

Courtroom Trends and What's To Come

David Larson

Illinois Workers' Compensation Commission



New Normal

- The COVID-19 pandemic was the catalyst for agencies to begin fully utilizing remote hearings.
- In March 2020, in-person hearings came to an abrupt halt. Judges granted continuances and case backlogs mounted.
- Agencies began relying on remote hearings to fulfill their workload responsibilities during the COVID-19 pandemic.



Reinvention of the Hearing Process

- Remote hearings allow for more efficient case processing, greater scheduling flexibility for agency and non-agency participants, and reduced travel expenses.
- Agencies throughout the country are working towards reinventing the hearing process in a virtual or hybrid setting.
- What legal issues will agencies encounter as they develop and implement new rules and processes for remote hearings?



New Rules to Promote Remote Hearings

Voluntary Participation

- Legal questions arise when parties claim that their remote participation was not truly voluntary.
 - Allege that they followed procedures to opt out of remote participation or showed good cause for not following opt-out procedures.
 - Did not understand or receive legally required notice that they would be participating remotely.
 - Lacked knowledge of a deadline to object to remote participation.
 - Did not understand the effect of participating remotely.

New Rules to Promote Remote Hearings

Mandatory Participation

- Many parties and stakeholders argue that agencies deny parties due process of law when they compel them to participate by remote means.
- The basic guarantee of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner” before an agency deprives a person of a liberty or property interest. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).



Due Process Concerns

- Due Process arises out of the Fifth and Fourteenth Amendments to the United States Constitution.
 - Substantive due process addresses individual liberties.
 - Procedural due process addresses what process is due when liberty or property interests are at risk of deprivation.
- Due process emphasizes notice and a meaningful opportunity to be heard.
- Are parties denied due process if they are required or compelled to participate in a remote hearing?

Gao v. Chevron Corporation

- California Workers' Compensation Appeals Board addressed whether due process required continuing a trial to allow for in-person testimony from defendant's witnesses.
- Applicant provided in-person testimony, on both direct and cross examination, on March 10, 2020. The trial could not be completed in one session and was continued until June 9, 2020.

Gao v. Chevron Corporation

- California Governor Gavin Newsom issued Executive Order N-63-20 on May 7, 2020.
- The order **suspended any statute or regulation that permits a party or witness to participate in a hearing in person**, a member of the public to be physically present at the place where a presiding officer conducts a hearing, **or a party to object to a presiding officer conducting all or part of a hearing by telephone, television, or other electronic means**, provided that all of the following requirements are satisfied:
 - a) Each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits;
 - b) A member of the public who is otherwise entitled to observe the hearing may observe the hearing using electronic means; and
 - c) The presiding officer satisfies all requirements of the Americans with Disabilities Act and Unruh Civil Rights Act.

Gao v. Chevron Corporation

- The Board stated that “[d]ue process is the process that is due under the circumstances as we find them, not as we might wish them to be.”
- Given the COVID-19 pandemic, the Board held that Executive Order N-63-20 represented the governor’s best judgment for striking a fair balance between the due process rights of participants in hearings, the necessity of protecting the public from significant harm, and the purposes of the workers’ compensation system.
- BUT, the Board determined that each case must be resolved according to its own particular circumstances and would not institute a blanket rule.



Credibility Determinations

- The most often cited concern with remoting hearings is the ability to effectively and accurately assess witness credibility, trustworthiness, demeanor, presentation, or symptomology via video conferencing technology.
- Critics identify the following areas of concern:
 - constraints on a judge's field of vision;
 - diminished eye contact; and
 - difficulty interpreting nonverbal cues such as body language, facial expressions, and tone of voice.

Berardi v. Commonwealth of PA

- Pennsylvania Workers' Compensation Appeals Board addressed the reasonableness of rendering a credibility determination on claimant's testimony based partly on demeanor when the claimant testified via video conferencing.
- The Pennsylvania Workers' Compensation Act requires the workers' compensation judge to render "a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decision so that all can determine why and how a particular result was reached." 77 P.S. § 834

Berardi v. Commonwealth of PA

- Pennsylvania Supreme Court recognized the difficulty in complying with this directive when rendering a credibility determination based upon the witness's demeanor.
- In a case where the fact-finder has had the advantage of seeing the witnesses testify and assessing their demeanor, a mere conclusion as to which witness was deemed credible, in the absence of some special circumstance, could be sufficient to render the decision adequately "reasoned." *Daniels v. Workers' Comp. Appeal Bd. (Tristate Transp.)*, 828 A.2d 1043, 1053 (Pa. 2003).

Berardi v. Commonwealth of PA

- The Board found that the workers' compensation judge was justified in partly basing his credibility determination on demeanor because "although the testimony was given via video conferencing technology, it was still 'live' and included video and sound that would allow the [judge] to assess claimant's demeanor."
- The Board did not read the Daniels case as limiting demeanor-based determinations only to live "in-person" testimony as long as the judge had a reasonable opportunity to see and hear the witness and assess his or her demeanor.
- The Board determined that the video conferencing technology in this case was a reasonable method of witnessing live testimony and adequate to assess the claimant's demeanor.




Party Limitations

- Some parties allege that they possess some attribute that makes it difficult for them to participate by video conferencing technology.
- The following individuals may have trouble participating by video conferencing technology:
 - individuals with hearing or vision impairments;
 - individuals who require the services of a foreign- or sign-language interpreter;
 - individuals who speak softly or have speech impairments;
 - individuals with auditory or visual hallucinations;
 - individuals with intellectual disabilities, brain injury, learning disabilities, and developmental disorders such as autism; and
 - low-income or elderly individuals who may be less familiar with technology.



Technical Issues

- Some parties allege that a technical issue interfered with their opportunity to be heard in a meaningful manner.
- The following technical issues may be an obstacle to access and to making a complete record:
 - lack of equipment or access to high-speed internet;
 - connectivity problems;
 - delays;
 - freeze frames;
 - audio issues;
 - inability to mute or unmute; and
 - difficulties turning on and off cameras.




Recommendations for the Future

- Remote hearings are likely to become more prevalent.
- Remote hearings work more effectively with updated and reliable technology and litigants who know how to use it.
 - Video screens
 - Cameras
 - Microphones
 - Speakers
 - High-speed internet

Recommendations for the Future

- Training is important for anyone operating or supporting video conferencing technology.
- Agencies must develop training materials that include basic information for normal users and advanced information for support personnel.
 - Placing, receiving, and ending a video call
 - Adjusting the camera and audio (muting and unmuting participants)
 - Trouble-shooting techniques if the equipment is not working
 - Contacting available support resources



Recommendations for the Future

- Due process cannot be pushed aside.
- Parties must be given timely and accurate notice that complies with regulations that delineate when, where, and how the hearing will take place.
- Agencies must consider accessibility and connectivity issues in order to provide a meaningful opportunity to be heard.