



WORKERS' COMPENSATION FUND

601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301

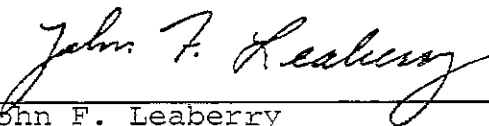
ARCH A. MOORE, JR.
Governor

JOHN F. LEABERRY
Commissioner

January 28, 1987

NOTICE OF ADOPTION

The enclosed Procedural Rules regarding Workers' Compensation Hearings are hereby adopted by the undersigned and filed with the Secretary of State. These rules shall become effective April 1, 1987.



John F. Leaberry
Workers' Compensation Commissioner

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~~WEST VIRGINIA PROCEDURAL RULES~~
~~WORKERS' COMPENSATION COMMISSIONER~~
~~Chapter 23-1~~
Series VII 7

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Title: Hearings

Section 1. General

1.1 Scope - These Procedural Rules shall govern the initiation and conduct of hearings in contested Workers' Compensation claims.

1.2 Authority - ^{West Virginia Code} West Virginia Code, 23-1-1, 23-1-8, 23-1-9, 23-1-10, 23-1-11, 23-1-12, 23-1-13, 23-1-15, 23-4-8c, 23-4-15b, 23-5-1.

1.3 Filing Date - January 28, 1987

1.4 Effective Date - April 1, 1987

1.5 Repeal of a Former Rule. Legislative Rule, 23-1, Series I, Sections 16 and 17.

Section 2. Hearing Process

2.1 Purpose

The purpose of the hearing process shall be to receive and consider, as expeditiously as possible, evidence and information relevant to determination of the substantial rights of the parties, and to provide the first level of review of the Commissioner's decisions and determinations with regard to the granting or denial of any award, or the entry of any order, or the granting or denial of any modification or change with respect to former findings, orders or awards made pursuant to Chapter 23 of the West Virginia Code, as amended.

2.2 Right to Hearing

Any party to a claim shall have a right to a hearing concerning any issue of fact or law upon which the Commissioner has made a determination and entered a protestable ruling, and upon the timely filing of an objection.

2.3 Initiation of Hearing Process

§ (a) Notice by Commissioner of Decision. Upon a ruling or determination by the Commissioner with regard to any award or order or modification or change with respect to former findings, orders or awards by the Commissioner, the Commissioner shall give written notice of the decision to all parties and their counsel of record. Such notice shall state the time allowed within which to file an objection.

(b) Objection. Any objection to the Commissioner's decision shall be filed with the Commissioner in writing.

(c) Time period for filing an objection. Any objection under (a) and (b) of this section shall be filed with the Commissioner within the time allowed after receipt of the notice set forth in (a) of this section, except as provided in West Virginia Code, 23-5-1e. If an objection is not so filed, the Commissioner's decision shall be final.

(d) Action by Commissioner. The Commissioner shall determine if an objection is timely filed, and shall notify all parties and their counsel of record of the determination. Any party may file an appeal to such determination.

(e) Manner and receipt of notice. Any notice required by these rules shall be deemed adequate if served upon a party and their counsel of record by mailing such notice by regular United States Mail, postage pre-paid, addressed to the party to be so notified at their last known address. Receipt of notice shall be presumed seven (7) calendar days after the date of the notice.

2.4 Referral to Trial Examiner

Following receipt of a timely objection, the Commissioner shall prepare a file, which shall include copies of all documents, forms, statements, evidence and information considered in rendering the Commissioner's prior decision, together with all documents, medical reports and other evidence submitted by the parties, subject to the objection of any party. The Commissioner shall refer such file to a Trial Examiner, who shall be an attorney licensed to practice law in West Virginia, for conduct of the hearing. Copies of such file shall be provided, upon request, to all parties and their counsel of record.

2.5 Duties of Trial Examiner

The Trial Examiner is the presiding official in a Workers' Compensation Fund hearing. The Trial Examiner shall:

(a) Rule on all evidentiary matters and motions for continuance properly raised at hearing;

(b) Ensure that the dignity and decorum of the proceedings are maintained, and that delay and interference with the efficiency of the hearing process are prevented;

(c) Perform such other duties as may be set forth in these rules for a Trial Examiner.

2.6 Date, Time and Place of Hearing

(a) Following receipt of a timely objection, the Commissioner shall determine the date, time and place a hearing will be held, in accordance with West Virginia Code, 23-5-1. The time of such hearing shall be within thirty (30) days of receipt of the objection; provided, that said hearing may be postponed upon agreement of the parties or for good cause.

(b) Notice of the date, time and place of the hearing shall be provided the parties and their counsel of record at least ten (10) days in advance of the hearing date.

(c) The place of hearing shall be the county seat of the county in which the injury occurred, or any other place agreed upon by the interested parties; however, if the ends of justice so dictate in the opinion of the Commissioner, the hearing may be held at any other place, within or without the state, with or without the agreement of the parties. In determining a place for hearing, regard will be given to the convenience of witnesses, but the ends of justice will control.

2.7 Hearing Procedures; Generally

(a) Rules of evidence. The hearing process shall not be conducted in accordance with strict common law or statutory rules of evidence, or by formal rules of procedure, except as provided by these rules. The Trial Examiner shall receive the testimony and other evidence of the parties and witnesses, subject to objection by any party.

(b) Procedure

(1) Presentation of evidence

(A) Order of presentation of evidence. The protesting party shall have the burden of going forth with evidence. In the event all parties have protested, the claimant shall go forth, except that for good cause or upon agreement of counsel the Trial Examiner may permit a variance in the normal order of presentation. When a party has presented all of their evidence including rebuttal of any matters raised by the cross-examination of the opposing party, they shall rest their case. The opposing party shall then go forth. When all parties have no further evidence or rebuttal to offer, they shall announce they are ready to submit the claim. The Trial Examiner shall then order the claim submitted for decision.

(B) Testimony. All testimony shall be taken under oath or affirmation administered by the Trial Examiner.

(C) Cross-examination. All parties shall be given reasonable latitude in cross-examining witnesses.

(D) Marking of exhibits. All exhibits offered into evidence shall be labeled and marked as either "Claimant's Exhibit", "Employer's Exhibit" or "Joint Exhibit", and shall have a number or letter assigned in sequence, starting with "1" or "A". All exhibits offered into evidence, or copies thereof, shall be appended to the record of proceedings, and if any exhibit is not susceptible to attachment or copying, either a photograph, facsimile, or description of such exhibit may be substituted.

(2) Objections. The Trial Examiner shall rule upon all objections to the evidence or testimony presented at the hearing. The Trial Examiner shall take into consideration the apparent reliability of evidence, and the basis of knowledge of a witness in ruling on objections. All objections shall be noted in the transcript of the hearing together with the rulings thereon. Exceptions to the Trial Examiners' rulings shall be automatic. The Trial Examiner may require oral argument and citation of authority by the parties in support of or opposed to objections.

(3) Transcription of evidence. All testimony, argument and rulings of the Trial Examiner shall be taken down by stenographic or voice recording, and shall be transcribed, and become part of the record of proceedings.

(4) Public access. It is the policy of the Commissioner that hearings will be open to the general public, subject to the following exceptions:

(A) Any person whose conduct is unruly or disruptive may be removed from a hearing.

(B) Only those persons for whom adequate seating is available shall be permitted to attend a hearing, and there shall be no duty imposed to provide notice to the public of the date, time or place for hearings, or to provide more than the usual amount of seating provided at hearings. Seating shall be on a "first come, first served" basis.

(C) Upon written motion of a party in advance of hearing or upon motion made at a hearing, supported by a showing of good cause, the Commissioner or Trial Examiner may order a hearing closed to the public. When the interests of justice dictate, the public may be excluded from a hearing.

(D) The Trial Examiner may order witnesses sequestered.

(5) Representation and appearance of parties

(A) By individuals. Any claimant or employer, who is a natural person, may appear at and represent their self in any hearing. The

Trial Examiner shall explain to any party appearing without counsel the right to be represented by counsel, and shall inquire as to their desire to obtain counsel. In appropriate cases the hearing may be continued to permit a party to obtain counsel; however, absent a showing of good cause, a hearing shall only be continued one time for a party to obtain counsel. When a party elects to proceed without counsel, the absence of counsel shall be considered in the application of these rules.

(B) By corporations. A corporate employer may be represented at a hearing only by counsel.

(C) By counsel. Any claimant or employer may be represented at a hearing by an attorney duly licensed or authorized to practice law in the State of West Virginia.

(D) Lay representative. A party may not be represented at a hearing by a spokesperson, lay representative or anyone else not licensed or authorized to practice law in the State of West Virginia.

(c) Presence of parties. All parties to a claim are entitled to be present and to present evidence at a hearing; however, the taking of evidence and a final determination of the issues in litigation shall not be prevented, and a party shall be considered to have waived the right to be present if:

(1) After being notified of the date, time and place of a hearing, does not appear, absent a showing of good cause; or

(2) After being advised by the Trial Examiner that disruptive conduct will cause removal from the hearing, persists in conduct which is such as to justify exclusion from the hearing.

(d) Commissioner's action. The Commissioner shall review the transcript of the hearing, the testimony, the evidence and exhibits, and shall take such action with regard to the issues as shall be appropriate. The Commissioner may order further hearing in a claim when it appears that the record has not been sufficiently developed to permit a just resolution of any issue. Any further hearing so ordered by the Commissioner shall be limited to only those matters referred by the Commissioner for further hearing.

2.8 Discovery

(a) Exchange of evidence prior to hearing. Any party desiring to submit the report of an expert or any other document shall do so by delivering such report or document to the Commissioner by mail with copies to opposing counsel or unrepresented parties as soon as can reasonably be accomplished following receipt of such report or document. Items not susceptible of reproduction or copying shall be brought to the attention of all other parties,

and reasonable inspection of such shall be permitted prior to hearing.

(b) Witnesses. All parties shall notify each other, and the Commissioner, of the names and addresses of the witnesses whose testimony they intend to introduce, as soon as reasonably possible, insofar as such are known or can be reasonably ascertained or anticipated.

(c) Failure to comply. Shall a party fail to comply with the disclosure requirements of these rules, the Commissioner, or the Trial Examiner may take one or more of the following actions:

(1) Order the party to supply the material required by this section;

(2) Grant a continuance if good cause is shown; or

(3) Prohibit a party from introducing evidence or testimony if the Commissioner or the Trial Examiner finds that the failure to disclose was intentional or without good cause.

(d) Interrogatories to Parties

(1) Written interrogatories may be utilized only upon agreement of the parties. Permission of the Commissioner shall not be prerequisite to the serving of interrogatories; however, copies of all interrogatories served and all answers thereto shall be filed with the Commissioner.

(2) Each party shall be limited to a maximum of fifty (50) written interrogatories, including any and all initial or follow-up interrogatories.

(3) Each interrogatory shall consist of a single question, and shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The party upon whom the interrogatories have been served shall serve a copy of the answers within thirty (30) days after service of the interrogatories. The Commissioner may allow a shorter or longer time for service of such answer or objection for good cause shown.

2.9 Production of Witnesses and Evidence

(a) Right to witnesses. Each party is entitled to compel the attendance of any witness whose testimony may be relevant and material, except a party is not entitled to the presence of a witness who is deemed unavailable. A witness shall be deemed unavailable in, but not limited to, the following situations:

(1) The witness is not subject to compulsory process in West Virginia by reason of non-residence within, or prolonged absence from, the State of West Virginia, unless that witness is the claimant or the employer.

(2) The witness refuses to testify despite an order to do so.

(3) The witness claims by sworn affidavit a lack of memory of the subject matter. 7

(4) The witness is unable to be present or to testify at the hearing because of then existing physical or mental illness or infirmity.

(5) The witness is absent from the hearing and the requesting party is not at fault, could not have prevented the unavailability, and demonstrates that all reasonable measures to secure the presence of the witness have been taken, including the timely request for and service of a subpoena, as set forth in Section 2.9(b)(2).

(b) Procedures for production of witnesses and evidence

(1) Subpoena. The presence of a witness or production of evidence may be obtained by the issuance of a subpoena or subpoena duces tecum by the Commissioner. A request for a subpoena must be made in writing as soon as reasonably possible prior to a hearing. A subpoena for a physician shall also include a subpoena duces tecum for the treatment records and notes pertaining to the claimant.

(2) Service. It shall be the responsibility of the party requesting the issuance of a subpoena to serve the subpoena on a witness by personal service or by certified mail.

(3) Witness fees

(A) General. The party requesting issuance of a subpoena for a witness shall pay the attendance fees and mileage provided for witnesses in civil cases in circuit court. Such fees may be paid in advance upon a timely request by the witness. When the subpoena was issued on behalf of the Commissioner, such advance shall not be required.

(B) Expert Witness Fees. The party who introduces the report of an expert witness shall be responsible for payment of the appearance fee of such witness, except that the Commissioner shall be responsible for payment of a witness fee when the claim has not been rejected and the witness is:

(i) An authorized treating physician, or

(ii) A physician engaged by the Commissioner, or

(iii) An authorized consulting physician acting upon referral from an authorized treating physician.

(c) Exclusion of evidence. Upon the failure or refusal of a properly subpoenaed witness to appear, produce requested evidence or testify in response to a subpoena, the Trial Examiner or the Commissioner may exclude any statement, record or report rendered by that witness from the record of litigation.

(d) Alternatives to testimony and other evidence

(1) The Trial Examiner and the Commissioner may receive and consider, subject to objection and the right of cross-examination by an opposing party:

- (A) Sworn statements or affidavits;
- (B) Prior testimony under oath;
- (C) Stipulations of fact or expected testimony; and
- (D) Depositions and interrogatories.

(2) The Trial Examiner and the Commissioner may receive and consider in lieu of evidence which is unavailable:

- (A) Testimony describing the evidence;
- (B) An authenticated copy, photograph or reproduction of the unavailable evidence;
- (C) A stipulation of fact or expected testimony concerning such unavailable evidence.

(e) Examinations and evaluations

(1) Right to Examination and Evaluation. All parties are entitled to a reasonable number of relevant medical examinations or vocational evaluations. A reasonable number of examinations or evaluations shall be no more than two (2) per specialty or discipline involved; provided, however, that upon written request a party may be granted the right to further examinations or evaluations upon a showing of necessity. A request must be served upon all other parties and filed with the Commissioner. The request shall set forth the reasons why such additional examination or evaluation is necessary. All other parties shall have fifteen (15) days after the date of service of said request to file a written response. No hearing shall be held upon said request, and the Commissioner's ruling thereon shall be interlocutory.

(2) Prompt exchange of reports. Reports of examination and evaluation which a party intends to introduce into evidence shall be promptly exchanged among the parties, and submitted to the Commissioner without waiting for a hearing.

(3) Admission of reports. Upon receipt by the Commissioner, all reports will become a part of the record, subject to objection and the right of cross-examination.

(4) Requests for cross-examination. A request for cross-examination shall be made promptly in writing to the Commissioner.

(5) Production of expert witness for cross-examination. When cross-examination of a reporting expert is properly requested, it shall be the responsibility of the party offering the report to procure the appearance of the witness for cross-examination. The direct and cross-examination of any expert witness shall be completed in one day.

(6) Submission without hearing. Following the submission of reports, in the absence of a need for hearing the parties shall promptly submit the claim by mail with notice to all opposing parties.

2.10. Stipulations

(a) General. A written stipulation, or an oral stipulation on the record, may be accepted as a substitute for evidence. A stipulation may relate to a question of fact, the contents of a document, or the expected testimony of a witness.

(b) Requirements. Before accepting a stipulation the Commissioner must be satisfied that;

(1) The stipulation does not amount to a negotiated settlement between the parties;

(2) The stipulation is relevant to an issue in litigation;

(3) The stipulation is written or stated in clear and unambiguous terms;

(4) A factual basis exists for the stipulation, which shall be thoroughly set forth upon the record or in the preamble section of a written stipulation; and

(5) All parties to the stipulation shall indicate in writing, or orally on the record, that they understand and agree to the stipulation.

(c) Withdrawal. Withdrawal from a stipulation shall be in writing and filed with the Commissioner with notice to all opposing parties.

(d) Effect of stipulation. Unless properly withdrawn, a stipulation of fact that has been accepted is binding upon the parties and may not be contradicted by the parties. The contents of a stipulation of expected testimony or of a document's contents may be attacked, contradicted, or explained in the same way as if the witness had actually so testified or the document had been actually admitted. The fact that the parties so stipulated does not admit the truth of the indicated testimony or a document's contents, unless the stipulation is one of fact, nor does a stipulation add anything to the evidentiary nature of the testimony or document.

2.11. Scheduling of Hearings; Limitations

(a) First hearing. The first hearing shall be scheduled in accordance with West Virginia Code, 23-5-1 and Section 2.6 of these rules. Whenever possible the introduction of evidence shall be completed at the first hearing and the claim shall be submitted for decision. Although a continuance of the first hearing may be granted, the parties may use the first hearing as a vehicle of discovery to aid in case preparation; also, the Commissioner may order that the hearing proceed for the purpose of addressing evidentiary matters, simplification of issues and such other matters as may aid in the disposition of the case.

(b) Limitations. When the first hearing scheduled in a claim is continued, there shall be no limit upon the number of hearings held subsequent thereto, provided however, that the objecting party or parties shall have completed the presentation of evidence no later than one (1) year from the date of acknowledgement of the objection. Subsequent to the completion of the presentation of evidence by the objecting party or parties, the defending party or parties shall have completed the presentation of rebuttal evidence no later than one (1) year thereafter. Upon written application of one or both of the parties, setting forth good cause therein, the Commissioner may extend the period for presentation of evidence.

2.12. Continuances

(a) General. Continuances, other than those upon the Commissioner's own motion, shall be granted only upon agreement of the parties, or at the request of either party only for good cause shown.

(b) Criteria; strictly construed. The criteria for good cause shall be strictly construed to prevent unnecessary delay in the resolution of claims. Criteria cannot be established covering the elements of every possible ground for continuance constituting good cause; however, each such motion shall be considered with regard to the circumstances and facts of each case, and by application of general criteria, as follows:

(1) The party must act in good faith, and not merely for the purpose of delay;

(2) The party must have acted with due diligence respecting the reason for which continuance is sought;

(3) There must be established the probability that something material, relevant, and necessary, not able to be obtained otherwise, will be obtained by the continuance; and

(4) It must appear that a party will be deprived of due process if the motion is not granted.

(c) Where the parties have completed presentation of evidence relating to an objection to the findings of the Occupational Pneumoconiosis Board, and the claimant indicates a desire to develop evidence of entitlement to a permanent total disability award payable from the second injury reserve, the claim shall be continued and scheduled for hearing upon an injury docket, subject to the provisions of Section 2.11, except that the time limitations for presentation of evidence therein shall commence running from the date such continuance is granted as opposed to the date of acknowledgement of objection.

2.13 Motions; Objections; and Communications

(a) General. A copy of all correspondence, motions, objections, or other writings to the Commissioner regarding any issue in litigation shall be provided to all opposing parties.

(b) In Advance of Hearing. All motions shall be made in writing in advance of the hearing, insofar as grounds for such are then known, or can be reasonably ascertained or anticipated. The motion shall clearly set forth all grounds, facts, and authorities in support of the motion. Any response by an opposing party shall be filed in writing with the Commissioner within fifteen (15) days of receipt of the motion, and shall set forth all matters in opposition to the motion.

(c) During Hearing. A motion may be made on the record, orally or in writing. The motion shall clearly set forth all grounds, facts and authorities in support of the motion. The opposing party, if present, shall have the right to set forth matters in opposition to such motion on the record. The absence of a party shall not be grounds for a delay in ruling upon any motion, nor grounds for reconsideration of any ruling made, absent a written motion for reconsideration and an affirmative showing of good cause for such nonappearance by the moving party.

(d) Action Upon Motions

(1) Deferred ruling. The Commissioner or Trial Examiner may, as deemed appropriate, defer ruling upon a motion until such time as all evidence to be presented by the parties has been received and the case submitted for final decision.

(2) Continuance for Ruling on a Motion. The Commissioner before hearing, or the Trial Examiner at hearing, may continue a case set for hearing in order to investigate and rule upon a motion.

(3) Character of Rulings. All rulings upon motions by the Commissioner or Trial Examiner shall be interlocutory.

2.14 Depositions

(a) General. Although the hearing process is for the purpose of the development of evidence and should be used to the maximum extent possible, depositions may be obtained and used for evidentiary purposes. Evidentiary objections may be made on the record during any deposition or at the time the deposition is offered into evidence. Depositions shall be conducted in accordance with Section 2.7, except that a Trial Examiner need not be present.

(b) By the Commissioner or by request of a party. The Commissioner may take the deposition of any witness. A party or parties may be permitted to take the deposition of a witness, within or without the State of West Virginia, upon written request to the Commissioner. A request for a deposition shall contain:

(1) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(2) A brief statement of the matters on which the person is to be examined; and

(3) A brief statement of the reasons for taking the deposition in lieu of testimony at a hearing.

The taking of a deposition shall be upon reasonable notice to the deponent and all parties and their counsel of record. Notice shall be in writing, and shall contain the date, time and place of the deposition, as well as the name and address of each person to be deposed. An objection to a request for the taking of a deposition must be filed in writing with the Commissioner within fifteen (15) days of receipt of the request for deposition served by the requesting party. The cost of court reporter services shall be borne by the Commissioner. The cost of witness fees and expenses shall be borne by the respective proponents of the witnesses, as provided in Section 2.9(b)(3).

(c) Deposition without request to Commissioner

(1) Taking deposition. Parties may agree to take a deposition, upon proper and reasonable notice, as provided by law for like depositions in the circuit court, without the prior approval of the Commissioner. In such cases, the parties shall bear all associated costs, as they may agree.

(2) Use. Use of any deposition so taken shall be subject to objection as in circuit court. The Commissioner may deny the admission of such deposition into evidence if it appears that the deposition was taken at such place and under such circumstances as imposed an undue burden or hardship upon the opposite party.

(d) Telephone Depositions. By agreement of the parties, depositions may be taken by telephone conference call in like manner as if taken in person, in accordance with these rules. Costs incurred in the taking of telephone depositions shall be borne as appropriate under sub-sections (b) or (c), above.

2.15 Non-Appearance of Party

(a) General. Absent proper service of a subpoena, no party is required to appear at a hearing, except that it shall be the responsibility of an objecting party to prosecute their objection. The non-appearance of a party shall not prevent an appearing party from presenting evidence at a hearing.

(b) Action when a party does not appear

(1) Objecting party. If an objecting party does not appear at a hearing to prosecute their objection, then upon the motion of an opposing party, or upon the direction of the Trial Examiner, the objection may be dismissed for failure to prosecute, or the claim may be submitted for decision upon the existing record; provided, before such action shall become final, the nonappearing party shall be given written notice that they have fifteen (15) days within which to show good cause to the Commissioner in writing why such action should not become final.

(2) Non-objecting party

(A) A subpoena requiring the presence of a non-objecting party at a hearing for cross-examination shall provide that such party's failure to appear, absent a showing of good cause, will result in one or more of the following actions: (1) suspension or termination of the payment of benefits, (2) submission of the claim for final determination upon the existing record, (3) a determination that an overpayment of benefits has occurred which may be recovered as permitted by law, or (4) when personal service of a subpoena has been obtained, institution of attachment proceedings as for contempt in circuit court.

(B) Upon failure of a non-objecting subpoenaed party to appear, the Commissioner shall give written notice to such party that they have fifteen (15) days within which to show good cause to the Commissioner in writing why one or more of the aforementioned sanctions should not be imposed.

Workers' Compensation Fund
Pro. Rule, 23-1
Series VII, Sec. 2

2.16 Dismissal of Party. When the Commissioner determines that a party is not a proper party to the claim, such party shall be dismissed.

2.17 Severability. If any provision of these rules or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.

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Pro. Rule, 23-1
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WEST VIRGINIA PROCEDURAL RULES
WORKERS' COMPENSATION COMMISSIONER
Chapter 23-1
Series VII

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Title: Hearings

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