

**VIRGINIA WORKERS' COMPENSATION  
AMERICAN INN OF COURT**

**June 23, 2021**

**Appealing for Success**

**Presented by:** Wesley G. Marshall, Commissioner  
R. Ferrell Newman, Chairman/Commissioner  
Robert A. Rapaport, Commissioner  
Virginia Workers' Compensation Commission

**I. Types of Appeals**

- A. Deputy Commissioner Opinions
  - Hearings (Evidentiary and Show Cause)
  - On the record (OTR)
- B. Deputy Commissioner Orders – Interlocutory
- C. Award Orders
- D. Stipulations
- E. Petition & Order Settlements
- F. Expedited Hearings
- G. Employer's Applications for Hearing

**II. Practice Pointers**

- A. Make certain your appeal is filed timely.
- B. Provide the JCN number, name of injured worker, and date of injury.
- C. Clearly state you are requesting review.
- D. Provide information to indicate if the appeal is from an opinion, award order, settlement, etc. and the date of that document.

- E. If confirmation of the review request is not received within one week, contact the Clerk's Office.

### **III. Preserving Issues for Appeals**

- A. Winning appeals begin at the hearing level.
  - Remember to state any objections for the record.
- B. Make sure the claimant's demonstration of how an injury occurred is clearly described in the record.
- C. Either request the Deputy describe the action or you describe it.
- D. In some cases, photographs of the accident scene are important on review.
- E. Make sure the photographs are entered as exhibits in the record.
- F. To avoid unnecessary delays regarding submitted videos, prior to the hearing, confirm with the Clerk's office the type of recording which can be easily viewed by the Commission.
- G. Submit clear copies of any exhibits.

### **IV. Requests for Review**

- A. Set forth all assignments of error with specificity.
- B. If requesting Oral Argument state why argument would be helpful to the Commission and the parties.
- C. Do not request review of issues not raised at the initial hearing.
- D. You do not need to appeal every issue on which you did not prevail. Select those issues that matter and which you feel are your strongest. A scattered approach may dilute your stronger arguments with less persuasive issues or minor issues and result in losing the Commission's attention and your credibility.

V. Written Statements

- A. Address all issues of error.
- B. Omit discussion of issues not noted in the request for review or raised below.
- C. Make your statement easy to read with proper formatting and organization.
- D. Brevity is appreciated – quality over quantity.
  - Generally, you do not need 40 pages to make your point.
  - Brief, Bright & Relevant
- E. Tell us why the cases cited by the Deputy Commissioner or opposing counsel are distinguishable and why your authority is controlling.
- F. Avoid tunnel vision. You just tried the case. Discuss possible appeal issues with others.
- G. Candidly concede contrary law and facts – it bolsters your credibility.
- H. Be an advocate but keep it professional. Write only what you would argue in person.
- I. Provide relevant case law with correct citations.
- J. Always indicate where in the record we can find relevant documents.
- K. If one or two documents are critical, attach them as exhibits.
- L. Clearly state the outcome or determination you request from the Commission.

VI. After Discovered Evidence

- A. Rule 3.3

Rule 3.3 of the *Rules of the Virginia Workers' Compensation Commission* pertains to the acceptance of additional evidence after a hearing. This rule provides that such evidence will be considered by the Commission only when it is absolutely necessary and advisable, and the party requesting that the evidence be considered conforms to the rules of

the courts of the Commonwealth of Virginia for the introduction of after-discovered evidence. To meet these requirements, the movant must prove the evidence (1) was obtained after the hearing; (2) is not merely cumulative, corroborative, or collateral; (3) could not have been discovered before the hearing by the exercise of reasonable due diligence; and (4) must be of such a character as to produce an opposite result on the merits at another hearing. *Whittington v. Commonwealth*, 5 Va. App. 212, 215 (1987) (citing *Odum v. Commonwealth*, 225 Va. 123, 130 (1983)).

**VII. Requests for Reconsideration**

- A. Note specific reasons for your request other than you are unhappy.

**VIII. De Novo Review**

- A. Review to the full Commission is a non-deferential standard of review. It does not place weight on the previous findings at the trial below. It is an independent review of the evidence.
- Findings of facts by the initial hearing are not binding on appeal to the full Commission. *Williams v. Auto Brokers*, 6 Va. App. 570 (1988).
  - A specific, recorded observation of a witness' demeanor or appearance in relation to credibility is an aspect of the hearing that the Commission may not arbitrarily disregard. However, the Deputy Commissioner's findings as to credibility do not necessarily bind the Commission. *Goodyear Tire & Rubber Co. v. Pierce*, 5 Va. 374 (1987).