FORMAL HEARING

When it becomes clear to the specialist that the disputed issues cannot be resolved at the informal level, the claim is forwarded to the formal hearing docket. The insurer must be represented by counsel at all stages of the formal hearing proceedings (including the pretrial conference). The injured worker is strongly advised to obtain counsel, but may appear pro se if he or she chooses.

The Pretrial Conference

The first step in the formal hearing process is the pretrial conference. The pretrial conference is conducted by telephone, with notice to all parties.

At least 2 days prior to the pretrial conference, the parties must submit a written **pretrial statement** that includes the following:

- A statement of the contested issues and uncontested facts;
- A list of the exhibits each party intends to use at the hearing;
- A disclosure of any hearsay evidence upon which each party intends to rely; and
- A list of the witnesses each party intends to call, along with a brief statement as to the substance of their testimony.

Contested issues may include whether a claim is compensable or whether proposed surgery is reasonable, necessary and causally related to the work injury. Common uncontested facts may include the date the injured worker began working for the employer, the date of injury and the injured worker's average weekly wage.

Typically the parties prepare a joint medical exhibit, which includes all of the injured worker's relevant medical records to be introduced into evidence at the hearing. Photographs and/or videotapes sometimes are offered as evidence; pursuant to Rule 7.1700 these must be provided to the opposing party beforehand so that there is an opportunity to review and evidence and verify its accuracy.

Although hearsay evidence is not usually admissible in a court trial, Rule 7.1010 allows for its admission at the formal hearing if it is "of a type commonly relied upon by prudent people in the conduct of their affairs." Hearsay evidence must be provided to the opposing party with sufficient notice to verify its accuracy.

At the pretrial conference the hearing officer will set a hearing date, a final disclosure deadline and a deadline for mandatory mediation to occur.

Often the parties need to collect more medical records, take depositions or attend to further discovery before they are ready for a hearing. In the process of conducting such discovery, new facts may emerge, which might require changes to the witnesses and evidence to be submitted at hearing. The purpose of the final disclosure deadline, which typically is set for 30 days prior to the hearing date, is to allow both parties to exchange this additional information. They do so by filing a written **final disclosure**, which contains the following information:

- A final statement of the contested issues and uncontested facts;
- A final list of the witnesses expected to testify, along with a brief statement of the substance of their testimony;
- A final list of the exhibits to be used or introduced at hearing; and
- A final statement of the hearsay evidence upon which either party intends to rely.

Unfair surprise is not permitted at the formal hearing. Consequently, failure to comply with the final disclosure deadline may result in the exclusion of evidence that was not properly disclosed beforehand.

The statute requires that all parties must participate in **mandatory mediation** at least 30 days prior to the formal hearing. The purpose of the mediation session is to fully explore settlement possibilities, so that hopefully the dispute can be resolved without the necessity of a contested hearing. The mediation must be conducted by a Department-approved mediator; a list of these is available on the Department's website. The cost of mediation is split equally between the parties. In rare instances, the Hearing Officer will approve a party's request that mandatory mediation be

waived. For more information about mandatory mediation, please refer to Rule 27.0000.

The Formal Hearing

Although "formal" in the workers' compensation context, the formal hearing is not quite as formal as a court trial. Hearings are held in a conference room at the Department of Labor in Montpelier (or elsewhere in the state, if the circumstances warrant it). Most hearings take no more than a day to try, though more complicated cases may require several days to hear.

At the hearing, the parties sit at a conference table. The Hearing Officer administers an oath to each witness and makes an audiotape recording of the proceeding. The Hearing Officer marks exhibits and rules on their admissibility. Hearing testimony is received in typical trial fashion, with direct and cross-examination, then redirect and re-cross. Objections are made on the record and are ruled on by the Hearing Officer.

At the conclusion of the hearing, the parties agree on a specific date by which to submit proposed Findings of Fact and Conclusions of Law. Once these are received, the record is closed and the Hearing Officer drafts an opinion for the Commissioner's review and signature. By statute, the Commissioner's opinion is to be issued within 60 days after the date upon which the record closes.

If the injured worker prevails, the Commissioner's opinion will identify the date on which the employer's obligation to pay benefits commenced. Interest must be computed and paid from that date forward. A prevailing injured worker also will be entitled to an award of litigation costs and attorney fees, in accordance with 21 VSA §678 and Rule 10.0000.

Unless a stay is granted, the Commissioner's decision is final and any benefits ordered must be paid, even pending an appeal. Questions of law are appealable to the Vermont Supreme Court pursuant to 21 VSA §672. Questions of fact, or mixed questions of law and fact, are appealable to the Superior Court, Civil Division. Appeals cannot be taken simultaneously. Counsel should consider carefully how best to proceed, as the law in this area can be confusing.

Once a party decides to appeal, it must send the appropriate filing fee to the Department along with its notice of appeal. The Commissioner will certify the questions to be considered on appeal and will send these to the court, along with the record on appeal and the appealing party's filing fee.