

TESTIMONY OF
MICHAEL T. BERNS,
FORMER BOARD MEMBER, NYS WORKERS' COMPENSATION BOARD (1996-2008)
BEFORE THE
NYS SENATE STANDING COMMITTEE ON LABOR
HEARING ON
THE RECORDING OF WORKERS' COMPENSATION HEARINGS

Tuesday, October 6, 2009
10:00 a.m.
Senate Hearing Room
250 Broadway, 19th Floor
New York, NY 10007

Thank you for inviting me to speak today before the New York State Senate Labor Committee as it reviews the New York State Workers' Compensation Board's plan to eliminate live reporters from hearings, and replace them with digital-audio recording systems.

As a Board Member, also called Commissioner, of this agency from 1996 to 2008, I participated in over 40,000 written decisions and 14,000 live hearings. During that time, I not only reviewed thousands of transcriptions, but often relied on them in order to properly adjudicate disputes between claimants and carriers, which was my primary responsibility as a Commissioner.

Based on that experience, I would consider the use of electronic transcriptions and the elimination of live reporters to be a disaster waiting to happen.

I am not alone in this opinion, and I am not just referring to all those who are speaking against this proposal today. I first raised this issue on my website, InsideWorkersCompNY.com in April of this year when I wrote about a firm which claimed that it had already started doing electronic transcriptions at the Workers' Comp Board. In May, at the request of a number of my readers, I conducted a poll of the visitors to my website—a cross section of the workers compensation community in New York State, including some Board staff—to solicit their feedback on this change. And while I have attached a copy of the full results of this poll, I can summarize it by reporting that 70% responded "Cancel this project".

I will now explain some practical problems with this project, leaving legal arguments to those who will be testifying later today.

Contrary to the opinion of the Board's executive staff, most of whom have never attended hearing at the Board, workers' compensation hearings are not like those in civil or criminal court. The informality of the hearings helps claimants feel more comfortable when dealing with the otherwise stressful situation of appearing before a law judge, with an opposing attorney trying to defeat their claims of injury.

While facilitating a more interactive hearing for claimants, this informality involves times when several people in the room may be speaking at once. In these cases, a live reporter plays an important role in distinguishing irrelevant background chatter from relevant statements for the record—such as the words of a simultaneous translator speaking at the same time as the non-English speaking claimant. Live reporters also control the pace of discourse during an impassioned hearing where important statements might otherwise be lost in a jumble of voices. By asking us to “slow down”, “speak up”, or to spell unfamiliar terminology, they are not exacerbating the hearing process: they are making it more effective and productive for everyone involved.

In addition to the advantage of having a human transcriber conscientiously working to preserve a true record of the proceedings, there are the technical limitations of audio recording systems. I make this point not just as a former commissioner, but as someone whose prior career included more 30 years manufacturing and designing sound recording systems and equipment that were distributed to nearly 100 countries.

Now all of you have experienced ‘selective’ audio input. That is, in a room full of people at a cocktail party, someone a few feet away mentions your name. You hear it amidst all the verbal chaos. Your brain is attuned to that. But a microphone is not, so it will record everything equally, with the only difference being volume.

I'm well aware of the fact that audio recording has advanced to the point where it can be used effectively in many venues, but, again, not in workers' comp. In addition to the conversational nature of the hearings, the physical format presents technical obstacles. Aside from the law judge who sits at one end of the table and the lawyers who sit on opposite sides of the table, there is no assigned seating for others who are participating in the hearing. A single microphone in such an environment will either require people to shuffle about to get close enough to the microphone to have their remarks recorded, or if it's powerful enough to record voices from a distance, it will also pick-up every other extraneous voice in the room. This makes it much more difficult for the microphone to pick up the voice we want to hear without picking up any extraneous conversation. As a result, the speaker can be drowned out or have their own voice mixed with another person in the room.

And background chatter isn't the only interference that can flaw a recording. Even the rustling of papers by one person in the room can mask out or override the voice of the speaker. This is a problem we have already experienced at the board

during hearings conducted with telephone conferencing during many of which person on the other end of the phone would request absolute silence in the hearing room so they could hear who was speaking.

One common way to address this type of audio interference is to use multiple, unidirectional microphones—microphones which pick up sound only coming from one direction. But to properly use unidirectional microphones to properly record hearings at issue, you need an audio engineer to control which microphone is on at which time. For example, when the Comp Board holds its monthly meeting, which is broadcast to the public via webcast, there are usually three technicians in the room to manage the microphones to make sure that the only voices recorded belong to the people speaking as part of the proceedings. And yet, as former Chairman Weiss could testify, even then, some irrelevant chatter and off-the-cuff remarks are picked up and broadcast.

An experienced on-site reporter can recognize which verbiage to transcribe and which not to. How would an off-site transcriber, working off of a recording, know which voice is the one they are supposed to be transcribing, assuming that they can distinguish between the two or more voices that have been recorded?

Unless someone is listening to a recording as it is being made during the hearing, we will have no way of knowing if the system picked up testimony needed as evidence. And where a live reporter recognizes which verbiage to transcribe, a machine cannot. Furthermore, even if there is a highly trained system operator in the room, is it reasonable to expect someone who is trained as an audio technician to recognize whether or not the verbiage recorded is that which was needed as evidence? I can assure you that the squiggly lines they see on the audio input meters measure sound, not the relevance of the voices being recorded.

At this point, if you need technicians on hand to operate the technology, you have to ask if it is more cost-efficient than simply employing a live reporter.

Aside from any technicians who may or may not be necessary to operate the recording systems, who will do the transcriptions as part of this system that is supposed to help eliminate costly personnel?

Since we cannot use software to do the transcription, real people will have to be hired. But if the Board is planning to save money, from where exactly will these people be hired? From New York State, from someplace on the other side of the country where a transcriber might be unfamiliar with our local accents or colloquialisms, or perhaps, from someplace on the other side of the world?

Assuming the best case scenario for these off-site transcribers—that they are located within New York State—how quickly can they produce hearing transcriptions? Very often, minutes are needed quickly. As a Commissioner, if I felt I needed to review a hearing transcription, I could ask a reporter for the minutes at the end of the hearing and I would have them within a day. If hearings are recorded and transcribed off-site, who does a decision maker like me ask to get the recording transcribed and delivered quickly? In a system that is already so susceptible to bureaucratic delays, is this technology so advantageous that it's worth introducing more opportunities for delay?

Finally, there is one more issue I've yet to see addressed, and this has to do with the statistical support for this new program.

As I discussed in my book, *Behind The Closed Doors - An insider's look at how things really work at the NYS Workers Compensation Board and how to fix them*, many years ago, the executive staff in Albany decided that only 40% of §32 settlements should go to a formal hearing, whereas in Brooklyn 75% went to hearings. Albany phoned the Brooklyn district manager and berated him for not meeting the 40% guideline. Among the many statistics I kept were those which explained why cases were being set for hearings; I called Albany to ask them from where they got their 40% for Brooklyn. Because based on their guidelines, the mix of cases in Brooklyn required that 75% had to have hearings. They told me "We have no numbers. We just know." My point being, whatever basis they may have had for their decision making had nothing to do with statistics, or the real world of workers' compensation.

Is that where we are on this issue? Because I am unaware of any documents from the Board which state how many transcriptions are done each year, how many of these are requested by one of the parties at that hearing, or by the law judges or Commissioners who need them to review complex issues before making a decision.

The Board seems to forget it is not simply dealing with 100,000 cases a year, but with 100,000 injured workers, who individually come before the Board for resolution of injury-related needs. When I was a Commissioner, I often had to remind the attorneys who appeared before me that the name of this agency is the Workers' Compensation Board, not the "Attorneys' Compensation Board." And today I use this opportunity to remind the executive staff, again, the name of this agency is the Workers' Compensation Board and not the "How Do I Promote Myself at the Expensive Injured Workers Board."

As you consider allowing digital-audio recordings to replace the role currently played by live, on-site stenographers, I ask that you consider the purpose of these hearings. They are meant to carry-out the mission of the agency, which is to attend to injured workers medical expenses and lost wages as appropriately and expeditiously as possible—and to give injured

workers a voice in this process. Please do not promote change for the sake of change that will drown out the voices of these injured workers. It is contrary to the very mission of the agency.

I thank Senator Onorato and the State Labor Committee for giving me this opportunity today to present my position on this issue. Feel free to contact me anytime for additional information and you are welcome to visit my website.

Attachment

Poll on Electronic Transcription

This poll had been done at the request of a number of my readers on a subject that is quite important to them: electronic transcription of the minutes. It was in my April 10, 2009 NEWSWIRE that I reported that Governor Patterson has asked the Workers Comp Board to eliminate 92 positions, referencing a story from a firm called "escribers" who do electronic recordings of hearings. According to e-scriber, "E-Reporting includes two elements: first and foremost, the electronic court reporter who oversees the process and who may be responsible for a subsequent transcript, and secondly, the sound recording equipment itself." Therefore, we asked what should the Board do at this point in time. And the responses were:

- at 70% Cancel this project.
- at 22% First discuss this with the staff & attorneys.
- at 22% Explain the reasoning behind this.
- at 13% Do some sample hearings.
- at 13% Other.
- With 1 Vote: Continue with this project.

A further analysis showed that while **70%** wanted the project canceled, there was a split in this group. **53%** chose only to close the project. But **27%** who wanted the project canceled also had other suggestions.

22% of the responses requested that the Board first explain why this change was being made with a number of them, as noted above, seeming to indicate that without an explanation from the Board the project should be canceled. Another **22%** requested that the board run some tests, including having live reporters randomly come in at the same time as the electronic transcription is being done and let the result be compared. But a number of them seemed to indicate that, without some sort of comparison testing, perhaps on an ongoing basis, the project should be canceled. **13%** simply chose the option of doing the testing.

And there **13%** who also chose OTHER in order to add some short comments. The two long comments, posted last week, are noted below. Among the most interesting was the recommendation that the deponent must certify the transcription for accuracy. And while at first glance this made sense, on reflection it does not. In a hearing when the proceedings include two lawyers (at a minimum) and a law judge there will have to be three people who would review the transcription for accuracy. And if it is a hearing in front of commissioners on a complex issue with the claimant and a translator, there could be as many of 10 parties who would have to confirm the accuracy. Based on the many minutes I have read of hearings in which I was a participant as a commissioner, even as simple as some of the §24-a and §50-3b/d interviews, I can speak for everyone when I say these are not always 100% accurate. If deponents were asked to certify the accuracy, we would need another adjudicative system the size of the WCB to do that.

Which comes back to a key point made by **47%** of the poll participants*. What is the reasoning behind this plan? Perhaps like the proposal to have deponents certify the accuracy of the electronic

transcription, at first glance electronic transcription makes sense. But upon reflection (and listening to others), some ideas good at first glance do not survive the light of day. This plan may well be a good one but until the Board communicates with the participants in the system, no one will know.

Oh, yes, There was the **one person** who voted to keep the plan going. Perhaps that is a member of the WCB who will get a promotion and raise to help manage the new system!

The longer comments on this poll are:

As anyone knows who has ever sat in on a hearing, sometimes it turns into chaos with everyone talking at once and over each other. Even if the Chair sat in on one (or even a few) he could not have any conception of how hard it is for the reporters to sort out the contents. They are pros. I've experienced so many occasions where the reporter speaks out, "Hold it!" "Please slow down." or "Who said that?" I've responded to practitioners and claimants alike, "Answer the question because without the transcript, this hearing is going nowhere!" If everyone had a separate microphone, everyone spoke in turn, and everyone was respectful of one another (a miracle!) it would work fine. Short of that, it's another pipe dream to save money.

And

The e-Reporter system has been in effect in Social Security hearings for decades. It's a disaster. The courts have learned to disregard the testimony because, simply, people don't talk that way. The transcripts are a very bad approximation of what was said. Often the e-Reporters just make up whole sentences. They are a source of corruption. The contract goes to someone's relative who hires minimum wage third-worlders to do the transcripts. Misspellings show that the transcribers are not native speakers. The judges will be sweating bullets. They often manipulate the record with a live reporter, insisting that whole sections be turned into oblivion - even hours after a hearing. A skilled attorney can drive them nuts if he/she knows the comments cannot be eliminated.

***[ED. NOTE]** The 47% comes from the fact that 53% made only one choice, to 'cancel' where as 47% (less that one vote 'to continue') wanted more information and/or tests.

May 18, 2009

As published in:

www.INSIDEWorkersCompNY.Com

The Insider@INSIDEWorkersCompNY.com