence without testimony.

A party may still object to the admissibility of all or part of the medical records on other grounds. The statute provides that “any party [may] object to the admissibility of any portion of the report . . .” Thus, while a portion of a medical report would otherwise be admissible any party can object to a portion of the report being admitted into evidence. Thus, if there are extraneous statements in the report which are not admissible, the attorney may tender an objection to that portion of the record and ask that it be redacted.

Of course, the non-tendering party may secure the provider’s deposition for cross-examination. However, when the tendering party’s witness is cross-examined, the party tendering the report has the right to redirect the witness and introduce that at the hearing as well.

Often the question is raised concerning whether to depose the other side’s medical expert. Considerations include the extent the expert’s opinion damages your client’s case, and the extent to which you can successfully cross-examine that witness and impeach the witness’ opinion. Attorneys should retain a file devoted to deposing experts, including information about the individual to be deposed. In addition, law firms should pool their research to ensure that, whenever a medical expert is deposed, transcripts from

¹¹ 141 Ga. App. 415, 233 S.E2d 492 (1977).

¹² O.C.G.A. §24-3-18.

prior depositions can be utilized to identify inconsistent testimony. The focus of deposing an expert should be on four categories: a) the background, credentials, and other pertinent information on the expert; b) the facts upon which the expert based his opinions; c) the expert's task; and d) the expert's opinions.

In cases involving laboratory results for drug and alcohol testing, the report is admissible so long as the report is written, complies with O.C.G.A. §34-9-415, and is accompanied by an affidavit from the laboratory confirming authenticity.¹³ Board Rule 102 (E)(2)(d) confirms that the report accompanied by an affidavit satisfies the requirement the record is authenticated, but does not prevent other evidentiary objections.

3. Disclosure of Evidence Prior to Trial

Board Rule 102 (E)(2)(b) requires that “[a]ll medical evidence regarding the treatment, testing, or evaluation of the claimant for the accident which is the subject of the hearing should be exchanged between the parties as soon as practicable, but no later than ten days prior to the hearing, and all depositions should be completed prior to the hearing.” Of note, the Board Rule does not reference records which may not be the subject of the hearing. Thus, if a party had in its possession records not directly related to the accident but related to either prior accidents/claims, or subsequent events, the Board Rule does not require the exchange of these records. However, in line with the policy of conducting informal hearings in a manner consistent with due process requirements, it may be good practice to turn such records over, either in response to discovery requests, or in accordance with Board Rule 102, so long as it does not negatively impact the presentation of evidence in the case. For example, if an attorney had records demonstrating a history of treatment prior to the alleged accident, but the witness denied

¹³ O.C.G.A. §34-9-102 (e)(4).

prior treatment at the deposition, it may be best to turn those records over to the other side following the deposition, but with sufficient time prior to trial for the attorney to have an opportunity to review the records. It may eliminate a surprise element at the hearing, the risk is always present for an ALJ to focus on the failure to turn over records, and not necessarily the records themselves. Nevertheless, the Board Rule does not require such disclosure prior to the hearing.

Board Rule 102 (E)(2)(b) specifies six potential consequences for failing to produce medical records to the other side within ten days. The most common results are a continuance of the hearing or leaving the record open to allow the non-tendering party an opportunity to produce additional evidence to refute the report in question. The sixth potential consequence listed in the Board Rule, exclusion of the evidence at the hearing, was added in the revisions effective July 1, 2006. Intuitively, the Board Rule was amended to further encourage the timely exchange of documents. However, since the Board Rule itself is not a statute, and since an exclusionary rule can be established only by statute, there is a question whether exclusion based on the failure to comply with Board Rule 102 would constitute reversible error.

4. *Daubert* Considerations

With the passage of O.C.G.A. §24-9-67.1, a judge in a civil matter must make initial determinations of whether expert opinions are admissible. This rule extends to an ALJ with the State Board. In a recent case, the Appellate Division acknowledged the requirements of the ALJ to serve as gatekeepers as envisioned under O.C.G.A. §24-9-67.1. The Appellate Division made a few findings of note. First, it stated that

“O.C.G.A. §34-9-102 (e)(2) provides that any medical report or document signed and dated by an examining or treating physician or other duly

qualified medical practitioner shall be admissible in evidence insofar as it represents an opinion relevant to any medical issue by the person signing the report. We therefore conclude the administrative law judge acted fully within that latitude available to her as trier of fact in considering [the medical] report in rendering her decision.”

It appears the Board’s position is that so long as the requirements of the Georgia Workers’ Compensation Act are satisfied, the report would be admissible.

The second significant finding by the Board in that case was in a comment made about the timing of the objection to the expert testimony. Although not specified in the facts described in the Board’s decision, it appears the objection was not raised until the time of the hearing. The decision stated that “[w]hile the language of O.C.G.A. §24-9-67.1 (e) relating to pretrial hearings on such objections is permissive and does not preclude the initial raising of an objection to expert testimony at the commencement of a hearing, we find it the better practice to address such objections prior to a hearing to allow issues related thereto to be aired fully.”

5. Conduct of the Hearing Generally

The Georgia Workers’ Compensation Act gives the Board authority to promulgate rules governing the procedures for hearings before an ALJ.¹⁴ Board Rule 102 (E) is the Board’s promulgated rules for how hearings should be conducted. It should be noted that the very first item addressed under the subheading “Conduct of Hearings” states that “[n]o person shall, during the course of a proceeding before an Administrative Law Judge or Director, engage in any discourteous or disruptive conduct.” The placement of this provision as the very first item under this subheading demonstrates the extent to which the State Board values ethics and professionalism.

¹⁴ O.C.G.A. §34-9-59 (“[t]he board is empowered and authorized to adopt proper rules of procedure to govern the exercise of its functions and hearings before the board or any of its members or administrative law judges.”)

The Board encourages the parties to consolidate all records to avoid repetition and disruption.¹⁵ The Board requires documents to be submitted on 8 ½ by 11 inch paper with sufficient space at the top, and must be submitted without tabs to separate the documents.¹⁶ It should be noted this last provision was added in the revisions effective July 1, 2005 in preparation for the ICMS scanning procedures.

Signed medical records usually do not require authentication. For other records, including personnel or payroll records, the records must be authenticated. Often the parties can agree to stipulate to the authenticity of records, which serves the purpose of streamlining the hearing and avoiding the need to inconvenience witnesses. By contrast, when there is surveillance video involved in the hearing, even if the other side stipulates to authenticity, the defense attorney would be well-served to have a witness present to show the videotape. Prior to trial involving videotape surveillance, the attorney should ensure the media is compatible with facilities at the Board to avoid an unnecessary delay in the proceedings. The ALJ has the power to issue subpoenas to compel witness testimony. As a practical matter, all witnesses the attorney relies upon to present his case should be placed under subpoena. So long as proof of service is filed with the Board at least 24 hours prior to the hearing, the attorney can move for either a continuance of for the record to be left open to take the witness' deposition.

CONDUCTING THE HEARING

Although the Georgia Workers' Compensation Act and Board Rules provide guidance for the steps leading up the hearing, there is little in the statute or the rules relating to the actual conduct of the hearing. This is largely because the informal nature

¹⁵ Board Rule 102 (E)(3)(b).

¹⁶ Board Rule 102 (F)(4).

of evidentiary hearings allows different ALJs to handle their evidentiary hearings in the manner they see fit.

While the State Board of Workers' Compensation does not provide specifics on the administration of hearings, there are some general items each attorney should be prepared to address at the time of an evidentiary hearing. Whether the hearing is in an "all issues" posture, is a change in condition action, an action to suspend benefits, etc., the parties should be prepared to address the standard stipulations as addressed in Mr. Daly's paper. Most notably, the parties should be prepared to address whether they can stipulate to jurisdiction, venue for that particular county, whether the employer was subject to the Act, whether there was insurance coverage or a qualified self-insurer, whether the claimant was in the general employment of the employer on the date of injury, whether the claimant provided notice of an accident, and whether there was an accident arising out of and in the course of the claimant's employment. Finally, although the claimant may already be receiving income benefits, there should be a statement as to the appropriate average weekly wage.

The WC-14 Request for Hearing is the pleading required by the Board to frame the issues for the evidentiary hearing. While the Board requires the WC-14 to frame the issues, the parties should feel free to supplement the WC-14 or provide attachments to it to further frame the issues. At no point should the parties be forced to proceed to trial without a clear definition of the issues as displayed on either the WC-14 or any attachments thereto.

O.C.G.A. §34-9-102(c) provides the Administrative Law Judge with authority to regulate the course of the hearing. The ALJ can request as much or as little information

prior to the taking of testimony and presentation of evidence. Therefore, although it is rare to present a formal opening statement, the ALJ may require the attorney provide a detailed statement of the case. Other judges will not permit any type of statement prior to the hearing; the case will be called, issues stated and the attorney with the burden of proof will be asked to proceed.

The ALJ has the power to hear motions, including motions in limine. Unlike in civil practice where such matters are addressed in pre-trial orders, a motion in limine can be made in writing prior to the date of the hearing or raised at the outset of the hearing. Although it is unlikely for the ALJ to rule on such a motion prior to the hearing, it does provide the ALJ with notice of the issue for the hearing to allow time for appropriate research. The courtesy may work to the moving party's benefit. Similarly, the responding party can ensure its position is favorably received by providing a written response.

1. Know the Judge

You must know the facts of your case and the law as it relates to those facts. Equally important is knowing your audience, in this case the ALJ. You must presume the ALJ enters the courtroom free of bias and without any knowledge of the facts of the case. The advocate's job is to present the evidence in an understandable manner and in a light most favorable to the advocate.

Notwithstanding the foregoing paragraph, there are nuances which are ALJ-specific. It is important to learn about a judge's special preferences. This is perhaps most important with respect to the use of objections.

There are numerous objections available to counsel, the most common of which is an objection to the form of the question. These objections include questions that are ambiguous, argumentative, asked and answered, assume facts not in evidence, compound, confusing, contain inappropriate hypotheticals, leading, misquoting other evidence, or overly broad. While it may be good trial practice to break momentum by raising an appropriate objection, do not get too caught up in technical objections. Most judges fashion their hearings to be more informal, and raising many technical objections could be seen as conflicting with the ALJ's goal. Of course, should your objection be more substantive in nature, for example objecting to a witness' testimony on the grounds they lack personal knowledge, such objections should be raised.

In workers' compensation hearings, the most common objection is to hearsay. Often, lay witnesses will testify about what individuals told them about the case. Witnesses for the employer often will testify about information (gossip) they heard about the claimant. Usually that testimony is inadmissible hearsay. Similarly, claimants often testify about what a physician may have told them. While the records are admissible, the defense attorney should object to the hearsay, especially since the failure to do so would allow testimony to be heard which may not be accurate.

One of the best ways to impeach a witness is to introduce evidence of convictions for crimes of moral turpitude. This is where the sponsoring witness' attorney must be wary. Although a certified copy of the conviction report may be tendered as evidence, the party cross-examining the witness may not inquire about the circumstances surrounding the conviction. If disputed, the attorney may simply ask if the witness is the person identified in the conviction record. Similarly, if the attorney knows the other

attorney will introduce a conviction record, and they should, the attorney should prepare the witness to avoid discussing or explaining the circumstances surrounding the conviction.

Regardless of the identity of the ALJ, it is always well-received when counsel's presentation is clear and concise. There is little need for excessive theatrics. Unlike jury trials, the ALJ with the State Board has plenty of experience with these cases. The ALJ needs more time, and if your presentation is clear and concise you will give them more time to handle their large case load.

2. Move with a Purpose

The goal of any presentation is to have the audience focus on your message. To accomplish this goal, avoid actions detracting from your presentation. When addressing the Court, or the opposing counsel, the lawyer should never wander or sway. The lawyer should always stand, and should always address the Court, even when a dispute arises between the lawyers.

Of course, when examining witnesses or conducting effective cross-examination, movement in the courtroom can work to the lawyer's benefit. The movement should not be made to alleviate nervousness or anxiety. Movements should be calculated. For example, when cross-examining a hostile witness, one can begin the questioning far away from the witness with easy questions for the witness. As the questions lead to more difficult answers, slowly advancing toward the witness can help build your momentum.

Pacing the courtroom has several negative consequences. First, it detracts from the lawyer's presentation by focusing attention on their movements, not the message being delivered. It also creates logistical problems. While the lawyer does not want to be

anchored to the podium, wandering off could lead to stopping your momentum to walk back to the podium.

Nervous habits have no place in the courtroom. When practicing a presentation, the lawyer should take video of himself to determine what nervous habits he or she may have and make efforts to avoid such habits. Taking video of your presentation will assist in eliminating habits, but also help the lawyer see what others see, and do not see, providing you with your own feedback for a more effective presentation.

3. Preparing Witnesses

If a witness is worth bringing to Court and providing testimony, it is worth the investment in time and effort to adequately prepare the witness for Court. There is no substitute for meeting the witness live before the trial. A live meeting will allow the attorney to make final preparations for the witness' testimony based on the witness' demeanor and her knowledge. It also sends the message to the witness that this is serious business.

Preparing a witness should not be confused with coaching a witness. The witness should be reminded throughout the preparation that they will be placed under oath and to tell the truth. As a practical tip, the last thing to tell every witness is to tell the truth. In that case, if the witness is questioned about the preparation, hopefully they will recall the reminder that, above all else, they are to tell the truth.

Preparing witnesses is little more than a function of whittling down their story. Often witnesses believe it is their job to tell everything they know about a particular case. Even expert witnesses fall into that trap, extending their testimony into areas where they are not experts. For fact witness, the first thing the attorney should address with them is

the reason for their testimony. If they witnessed the alleged accident, they should be told they are being called for that purpose. They should not expand to extraneous matters pertaining to other perceptions unless it bears directly on a fact at issue in the case. They should be instructed to keep answers to a minimum, and to simply answer the question that was asked. They should be instructed to avoid trying to give explanations unless specifically directed to do so. I tell witnesses that, if I know everything they know, I will be sure to redirect them if cross-examination reveals some negative aspects in their testimony. The key fact to be remembered is to have the witness avoid arguing with the other lawyer. Lawyers are trained to argue; it is usually a losing proposition for lay witnesses.

4. Organize Your Material

Although the attorney will most likely go “off script,” it is often very helpful to write out questions for your direct and cross-examination. The questions should be properly spaced and under general headings. Once the questioning begins, the attorney will likely not rely on the written questions, especially if the attorney has thoroughly prepared. However, by keeping the questions categorized under general headings, the attorney can go back to his written questions in the event there is a break in their train of thought.

For purposes of referring to previous testimony or other documents, the attorney should make a note in the margins for references to the record. For example, when cross-examining an employer about a previous statement favorable to the employee, the employee’s attorney should have the specific exhibit number and page written on the left margin next to the question the employee’s attorney intends to ask.

When posing a question to a witness who you believe may change their testimony from previous sworn testimony, be sure not only to mark the location in the deposition transcript (page and line) but also that the same wording is used for the question. At that point, if the witness answers inconsistently, you can immediately recall that portion of the deposition and ask the same question previously posed demonstrating different answers under oath. That places greater responsibility on the attorney at the deposition to ask questions not susceptible to objection.

Most State Board hearing venues provide adequate space on desks to allow for several sets of documents at your disposal. However, that should not be a license to spread out your materials. On your desk should be the transcript from depositions, with appropriate tabs for important portions of the testimony to which you may later refer. The table should also include a well-marked complete copy of your exhibits along with the exhibits from the other attorney. Keep legal pads to a minimum. For the beginning of the hearing, there should be notes laying out the appropriate board forms filed in the case, including the WC-14 hearing request, any controverts, and other Board Forms for the ALJ to take judicial notice. The employee's attorney should have notes on the first page describing the employee's theory of the case, including the alleged facts demonstrating why attorney fees and penalties are appropriate. The first page of the defense attorney's legal pad should contain the theories of the defense of the case including reference to facts and any appropriate legal citations. The following pages should contain a brief list of the most important exhibits which are likely to be referenced in hearing testimony. Finally, the pad should contain the questions the attorney intends to ask.

5. Tell Your Client What You Are Doing

Admittedly, this is breaking off the topic of trial preparation. However, it is all part of the practice of law. Bar complaints usually focus on the client's perception their attorney is not communicating with them. Keep your client informed, either in writing, or by telephone. While it may take a bit of time away from trial preparation, it will add volumes to your practice administration.

APPEALS TO THE APPELLATE DIVISION

Trial preparation begins the moment the case comes in the door. Similarly, appellate preparation begins the moment the trial starts. Everything at the trial of a case should be done with an eye toward preserving appellate rights. Many of the rights preserved will not be addressed on appeal, but being aware of preserving a record will enhance trial techniques.

One must distinguish between an appeal and a correction of apparent errors and omissions. Any party to the case, within 20 days from the date of the award, may move to correct an apparent error or omission.¹⁷ The mechanism should not be utilized for appealing decisions, but merely to correct what was misstated in the ALJ's decision based on the evidence in the record. For example, if the ALJ incorrectly stated the employee's average weekly wage after a joint stipulation as to the appropriate wage, it would be appropriate to file a motion to correct an apparent error or omission. By contrast, if there was a dispute over the appropriate average weekly wage and the ALJ ruled in favor of one of the parties, the party disagreeing with the finding should file an appeal to the Appellate Division. It should be noted that regardless of the filing of a motion to correct an apparent error or omission, the parties have 20 days from the date of

¹⁷ O.C.G.A. §34-9-102 (f).

the ALJ's decision to file an appeal. However, if the ALJ does correct the error, the parties would have 20 days from the date of the corrected Award.¹⁸ "The time for application for review commences on the date shown on the notice of award . . ." ¹⁹

In determining whether an appeal to the Appellate Division should be filed, consideration should be given to the fact that the Appellate Division has the authority to impose attorney fees for unreasonableness.²⁰ As for factual findings of the ALJ, O.C.G.A. §34-9-103 (a) states "[t]he findings of fact made by the administrative law judge in the trial division shall be accepted by the appellate division where such findings are supported by a preponderance of competent and credible evidence contained within the records." This standard permits the Appellate Division to weigh evidence and evaluate the credibility of witnesses.²¹ Thus, in theory, the members of the Full Board can overturn the factual findings of the ALJ with nothing more than a record and five minute oral arguments.

As a practical matter, the Appellate Division often acknowledges the ALJ's unique position of actually hearing the evidence, observing the witnesses, and being in a superior position to weigh that evidence in most cases. As such, when appeals are based solely on the position the ALJ made incorrect factual findings, the chances of prevailing on appeal are diminished. This is even more so when the dispute is over the credibility of witnesses, unless the record is fairly clear that one witness deserved less credibility than another.

¹⁸ O.C.G.A. §34-9-103(b).

¹⁹ Board Rule 103 (a).

²⁰ O.C.G.A. §34-9-108(b); Board Rule 103 (f).

²¹ See Bennett-Murray, Inc. v. Barnes, 222 Ga. App. 137, 473 S.E.2d 166 (1996).

Board Rule 103 (b) permits five minutes for oral arguments before the Appellate Division. Five minutes is not enough time to walk the members of the Board through all the facts of the case. Fortunately it is not necessary to do so. Any time spent engaged in oral arguments before the Full Board will demonstrate the Appellate Division is aware of the facts and issues in the case. In fact, rarely do they fail to ask pointed questions directed to the heart of the issues on appeal. Therefore, a five minute presentation before the Appellate Division should not be spent recounting of all the facts of the case. Instead, the attorney should give a very brief background about the case to set the context. From there, they should hit the facts and law in dispute, being prepared to reference specific citations in the record. The Board gives some flexibility to the five minute rule for arguments when questions are posed to counsel, but when the buzzer sounds, the attorney should not continue as a matter of right. Instead, the attorney should request permission to extend their presentation.

Sometimes appeals are filed for the purpose of creating leverage for potential settlements, especially in the circumstance where an employee is not receiving benefits to which the ALJ has found him entitled. While a party has a right to appeal to the Appellate Division, frivolous appeals can result in attorney fees.

Interlocutory orders cannot be appealed absent a certificate of immediate review.²² Board Rule 103 (d) states that “[t]he Board will not accept an application for review of an interlocutory order unless the Administrative Law Judge, in the exercise of his or her discretion, certifies that the order or decision is of such importance to the case that immediate review should be had.” Rarely are certificates granted. However, when a

²² Board Rule 103 (d).

certificate is granted, the party must file its application for review within twenty days of the original interlocutory order.²³

CONCLUSION

If the lawyer begins his trial preparation the moment the case comes through the door, he is preparing for success, regardless of the ultimate disposition of the case. The lawyer should be familiar with the rules of court, the rules of evidence, and the law pertaining to the facts of the case at the outset so that the accumulation and development of evidence can follow suit. The lawyer should draft a litigation plan with an outline of the discovery to be performed, witnesses to be interviewed, and documents to be obtained from third party sources. By the time the attorney arrives in court to present the case, the attorney should be an expert on the case.

Such expertise will not go unnoticed by the ALJ. By knowing the facts and the law of your case, it will enable you to read the ALJ and their perception of the case so that you can effectively modify your presentation to accommodate that perception. If your presentation is not marred by gaps in knowledge, disorganization, or unprofessionalism, the case can be expertly presented, and the ALJ will have the tools to make the correct decision.

²³ Board Rule 103 (d).