

# DEPARTMENT OF LABOR AND EMPLOYMENT

## Division of Workers' Compensation

7 CCR 1101-3

### WORKERS' COMPENSATION RULES OF PROCEDURE

#### Rule 9 Division of Workers' Compensation Dispute Resolution

##### 9-1 DISCOVERY

One of the goals of the workers' compensation system is to minimize litigation, but disputes do arise and a system for resolution is necessary. One of the underlying premises of an administrative adjudication system is that parties should be able to resolve disputes in, as much as possible, a quick, inexpensive and simple manner. Therefore, when discovery is authorized and appropriate, the following apply:

- (A) Upon agreement of the parties or for good cause shown, an administrative law judge may allow additional discovery, may limit discovery or may modify the time limits set forth in this rule. ~~Setting of a formal hearing on an expedited schedule shall constitute good cause.~~ Good cause shall include but not be limited to an agreement of the parties **OR SETTING OF A HEARING ON AN EXPEDITED BASIS.**
- (B) Interrogatories and requests for production
  - (1) Written interrogatories and requests for production of documents may be served upon each adverse party. The number of interrogatories, including the requests for production of documents, to any one party shall not exceed 20.
  - (2) The responses to the interrogatories and production of documents shall be provided to all opposing parties within 20 days of mailing of the interrogatories and requests.
  - (3) The interrogatories and the requests for production of documents may not be submitted later than 60 days prior to hearing, except for expedited hearings.
- (C) Depositions
  - (1) Depositions may be taken upon written motion and order, or by written consent of the parties.
  - (2) Absent consent of the parties, permission to take a deposition of a party will be granted only when there is a specific showing:
    - (a) That a party who has been served with written interrogatories has failed to respond to the interrogatories; or
    - (b) That the responses to the written set of interrogatories are insufficient; or
    - ~~(c) All parties agree to the taking of a deposition.~~
  - (3) A non-party witness may object to being deposed in writing to the requesting party within five (5) days of service of the subpoena.

- (a) The subpoena must be accompanied by notice to the non-party deponent of the right to object in writing.
  - (b) If the non-party deponent objects, the requesting party may schedule a prehearing conference to request an order compelling the deposition.
- (D) Each party is under a continuing duty to timely supplement or amend responses to discovery up to the date of the hearing.
  - (E) Discovery, other than depositions, shall be completed no later than 20 days prior to the hearing date, except for expedited hearings.
  - (F) If any party fails to comply with the provisions of this rule and any action governed by it, an administrative law judge may impose sanctions upon such party pursuant to statute and rule. However, attorney fees may be imposed only for violation of a discovery order.
  - (G) Once an order to compel has been issued and properly served upon the parties, failure to comply with the order to compel shall be presumed willful.

9-2 MEDIATION, SETTLEMENT CONFERENCES, PREHEARING CONFERENCES AND ARBITRATION

- (A) Mediation. Parties to a dispute may consent to submit any dispute to mediation. A request for mediation may be presented to either the Division of Workers' Compensation or the Office of Administrative Courts. If all parties agree, a conference will be scheduled.
- (B) Settlement Conferences. Parties to a dispute may request a settlement conference subject to the limitations set forth in § 8-43-206, C.R.S.
- (C) Prehearing Conferences. The Director, administrative law judges in the Office of Administrative Courts, or any party to a claim may request a prehearing conference before a prehearing administrative law judge. Prehearing administrative law judges may order any party to a claim to participate in a prehearing conference.
  - (1) The issues raised for consideration may be raised by written or oral motion at the time of setting. At the time of setting, the party setting the conference shall notify the prehearing conference unit of the issues to be heard. The prehearing conference unit will notify all other parties of the issues via e-mail.
  - (2) Within two (2) business days of the setting, any party may add issues to be heard by providing written notice to the prehearing conference unit and all other parties.
    - (a) ~~If a party objects to the addition of issues it shall be within~~ **ISSUES ADDED** more than two (2) business days after the setting ~~it shall be within~~ **WILL BE HEARD AT** the discretion of the prehearing administrative law judge ~~to determine if adequate notice was provided to the non-moving party and if the time scheduled for the conference is sufficient for the additional issues to be heard.~~
  - (3) A PARTY MAY REQUEST additional time to respond to an issue raised at the prehearing conference ~~may be requested by any party~~. It shall be within the discretion of the prehearing administrative law judge to determine if such additional time is necessary to protect the rights of the parties.

- (4) Once a prehearing conference has been requested by a party to a claim, it shall be set. If any party objects to the prehearing conference as set, the following procedures shall apply:
- (a) A party objecting to the setting of a prehearing conference or refusing to participate in the conference shall e-mail, fax or hand-deliver any objections to the prehearing unit within 2 business days following the date the prehearing conference is set. If the prehearing administrative law judge orders that the prehearing conference proceed as set, the requesting party shall send written notice of the time and place of the prehearing conference to all other parties.
- ~~(5) At the time of the prehearing conference, each party may submit a prehearing statement setting forth a brief summary of the issues in dispute, the names of all witnesses each party intends to call, the estimated time each party will require to present testimony and evidence, and the status of settlement discussions. Each party may also submit any discovery or pre-trial motion.~~
- (65) Any party to a claim may request, either in advance or on the date of the prehearing conference, that the prehearing conference be recorded electronically. If a request for electronic recording is made, a party shall have until the date of the merit hearing, if such hearing date is pending at the time of the prehearing conference, or 100 days following the prehearing conference, whichever is shorter, within which to request that the prehearing conference unit provide a copy of the electronic recording.
- ~~(76) The prehearing administrative law judge may require a party to provide available vocational, medical, hospital and employment records, or reports to the other parties. **A PARTY REQUESTING A PREHEARING CONFERENCE MUST MAKE A GOOD FAITH EFFORT TO CONFER WITH ALL OPPOSING PARTIES REGARDING BOTH THE PROPOSED SCHEDULING OF THE CONFERENCE AND THE MATTERS TO BE ADDRESSED AT THE CONFERENCE AT LEAST ONE BUSINESS DAY BEFORE SETTING THE CONFERENCE.**~~
- (D) Arbitration. Parties to a dispute may consent to submit any dispute to binding arbitration by written agreement. Binding arbitration shall be conducted by an eligible prehearing administrative law judge of the parties' mutual choice, or pursuant to arbitration procedures as provided by the Colorado Rules of Civil Procedure. Unless otherwise provided by the administrative law judge or upon mutual consent of the parties and/or upon the order of the arbitrator(s), proceedings in any such arbitration shall be conducted in a manner consistent with the Colorado Rules of Civil Procedure.

### 9-3 MOTIONS

- (A) All matters for the Director's determination shall be filed with the Division of Workers' Compensation, to the attention of the Director. Matters for the Director's determination include but are not limited to:
- (1) Requests for penalties for consideration by the Director;
- (2) Requests for attorney fee determinations made by the Director;
- (3) Matters regarding claims handling or administration, for example, benefit distribution, petitions to modify, terminate or suspend temporary benefits, lump sum requests;

- (4) Requests for payment of costs of a transcript due to indigence pursuant to §8-43-213 (3), ~~C.R.S.~~;
  - (5) Closure orders;
  - (6) Matters involving uninsured employers;
  - (7) Utilization reviews, unless the Director has referred the matter on appeal;
  - (8) Applications for admission to the major medical or medical disaster funds;
  - (9) Disputes regarding medical payments
- (B) Motions shall be filed exclusively with either the Division of Workers' Compensation or the office of administrative courts. Duplicate copies of motions shall not be filed. ~~However,~~ Copies of these documents may be filed if required as attachments, evidence submissions, and other instances to complete the record for determination of a matter before the Director.
- (C) Every motion must include a certification by the party or counsel filing the motion that he or she has conferred, or made a good faith effort to confer, with opposing counsel and unrepresented parties. If no conference has occurred, an explanation must be included in the motion.
- (D) The motion shall conspicuously state in the caption if the motion is contested, uncontested or stipulated. If a motion is stipulated, or uncontested, the motion may be granted immediately.
- (E) Any response or objection shall be filed within 10 days from the date the initial motion was filed. A response or objection must be simultaneously served on the opposing parties. The certificate of service must indicate that service was executed on the date of filing and indicate the method of service.
- (F) The parties shall submit a proposed order with each motion and response. The proposed order shall include a certificate of service containing the e-mail addresses for all parties, or if the parties do not have e-mail addresses, the facsimile numbers. The resulting order shall be sent either by e-mail or facsimile to all parties. If e-mail or facsimile information is not available for all parties, the order shall be sent to the moving or prevailing party who is responsible for distribution of true and correct copies of the order to all remaining parties promptly, and in any event no later than five calendar days after the date the order is received.
- (G) Motions filed for consideration by a prehearing administrative law judge may be submitted via electronic mail.

#### 9-4 PRIVILEGES AND PRIVILEGE LOGS

- (A) In discovery and disclosure disputes in which a privilege is being asserted (including but not limited to discovery and requests for claim files pursuant to §8-43-203) the party asserting the privilege shall prepare a privilege log with sufficient description to allow the other parties to assess the applicability of the privilege claims.
- (B) The privilege log shall contain, at a minimum:

1. The date of the item for which the privilege is being asserted;
2. The author and recipient of the item;
3. A description of the subject matter sufficient to explain, without disclosing the substance of the allegedly privileged material, why the item qualifies for the asserted privilege;
4. The legal and factual basis for the claim of privilege;
5. If the privileged item contains a communication, the names and titles of the parties to that communication;
6. **THE PAGE OR BATES NUMBER OF THE ITEM FOR WHICH PRIVILEGE IS ASSERTED.**

#### 9-5 TRUST DEPOSITS AND SURETY BONDS

- (A) The Subsequent Injury Fund Unit of the Division of Workers' Compensation is designated as trustee for purposes of §8-43-408(2), ~~C.R.S.~~ When the provisions of §8-43-408, ~~C.R.S.~~ apply, an administrative law judge or the Director shall compute, using the best information available, the present value of the total indemnity and medical benefits estimated to be due on the claim. The employer shall provide the funds so ordered by check within ten days of the order. The trustee shall pay an amount to bring the claim current, and continue to pay the claimant benefits on a regular basis in an interval and amount ordered by an administrative law judge or the Director. The trustee shall also make payments for medical services consistent with the order of an administrative law judge or the Director. Any interest earned shall accrue to the benefit of the trust. The amount ordered to be placed in trust can be amended from time to time, and any excess amount shall be returned to the employer. The trustee shall make such disbursements as appropriate so long as funds are available, and shall not be subject to penalties or any other actions based on administration of the trust.
- (B) In the alternative to the establishment of a trust, the employer shall provide a bond as set forth in §8-43-408(2), ~~C.R.S.~~ In the event that the employer fails to bring the claimant current with medical and indemnity benefits owed, or fails to continue to pay the claimant such benefits on a regular basis in an interval and amount ordered by an administrative law judge or the Director, the surety will be obliged to do so. The surety's liability to fulfill such obligation shall extend to the amount fixed, which can be amended by order, and exist in the form prescribed by the Director.
- (C) Any disputes about the proper disbursement of funds in the trust shall be made to the Director or an administrative law judge for determination.

#### 9-6 CONSOLIDATION AND MERGER OF CLAIMS

- (A) Two or more claims or applications may be consolidated for hearing or other purposes upon the order of a judge or the Director for good cause shown.
- (B) Duplicate claims may be merged into one file with one workers' compensation number upon the order of an administrative law judge or the Director. Merger of files shall be requested via motion specifying the surviving workers' compensation number and any other identifying information requested by the Division.

- (C) No motion will be required in instances where a duplicate claim has been created as the result of a typographical error in the claimant's social security number. When duplicate claims exist as a result of such an error, the claims may be merged upon written request to the Division with copies to all parties identifying the typographical error and supplying the correct information.

#### 9-7 PENALTY PROCEDURES

A party requesting that the Director assess penalties shall file a motion with the Division of Workers' Compensation directed to the attention of the Director which states with specificity the grounds upon which penalties are being sought and includes all evidence upon which the requesting party is basing the request. If no response to the motion is filed the Director may issue an order to show cause why penalties should not be imposed. Failure to respond to the order to show cause may be deemed a confession of the facts alleged in the motion and a waiver of the right to be heard in response to the request for penalties.

#### 9-8 ATTORNEY REPRESENTATION

- (A) To represent a party in a claim at the Division of Workers' Compensation, an attorney shall file an entry of appearance with the Division.
- (B) When a claim has closed, an attorney may withdraw by filing a notice of withdrawal sent to the client and all parties.
- (C) When a claim is not closed, an attorney may withdraw by filing a substitution of counsel signed by both the attorney withdrawing and the attorney entering the claim and sent to all parties. Otherwise, an attorney must request an order allowing withdrawal from the claim by filing a motion to withdraw including the required notice. The motion must be sent to the client and all parties. The notice must contain all the following:
  - (1) A statement that the attorney wishes to withdraw;
  - (2) A statement that the client is responsible for keeping the Division of Workers' Compensation and the other parties informed of the client's current address and telephone number;
  - (3) A statement that the claim may be closed if no further action is taken;
  - (4) The date scheduled for any future hearings, the dates by which any pleadings or briefs are to be filed (including, if applicable, the date by which any objection to an admission must be filed); and notice that these dates will not be affected by the withdrawal of counsel;
  - (5) A statement that the client may object to the withdrawal by filing a written objection within 10 days of the date on the certificate of mailing of the notice, and mailing a copy of the objection to the attorney.

#### 9-9 SETTLEMENT PROCEDURES

- (A) When the parties enter into a full and final settlement of a claim, they shall use the form settlement agreement prescribed by the Division of Workers' Compensation. The parties shall not alter the prescribed form, except as set out in this rule. Parties who are settling a claim for a fatality are not required to use the Division's prescribed form settlement agreement.

- (B) The parties may include terms in paragraph 9(A) that are both specific to that agreement and involve an issue or matter that falls within the Workers' Compensation Act.
- (C) The parties may reference exhibits attached to the agreement in paragraph 9(B) of the settlement agreement. These exhibits may include a workers' compensation Medicare set-aside arrangement (WCMSA) or other information related to the workers' compensation claim.
- (D) The parties may attach other written agreements to the prescribed form and shall list these agreements in paragraph 9(C) of the settlement agreement. These other written agreements may include an agreement involving employment, or a waiver of a claim for bad faith.
- (E) Any exhibits and/or agreements attached to a settlement agreement pursuant to subsection (D) above are included for the convenience of the parties and shall not be reviewed by the Division. Approval of the settlement agreement does not constitute approval of any attachments to the settlement agreement.
- (F) The monetary amount of the settlement as reflected in the written agreement shall not include any consideration **FOR** any agreements which fall outside the jurisdiction of the division of workers' compensation.
- (G) The parties shall file the settlement agreement and a completed settlement routing sheet with a proposed order in the form prescribed by the Division. The settlement agreement must be signed by all parties with the claimant's signature verified by a notary public consistent with the notaries public act. The filed copy of the agreement will be retained by the Division. The parties will be responsible for retaining a copy for their records. The completed order will be distributed in accordance with the attached certificate of service. If the parties request the order be returned via mail, self-addressed stamped envelopes must be supplied.
- (H) Parties requesting approval of a stipulation resolving one or more issues in dispute shall submit a motion for approval of joint stipulation to the Director or an ALJ and should not use the Division's prescribed form settlement agreement.
- (I) The settlement agreement must be accompanied by a statement from the claimant on the Division provided form indicating if an appropriate in-person advisement has occurred, if the right to an in-person advisement is waived and/or if a telephone or online advisement by Division staff is requested.
  - (1) A self-represented (pro se) claimant who has waived advisement may withdraw the waiver in writing, provided a written notice of withdrawal is received by the division within three days of the settlement documents being signed and request either an in-person or telephone advisement.

## 9-10 CLAIM FILES

- (A) The file at the Division of Workers' Compensation will be retained in its original form at the Division until the claim is closed and is not subject to subpoena for administrative hearings. A scanned electronic version of the file will be retained for at least seven years from the date of closure. Certified copies of any documents in the Division file can be tendered by a party to the office of administrative courts and shall be considered self-authenticating. Parties may obtain certified copies of documents in the Division file by contacting the Division of Workers' Compensation, customer service section.

- (B) Absent extraordinary circumstances, no employee of the Division of Workers' Compensation shall be expected or required to testify at a hearing.

**9-11 DISFIGUREMENT AWARD (PHOTO)**

- (A) **REQUESTS FOR DETERMINATION OF ADDITIONAL COMPENSATION FOR DISFIGUREMENT BASED UPON SUBMISSION OF PHOTOGRAPHS SHALL BE FILED ON THE FORM PRESCRIBED BY THE DIVISION.**
- (B) **REQUESTS SHALL BE ACCOMPANIED BY AT LEAST ONE PHOTOGRAPH, CLEARLY SHOWING THE DISFIGUREMENT, TAKEN AFTER THE INJURED WORKER HAS BEEN PLACED AT MAXIMUM MEDICAL IMPROVEMENT OR AT LEAST SIX MONTHS AFTER THE DISFIGURING EVENT.**
- (C) **THE BACK OF EACH PHOTOGRAPH SHALL BE SIGNED AND DATED BY THE INJURED WORKER. THE SIGNATURE SHALL CERTIFY THE PHOTOGRAPHS ARE A TRUE AND ACCURATE REPRESENTATION OF THE DISFIGUREMENT AT THE TIME THE REQUEST IS BEING MADE.**
- (D) **ANY PARTY DISSATISFIED WITH AN ORDER REGARDING DISFIGUREMENT BENEFITS ISSUED PURSUANT TO THIS RULE MAY FILE AN APPLICATION FOR HEARING BEFORE THE OFFICE OF ADMINISTRATIVE COURTS.**