

## **MEDIATING WORKER'S COMPENSATION DISPUTES**

### **When to Think About It and What to Expect**

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#### Suitable Cases for Mediation

- A. Where the Exposure is Large
- B. Where There are Large Medical Bills or There is an Interested Third Party (e.g. Large Subrogated Claim or Medicaid Interest)
- C. Where the Evidence Suggests an Administrative All-or-Nothing Outcome
- D. Where the Client is Convinced of His/Her Position and Cannot or Will Not See the Merits of the Other Side's Position
- E. Where Both Parties Have Doubts About Their Respective Positions
- F. Where Both Parties or their Counsel are Motivated to Find a Middle Ground

#### What to Expect

#### Preparation Before the Mediation

1. Parties or their counsel should send the mediator the following:
  - a. The application and answer including any amended pleadings.
  - b. The medical records upon which the parties will rely in total.

- c. The WC-16B's, IME's, WC-13's (if medical bills will figure largely in the negotiations.
  - d. Any other evidence upon which the parties intend to rely if the dispute is factual. (If the attorney's intend to introduce certain evidence as surprise at the hearing, they need not submit this at the mediation but should inform the mediator orally that the facts may not be as the other party is representing.) Furthermore, what the party intends to introduce at hearing can and should be communicated confidentially during the mediation with the understanding that the mediator will not communicate these facts to the other side.
2. The attorneys should speak to their clients prior to the mediation about what to expect at the mediation generally. Claimant's should be advised that the mediator is a neutral and not on anyone's side. The representatives for the carrier or self-insured should have generally discussed some parameters for settlement offers.

## The Mediation

The parties or the mediator will arrange for 2 conference rooms.

**THE PARTIES SHOULD IDEALLY HAVE THE DECISION-MAKERS PRESENT OR AT LEAST REACHABLE BY TELEPHONE.**

## The Process

1. Individual mediators differ in the conduct of the mediation.
2. Generally the mediator makes an opening explanatory statement, attempts to identify the issues or sticking points in the dispute, and explains how he or she will proceed with the parties. Mediation basics are covered. Most mediators encourage the parties to ask questions. They will also gently instruct counsel on issues that they may wish to discuss with their clients.
3. At some point the mediator will split the parties up and speak with each side privately. After fully understanding everyone's

position, the mediator will begin to discuss what is necessary to settle the matter.

4. The mediator will communicate settlement offers to the other party.
5. Some mediators may give an estimate of the value of the claim but most will not do so without the consent of both sides. There are pros and cons to having or asking the mediator to do this.
6. The mediator should be knowledgeable with respect to both the substantive law and the factors that the department, LIRC, and the courts are likely to consider with respect to the claim.
7. The mediator should assist the parties with any problem areas that serve as barriers to settlement.
8. The mediator can be expected to take the attorneys out in the hall away from their clients to discuss fine points or sticking points on occasion and the clients should be aware of this in advance so there is no appearance of "collusion."
9. The attorneys should advise their clients that the mediator will be discussing the negative aspects of their case and pointing out the risks of going further with litigation.
10. The mediator is not responsible for adequately representing the client. There may be tax implications or other considerations such as court-ordered formulas involving third party claims for which the attorney is responsible.
11. The mediator is not responsible for insuring that the settlement is FAIR. Counsel for the parties have this responsibility.
12. The parties should draft the settlement agreement. Everyone should fully understand all of the terms of the settlement agreement.