

Workers' Compensation Trial Considerations

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A review of a workers' compensation R.C. 4123.512 Court Appeal given new parameters by various Common Pleas Courts. An analysis of how to evaluate whether to pursue a .512 court appeal. Preparation for and eventual trial proceedings, including Interrogatories, depositions, expert testimony, exhibits, dispositive motions, jury instructions, and actual trial strategies will be explored. Additional issues will be reviewed including voir dire, jury selection, and jury versus bench trials.

- Presentation More Aptly titled "Musings of an Old Fart"
 - Part Civil Rules
 - Part Case Law
 - Part Better/Best Practices
 - Part War Stories
- Caveat: Last tried a .512 appeal pre-pandemic
- New Parameters
 - Covid-related protections
 - Maximizes proper use of exhibits
 - Minimizes reservation of admission of exhibits after conditional "resting" of case-in-chief
 - Proportional Discovery
- Some Considerations
 - County
 - Judge
 - Courtroom
 - Opposing Counsel
 - AG's involvement & table/chair location
 - Opposing party
 - Own party
 - Expert witnesses

- Fact or Myth
 - Most Judges Hate Contentious Workers' Compensation Cases
 - Most Employers in .512 Cases Believe That Most, If Not All, Injured Workers Are Liars and/or Scammers
 - Most Injured Workers in .512 Cases Believe That Employers Are Cheap Or Cheaters
 - Most Injured Workers Are Ill-Prepared for Depositions & Trial Testimony
 - Judge George McMonagle's Rule Applies
 - Voir Dire Is The Most Difficult Part Of All Trials, And The Part At Which Workers' Compensation Attorneys Particularly Are The Least Proficient
 - Jurors Keep Open Minds Until The End of Trial

- Should I appeal?
 - Is the Injured Worker or the Employer the Appellant?
 - Is the Employer SI or state-funded?
 - Why did the Appellant lose administratively?
 - What is the good faith basis to appeal? R.C. 2323.51/Civil Rule 11

- Should I seek a jury trial?
 - Civil Rule 38
 - Why not?

- Discovery?
 - What do I want to accomplish?
 - Initial Disclosures – Civil Rule 26(B)(1)
 - Don't underestimate Civil Rule 36
 - Clearly label separate portions of combined discovery
 - Remember Civil Rule 45
 - How contentious or cooperative should discovery be?
 - Physical injury v. Mental injury
 - "Narrative" objection - Nothing in the Civil Rules prohibits such a narrative interrogatory. The "narrative" objection is a relic of a misguided 1970 common pleas court decision, *Penn. Cent. Transp. v. Armco Steel Corp.*, 27 Ohio Misc. 76, 271 N.E.2d 877, which was wrong and which even its author refused to follow it years later when he was on the Second District Court of Appeals. See *Hudson v. United Services Auto. Ass'n Ins. Co.*, 150 Ohio Misc.2d 23, 902 N.E.2d 101, 2008-Ohio-7084, ¶¶ 33-34; see also, *Babcock Swine, Inc. v. Shelbco, Inc.*, 126 F.R.D. 43, 44 (S.D. Ohio 1989).

- Boilerplate objections

The factors of proportionality are (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, the importance of the discovery in resolving the issues, and (5) whether the burden or expense of the proposed discovery outweighs its likely benefit. Ohio Civil Rule 26(B)(1), which "incorporates nearly identical language as the federal rule in Fed. R. Civ. P. 26(b)(1), as amended in 2015." Ohio Civil Rule 26, Staff Note, July 1, 2020 Amendments. The 2020 change "does not place on the party seeking discovery the burden of addressing all proportionality considerations." *Id.* Rather, the party opposing discovery bears the burden. *Deering v. Beatty*, 8th Dist. No. 110158, 2021-Ohio-3461, ¶ 25; *Avanos Sales, LLC v. Medtronic Sofamor Danek USA, Inc.*, No. 19-cv-20754, 2021 U.S. Dist. LEXIS 41670, ¶ 7 (W.D. KY 2021).

The burden cannot be satisfied simply by declaring that the discovery is not proportional. Ohio Civil Rule 26, Staff Note, July 1, 2020 Amendments; *Waskul v. Washtenaw Cty. Community Mental Health*, No. 16-10936, 2021 U.S. Dist. LEXIS 209859, (E.D. Mich. 2021).

*** "A party objecting to a request for production of documents as burdensome must submit affidavits or other evidence to substantiate its objections." [*Cratty v. City of Wyandotte*, 296 F. Supp. 3d 854, 859 \(E.D. Mich. 2017\)](#). "[T]his burden cannot be sustained with bald generalizations or a conclusory assertion that production will be time-consuming and/or expensive." Hon. Craig B. Shaffer, *The 'Burdens' of Applying Proportionality*, [16 Sedona Conf. J. 55, 93 \(2015\)](#).

Id. at *15; see also, *Siriano v. Goodman Mfg. Co., L.P.*, No. 2:14-cv-1311, 2015 U.S. Dist. LEXIS 165040, at *5; *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288 (6th Cir. 2007). Indeed, boilerplate objections are no objections at all, and constitute a waiver of the objections. *Id.* at *23.

- Verification of Interrogatory Answers
- Depositions
 - Only Privilege Objections Justify Refusals to Answer
 - Right of Signature – not solely the province of the deponent

- Dispositive Motions
 - Pretrial
 - Trial

- Voir Dire – Jury De-Selections
 - Cause
 - Peremptory
 - Batson
 - Silent voir dire
 - Red
 - Blue
 - Green
 - Yellow

- Opening Statement
 - Stipulations
 - How Detailed?
 - Use of Medical Records or Demonstrative Evidence

- Direct examination
 - 5 W's & How
 - Write out your questions
 - Don't share with client
 - Don't check off during trial

- Cross-examination/re-direct/re-cross – jot down the antecedent answer, not the question

- Jury Questions & Notetaking

- Jury Instructions & Jury Interrogatories

- Closing Arguments
 - Use Exhibits
 - Use Jury Instructions
 - Walk Jury Through Analysis

- Post-Verdict Challenges
 - Motion for Judgment Notwithstanding the Verdict
 - Appeal
 - Settlement

- Unwritten Rules
 - The Real Jury Interrogatories
 - Do you like the Injured Worker?
 - Do you like the Employer? BWC?
 - Which do you dislike more/most?
 - The Real World Rules of Evidence
 - Two witnesses, one of who is disinterested in outcome
 - One witness with a contemporaneously-created document