DEPOSITION DOS AND DON'TS

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DEFENDING THE CLAIMS ADJUSTER'S DEPOSITION

I. PREPARATION BEFORE THE DEPOSITION

A. Pre-deposition conference

Allow adequate time to meet with your attorney in order to properly prepare for the deposition. If your file has been requested, have your attorney pick up the file and review it to place privileged and objectionable documents in a separate file. Remember, if you attempt to review the file and meet with your attorney just

prior to the deposition, you will probably run short on time and be forced to compromise your review of the file and your preparation.

B. Determine issues prior to adjuster deposition
Carefully review the form WC-14 Notice of Claim/Request for Hearing with your attorney to identify hearing issues, relief sought, and all potential defenses. It is imperative that you have a clear understanding of the claimant's and the employer's respective theories of the case. Obviously, this cannot occur unless defense counsel develops the theory and conducts enough discovery to determine the claimant's theory prior to your deposition. For this reason, medical records should be gathered and the claimant's deposition should be taken when possible prior to your deposition.

C. Freeze Claimant's testimony prior to your deposition
This is especially true when you have hired an investigator to conduct surveillance. Claimants tend to be much more open and forthcoming regarding their activities and post-accident employment when they suspect they have been under surveillance, but are uncertain as to the results. Furthermore, most ALJs will allow the claimant to be deposed prior to revealing the results of surveillance. However, if you are deposed before you have frozen the claimant's testimony as to post-accident activity and employment, the claimant may only admit to the same activities and employment uncovered by the investigator and revealed during your deposition. The claimant should always be given the opportunity to damage their own credibility by misrepresenting the nature of their post-accident activity and employment before you educate them regarding the results of your surveillance.

D. Evaluate your relevant conduct and decisions
An adjuster's conduct and activity leading up to a decision to controvert a claim or to raise certain defenses is a legitimate scope of inquiry by claimant's counsel. However, because of the narrow time frames within which adjusters often make decisions only limited information may be available to the adjuster when a decision is made to controvert a claim or to raise certain defenses. Be sure to review the information which was available to you at the time a decision was made to pursue a challenged position or defense. The reasonableness of your activity or decision will usually turn on the information available at the time the activity was performed or the decision was made.

If a defense asserted by the adjuster was appropriate when first raised but inappropriate in light of subsequently acquired information, don't be reluctant to

abandon the defense and to take corrective action. Nothing is more uncomfortable for the adjuster and defense counsel than to try to defend an indefensible decision or position taken early in a file when subsequently developed facts demonstrate the defense is no longer viable.

When mistakes are uncovered in your review of the file with your attorney, be careful not to volunteer information about the mistakes, but be prepared to admit the mistake if questioned regarding same during the deposition. If mistakes are identified during the pre-deposition conference, prepare to explain why the mistake was made and what corrective action was taken once the mistake was fully appreciated. Begin corrective action prior to the deposition if at all possible. For example, if benefits were improperly suspended, or authorization was not given for appropriate medical treatment, consider recommencing the benefits with payment of appropriate penalties or to authorize appropriate medical treatment so the matter is cleared up and communicated to the claimant's attorney prior to the deposition. This may eliminate the need for the deposition and, if it does not, it may enable you to avoid paying assessed attorney fees for the time of the claimant's attorney in preparing for and conducting the deposition.

E. Standard deposition "dos and don'ts"
Tell the truth;
Don't volunteer information;
Avoid exaggerations;
Avoid generalizations regarding the claimant or his/her activity;
Be sure to understand each question before answering;
Feel free to ask claimant's attorney to repeat or rephrase question if question is unclear;
Don't guess or speculate;
Don't allow claimant's attorney to put words in your mouth or to put an inaccurate spin on your testimony by allowing him or her to improperly summarize your testimony;
Don't agree to provide documents during the course of the deposition which were not previously requested or produced. This would prevent defense counsel from having adequate time to review and discuss such documents and to assert appropriate objections. Allow defense attorney to respond to any such inquiries;
Be cautious about responding from memory with specific dates and times;
Be sure to qualify answers when appropriate by prefacing answer with "To the best of my recollection . . . ";

Discuss the attorney-client privilege regarding information obtained from defense counsel and the fact that this privilege may be waived in certain instances to explain the adjuster's decisions or course of conduct;
Understand the purpose of your deposition and to the extent possible, the goal of the claimant's attorney in taking it.

F. Review potential cross-examination questions and documents with your attorney
There is no better way to prepare for cross-examination by the claimant's attorney than to anticipate the tough questions and documents which will be used in questioning the adjuster and to review them with your attorney prior to the deposition. This helps you better anticipate the types of questions you will be asked and it provides defense counsel with the opportunity to assist you in understanding how the wording of certain answers can be misconstrued and taken out of context.

II. LOCATION OF ADJUSTER'S DEPOSITION

Never conduct depositions at your office. The claimant's attorney should not be given an opportunity to conduct the deposition where you have complete access to all files, computer, etc., so as to allow you to access information not requested by the claimant's attorney prior to the deposition. The claimant's attorney should be required to request desired documents prior to the deposition, even if done informally with a letter.
Furthermore, the claimant's attorney should not be provided with the opportunity to see or overhear conversations and activity at the insurance company or the third party administrator's offices which could be misconstrued as improper or inappropriate.

III. DOCUMENTS TO BE PRODUCED AT ADJUSTER'S DEPOSITION

A. Require written document request prior to deposition
The claimant's attorney should be required, well in advance of the deposition, to identify all documents desired so that defense counsel has the opportunity to determine which documents are objectionable and so that counsel has the opportunity to review the discoverable documents with you prior to the deposition. This can be done on an informal basis without resort to the procedures outlined in the Civil Practice Act, but the claimant's attorney should at least be required to confirm the specific documents being requested by

correspondence. This will avoid misunderstandings that can subsequently develop.

B. Appropriate discovery device for document production

Discovery in Workers' Compensation cases are governed by the "Georgia Civil Practice Act." O.C.G.A. §34-9-102(d). If documents are produced by the adjuster through formal discovery, the appropriate tool is the request for production of documents, as referenced in O.C.G.A. §9-11-34. This is established by the express language of O.C.G.A. §9-11-30(b)(5) which establishes the parameters of document production by a party at a deposition. The pertinent provision provides:

"The notice to a party deponent may be accompanied by a request made in compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition. The procedure of Code Section 9-11-34 shall apply to the request." (Emphasis added).

Accordingly, an adjuster cannot be required to produce documents except by agreement of counsel if the adjuster's deposition is scheduled within thirty days after notice. The policy behind the thirty day response time is for the purpose of providing party representatives with adequate time for gathering, reviewing and determining the discoverability of documents in consultation with their counsel prior to being required to produce the documents and answer questions regarding same.

C. Inappropriate discovery devices for document production

Although O.C.G.A. §9-11-45 allows the use of subpoenas for taking depositions, that Code Section is only applicable to non-party witnesses. Warehouse Home Furnishings Distributors, Inc. v. Davenport, 261 Ga. 853 (1992). Thus, a subpoena duces tecum is not a proper tool for requiring a party representative, such as an adjuster, to produce documents during a deposition. Likewise, it has long been held that subpoenas duces tecum never issue to anyone who is a party to the case. Ex parte Calhoun, 87 Ga. 359 (1891) and Aycock v. Household Finance Corp. of Georgia, 142 Ga. App. 207 (1977). Although a notice to produce pursuant to O.C.G.A. §24-10-26 can be used "in lieu of serving a subpoena" when one party desires another party to bring documents to a hearing or trial, this device may not be used as a discovery tool in obtaining information prior to hearing or trial. See Bergen v. Cardiopul Medical, Inc., 175 Ga. App. 700 (1985). "A notice to produce is not a discovery tool. Notices to produce are authorized by provisions in the evidence code, which are designed to insure that documents will be brought to a trial for examination and possibly for introduction as

evidence in the proceeding." Langham's Agnor Georgia Civil Discovery (rev. ed.), §13-5.

D. Recommended compromise regarding document production
Because of the limited time for discovery in Workers' Compensation cases, many times a determination will not be made that the adjuster's deposition is needed until less than thirty days remain before the scheduled hearing. In these instances, there is no discovery device in the Civil Practice Act which will require a party representative to produce their documents at a discovery deposition. Although the documents can generally be produced by agreement of counsel in a shorter period of time, depending upon the time remaining before the hearing, and the number of documents contained within the adjuster's file, there may be inadequate time for defense counsel to review the file and to remove objectionable documents. In such situations, we generally recommend that counsel enter a stipulation to be placed on the record at the beginning of the deposition that the adjuster's file will be available for use by the adjuster in refreshing his or her recollection during the course of the deposition, but will not be made available for inspection or review by claimant's counsel. This will allow the claimant's attorney to obtain complete answers to their deposition questions, but will not require defense counsel to spend an inordinate amount of time reviewing a voluminous file in order to remove objectionable documents containing mental impressions, conclusions, opinions, legal theories, file reserves, attorney-client communications, settlement evaluation memoranda, etc.

IV. CONDUCT OF DEPOSITION

A. Deposition stipulations
Consider deviating from the standard discovery deposition stipulations where objections are reserved except as to form of question or responsiveness of the answer and instead make appropriate objections during the course of the deposition in order to more closely restrict or limit the scope of the examination of the adjuster. Remember, depositions in workers' compensation cases may be admissible into evidence whether or not the adjuster is available to testify at the hearing and regardless of the original purpose for taking the deposition. See O.C.G.A. §34-9-102(d)(3). You cannot "un-ring the bell" and since the ALJ is the finder of fact, his or her decision could be influenced by prejudicial information elicited during the deposition, but ruled inadmissible at the hearing.

B. Deposition objections

Although defense counsel should be reluctant to reserve objections and thereby allow claimant's counsel to question the adjuster regarding irrelevant matters because of the potential prejudicial effect on the ALJ, defense counsel must also avoid unnecessary or frivolous objections because this can create the impression that you are attempting to conceal something and it will adversely impact the defense counsel's credibility both with the claimant's attorney and the ALJ.

C. Scope of examination
Limits on the scope of examination:
If the reason for the adjuster's deposition is not apparent from the issues raised in the WC-14, request an explanation from the claimant's attorney. If the claimant's attorney is unable or unwilling to identify a legitimate area of inquiry which appears reasonably calculated to lead to the discovery of admissible evidence and it appears the deposition is being used solely to pressure or inconvenience the adjuster in an effort to bring about settlement, then a motion for protective order may be appropriate. If a motion for protective order is filed in an effort to prevent the adjuster's deposition from being taken, the claimant's attorney will be required in their responsive brief to identify a legitimate area of inquiry or risk being denied the opportunity to depose the adjuster.

During the course of the deposition the scope of the questions should be limited by the issues contained in the WC-14. Claimant's counsel should not be allowed to engage in a "fishing expedition" regarding the adjuster's handling of the claim. Likewise, inquiry into the adjuster's conduct in handling other unrelated claims should not be allowed. If the claimant's attorney refuses to limit the scope of his examination to those issues raised in the form WC-14, counsel may attempt a conference call with the ALJ. Many ALJs are receptive to resolving discovery disputes informally over the telephone and if you are able to catch the ALJ in his or her office, you may be able to resolve the discovery dispute without the necessity of suspending and later reconvening the deposition. O.C.G.A. §9-11-30(c)(3) provides that a deposition may be suspended upon an objection that the examination is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass or oppress the deponent.

Common areas of inquiry for adjuster depositions:
Reasons for failure to authorize medical treatment.
Disputes regarding authorized health care providers.
Reasons for adjuster's unilateral suspension of benefits.
Results of surveillance or investigation regarding prior accidents or claims.
Reasons for controverting claim in an "all issues" case.

VI. ALTERNATIVES TO ADJUSTER DEPOSITION

In some cases, the expense and inconvenience of the adjuster's deposition can be avoided by use of interrogatories, or pre-hearing stipulations regarding certain facts which are not in dispute and which the claimant's attorney is seeking to establish through the adjuster's deposition. In fact, in many situations, interrogatories may be more appropriate than a deposition of the adjuster. This is true because the scope of answers to interrogatories is generally broader than the scope of answers to questions posed during a deposition. It is generally accepted that a corporate party is required to search all sources of information reasonably available within the corporation in responding to interrogatories, even if the corporate employee assisting in the preparation of the interrogatory responses has no personal knowledge. Langham's Agnor Georgia Civil Discovery (Rev. Ed.), §12-7. Furthermore, in responding to interrogatories directed to both the employer and insurer, non-objectionable information which is reasonably available to representatives of both the employer and the insurer should be disclosed. Generally, this is significantly broader than a question directed to a specific adjuster who testifies solely based upon his or her personal knowledge and who is unable during the course of a deposition to refer to outside sources of information aside from the documents produced for the deposition. It should also be noted that an employer's interrogatory responses may also be admitted as evidence during the hearing pursuant to O.C.G.A. §34-9-102(d).

VII. DEPOSING THE CORRECT ADJUSTER

Due to occasional adjuster turnover experienced by insurers and third party administrators, a problem sometimes arises regarding which adjuster the claimant's attorney should depose. Unless the claimant's attorney wants to take two depositions, he or she is often confronted with the need to decide whether to depose the former adjuster, who was involved in making relevant decisions, or deposing a current adjuster who has embraced the earlier decisions and who is up to date regarding recent activity within the file. Defense counsel has little to gain by failing to disclose which adjuster is most knowledgeable regarding the issues in dispute. Word travels fast within the workers' compensation bar and both sides will be better served by a frank discussion regarding the knowledge of current and former adjusters prior to a deposition so that needless depositions are not conducted.

VIII. LIMITING COMMUNICATION BETWEEN CLAIMANT'S COUNSEL AND THE ADJUSTER PRIOR TO THE DEPOSITION

Communication between the adjuster and the claimant's attorney is commonplace in the handling of Workers' Compensation claims. This is true because many claims and issues are successfully resolved without litigation. However, once defense counsel has been assigned, the claimant's attorney should not communicate directly with the adjuster without first obtaining permission from defense counsel. The Supreme Court of Georgia interpreted Disciplinary Standard 47 to prevent such communications. The decision reads in pertinent part as follows:
"An attorney may not ethically interview an employee of a corporation which is an opposing party in pending litigation without the consent of the corporation or other corporation's counsel where the employee is either: (1) an officer or director or another employee with authority to bind the corporation; or (2) an employee whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case."

State Bar of Georgia Formal Advisory Opinion 87-6 (87-R2) decided July 12, 1989.

IX. READING AND SIGNING THE DEPOSITION

Have your attorney reserve your right to read and sign the deposition. This will provide you with an opportunity to correct not only mistakes made by the court reporter, but any mistakes you may have made. O.C.G.A. §9-11-30(e) states, in pertinent part, that upon reviewing the transcript, the deponent may make ". . . any changes in form or substance which the witness desires to make . . ." Accordingly, you have the opportunity to modify, and change testimony if appropriate after reflecting upon the question and response. Although substantive changes can be used to challenge a deponent's credibility, the impact on one's credibility will certainly be much less dramatic if the change is voluntarily made upon the first opportunity to read the transcript than the impact will be if you fail to correct the testimony and are impeached at the hearing.