

Mediation Best Practice Guidelines

Case Facts

| | |
|----------------------------|---------------------------------------|
| Date of birth | IRE |
| Life expectancy | SSDI/SSI |
| Date of injury | Date of Medicare/Medicaid eligibility |
| Average weekly wage | Employment benefits |
| Benefit rate | Liens/medical expenses |
| Accepted injury | Subrogation STD/LTD |
| Unaccepted injuries | Support |
| Pending petitions | Litigation expenses |
| Prior decisions/agreements | Third-party litigation |

Consult with Your Client

Pre-mediation:

- obtain authority and convey a demand
- obtain authority and convey an offer
- provide WCJ with a mediation statement
- confirm availability of decision makers

Mediation:

- know your case and be prepared
- no authority ≠ futility
- memorialize settlement terms

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Best Practices for Employee's Counsel Preparing for Mediation

- Date of Injury
 - Be sure to ask about prior injury dates with same employer/insurer; defendant is likely to seek resolution of all open claims;
- Date of Birth
- Life Expectancy
 - Particularly important with older clients or clients with catastrophic injuries;
- Average Weekly Wage
 - Is the AWW agreed to or in contention?
 - If it is in contention, what is the argument, expected earnings, concurrent employment?
Colpetzer or *Hannaberry*;
- Weekly Compensation Rate
- Accepted Injuries versus Alleged Injuries
 - Realities of treatment versus legal description;
 - Effect of having judicial determination in uncertain climate regarding return to preclusions of preexisting conditions;
- Pending Petitions and Their Impact on Current and Future Value of the Case
- Prior Decisions/Agreements
 - Managing expectations with clients who have resolved prior injuries;
 - Effect of prior stipulation if *Weney* issues not considered;
 - Effect of prior decisions on doctor's credibility (*Lewis* and change in condition);
- IRE (Supreme Court?) 60-Day Period to Preserve Objections Still in Effect
- SSDI/SSI
 - LIBC 750/756 and 760;
 - When did benefits commence?
 - Offset (50% net ÷ 4.34);
 - "Reasonable expectation" within 30 months;
- Medicare/Medicaid Eligibility
 - \$25,000 safe harbor (must still protect Medicare's interests);
 - Reasonable expectation less than 30 months and settlement < \$250,000;
 - MSA proposals (rated age, professionally prepared, professionally managed, non-covered expenses);

- Employment Benefits
 - Vacation, sick time, and pensions;
 - STD/LTD benefits (who funded them; if it was claimant, is there a “clawback” provision?);
- Third-Party Lawsuits
 - ADA claims, ERISA claims, personal injury claim and coordination with third-party counsel;
 - Involvement of third-party attorney/awareness of third-party issues;
 - Reasonable expectation of third-party value;
 - Waiver of section 319 lien versus retention of lien and effects on settlement value;
- Liens/Medical Expenses
 - Preserved lien versus potential lien;
 - Bridge loans;
 - Contact providers prior to mediation;
 - Ability to compromise lien amounts;
 - Effect of repricing on settlement amounts;
- Support (Run the Act 109 Lien Support Search)
- Litigation Expenses
 - Running total;
 - Doctor’s cancellation fees;
 - Payment for C&R transcript;

Workers' Compensation Mediation—Defense Perspective

I. Screen the Case for Mediation

- Advise the WCJ at the initial hearing if the case is ripe for mediation.
- Has sufficient discovery been completed (e.g., medical records and reports received)?
- IME(s) scheduled/completed if necessary?
- Is there a need for clarification of critical facts by presentation of evidence?
- What is the status of claimant's condition (e.g., MMI reached)?
- Identify legal issues.
- Determine preference for assigned or nonassigned WCJ to mediate.
- Determine if settlement would be futile.

II. Prepare for Mediation

- See Best Practice Guidelines, above.
- Identify proper chain of command at carrier/employer to provide authority.
- Obtain authority from client.
- Seek initial offer from claimant.
- Submit confidential memorandum to WCJ in advance of mediation.
- If substitute counsel will attend, he or she should be as prepared as assigned counsel.
- Confirm availability of client representative with authority.
- Review case with client representative in advance of mediation.
- Request a continuance or cancellation timely if not ready to proceed.
- Determine in advance necessary collateral issues (e.g., Medicare, resignation).

III. Mediation Disclosure Statement

- Be as detailed as necessary.
- Provide strengths and weaknesses of case.
- Suggest best- and worst-case outcomes.
- Point out collateral matters that need to be discussed.
- Identify unusual circumstances (e.g., unrealistic expectations of either party).

IV. Collateral Matters

- Identify and address critical collateral matters, if applicable, such as:
 - resignation from employment;
 - release of other employment claims;
 - child support orders;

- receipt of or eligibility for Medicare or state medical assistance and need for reimbursement or set-aside;
- Social Security Disability;
- subrogation claim of health insurer or short-/long-term disability carrier;
- status of any third-party lawsuits by claimant;
- out-of-pocket medical expenses or outstanding bills;
- other open workplace claims being resolved.
- Advantage to obtaining a decision on the merits:
 - residual issues may be presented to the WCJ for decision (e.g., determination of description of injury, termination/suspension/modification of benefits, or compensability of outstanding medical bills);
 - could be critical for supersedeas fund recovery or future payment of medical expenses by Medicare or private health insurance;
 - case law allows C&R of *future* compensation without affecting potential supersedeas fund recovery. See *H.A. Harper Sons, Inc. v. WCAB (Sweigart)*, 84 A.3d 363 (Pa.Cmwlth. 2014); *Department of Labor & Industry, Bur. of Workers' Comp. v. WCAB (Ethan-Allen Eldridge Div.)*, 972 A.2d 1268 (Pa.Cmwlth. 2009); *Coyne Textile v. WCAB (Voorhis)*, 840 A.2d 372 (Pa.Cmwlth. 2003);
 - parties should make sure to build the record to support the requested decision (e.g., provide evidence, withdraw hearsay objections);
 - submit proposed findings with requested determination.

V. Mediation Process

- Procedures vary by WCJ.
- In Williamsport BWC Office, parties meet together with WCJ initially to present summary of factual and legal issues. Parties then break off and WCJ meets individually with each side to discuss factual and legal issues and valuation. WCJ goes back and forth to parties with proposals.
- Parties need to make clear any disclosures that must remain confidential.
- Defense counsel should determine how much of ultimate authority to be disclosed under the circumstances.
- If an agreement is reached, the parties generally meet together with the WCJ to confirm the terms of the settlement and confirm/schedule the settlement hearing.
- Special circumstances may evolve where defense counsel telephones client with the WCJ, only attorneys will confer, or settlement becomes contingent on satisfactory resolution of collateral matters (e.g., negotiation or settlement of subrogation lien).

VI. Disposition of Non-Workers' Compensation Issues

- If the parties can agree, a workers' compensation settlement may include non-workers' compensation issues.
- Make sure your carrier allows it.
- Disclosure that WCJ's authority is limited to matters under the Workers' Compensation Act.

- Emphasize that non-workers' compensation issues are subject to the applicable law governing such matters and that consultation with other employment law counsel may be warranted.
- Like compromises and releases, settlement of certain employment law claims may have specific requirements (e.g., ADEA advance and withdraw periods, EEOC release language). Make sure you are aware of the requirements.
- Stress that WCJ's role is limited to confirming claimant's understanding of the workers' compensation issues, not the law of non-workers' compensation issues.
- C&R agreement has been determined to be a binding contract regarding non-workers' compensation issues. See *Hoggard v. Catch, Inc.*, Civil Action No. 12-4783 (E.D. Pa. July 9, 2013) (unreported) (holding that claimant waived right to assert ADEA and PHRA claims against employer where claimant signed resignation as part of compromise and release and did not reserve right to assert future employment law claims); *Flynn v. Federal Express*, Civil Action No. 07-2455 (E.D. Pa. May 23, 2008).
- In construing a contract, "[t]he court will adopt an interpretation that is most reasonable and probable bearing in mind the objects which the parties intended to accomplish through the agreement." *Wrenfield Homeowners Ass'n, Inc. v. DeYoung*, 600 A.2d 960, 963 (Pa.Super. 1991).

VII. Settlement Hearing

- Circulate draft C&R agreement as far in advance of the settlement hearing as possible.
- Make sure there is agreement as to language stated on all issues agreed to at mediation.
- Consider what exhibits should be attached to the C&R agreement or entered into the record regarding non-workers' compensation matters to be resolved.

MEDIATION DISCLOSURE REPORT

Each party must submit this completed form to ensure receipt by the mediation Judge at least 5 days before mediation. Do not copy the other side. Requests for postponements or cancellations should be directed to the mediating Judge and will only be granted for good cause shown due to limited availability of mediation slots. Any request for cancellation or postponement must be received more than 14 days before the mediation unless it is an emergency. A postponement of mediation will not extend the mandatory trial schedule unless agreed to by the assigned Judge. The parties are in charge of such requests.

PARTY YOU REPRESENT:

YOUR NAME, ADDRESS AND PHONE NUMBER:

BASIC FACTS: ALL PARTIES TO COMPLETE

{Use a separate sheet of paper if additional space is needed}

- A. Claimant's age:

- B. Date of injury:

- C. Last date of employment:

- D. Claimant's job title and work duties:
(Classify as heavy, moderate or light duty)

- E. Injury accepted by Bureau Document or Judge's decision:
(attach controlling document)

- F. Mechanism of injury:

- G. Description of Accepted Injury:

- H. Average Weekly Wage and Rate:

- I. Assigned Judge:

- J. Status of Litigation:

CLAIMANT'S COUNSEL ONLY: Please remember to ask for approval for out of state or telephone participation.

- A. Explain briefly Claimant's medical treatment to date. Include all treating physicians by name, prescriptions by name and amount, likelihood of future surgery by whom and to where, etc. Please attach controlling report and diagnostics relied upon.

- B. Are there outstanding medical bills? If yes, what are the amounts? Please include prescriptions and out-of-pocket expenses.

- C. Amount of medical expenses Claimant is incurring per year (also identify any anticipated large medical expenses)

- D. Is Claimant on Social Security Disability or has Claimant applied? Will Claimant apply? Please state date of Medicare eligibility if applicable.

- E. Has Claimant applied for a light-duty job with any other employer? Why not?

- F. If this is a labor market survey case and you have your own vocational assessment, please attach it.

EMPLOYER'S COUNSEL ONLY:

By completing this form, Employer's Counsel certifies and agrees an adjuster and/or all decision makers with appropriate authority to resolve the case will be available at all times during the mediation by telephone only if personal appearance at the mediation by the adjuster or decision maker is impossible. Please inform them that matters can start later than scheduled and last longer than scheduled. Personal appearance is encouraged, appreciated, and in this Judge's experience lead to more successful results.

- A. Has an IME been performed? By whom? What were the results? Please attach report and any diagnostics relied upon.

- B. Has Employer offered Claimant light duty/modified work with pre-injury Employer? If not, why not? If so, please attach a copy of the job offer letter and the modified duty job description.

- C. Please summarize medical expenses paid to date. Please attach a printout of all medical expenses paid within the most recent three years.

- D. Please summarize any surveillance evidence in the currently pending matter. Please attach report.

- E. If labor market, please calculate out exposure for highest and lowest wage job located per 500 week. Please attach report.

- F. Has an IRE been completed? If not, why not? If one has been completed, please attach report.

ALL PARTIES TO COMPLETE:

1. Explain your analysis of the merits of the case (including basic background facts, medical evidence, credibility of witnesses, etc.)

2. Identify the strengths and weaknesses of each party's case:
 - A. Claimant:

 - B. Defendant:

3. Have settlement negotiations occurred? If not, why not? (Explain thoroughly. If yes, what was the result?)

4. What factors or issues do you view as impediments to reaching a negotiated settlement?
 - A. Claimant:

 - B. Defendant:

5. Do you believe that a negotiated settlement is possible?

6. Outline your settlement proposal, be concise, but thorough. Rank each component (i.e., indemnity amount, future medical coverage, etc.) in order of importance from first to last.
 - 1.
 - 2.
 - 3.
7. Which component(s) is (are) negotiable?
8. Which component(s) is (are) not negotiable?
9. Are there other ancillary issues that might impact the outcome of the mediation, such as resignation, pension, unrelated employee benefits (e.g. lifetime flight privileges), health insurance, spouse working with health insurance, concurrent losses such as benefits, vacation days lost, sick time lost and/or vacation time that might need to be reimbursed, and any/all other issues that might impact the success of the mediation? If so, please explain.