

## Workers' Compensation Mediation – What Employers Need to Know

Articles November 23, 2015

The costs of civil litigation, and uncertainties of a jury trial, have turned mediation into its own cottage industry. Now more than ever, parties involved in civil suits will voluntarily agree to mediate the dispute, with the help of a mediator, rather than proceed full bore to a jury trial. The parties will usually split the costs of the mediator – which are similar to hourly billable rates for attorneys.

Taking a cue from this trend in civil litigation, in 2007, the PA Bureau of Workers' Compensation instituted a policy through which **all** Workers' Compensation claims in litigation are subject to a mandatory mediation process. In the decades pre-dating the amendments to the Act, parties involved in Workers' Compensation litigation rarely headed toward mediation, largely because – in Workers' Compensation litigation – costs are usually more easily controlled, and there is never a possibility of facing the expense and uncertainty of a jury trial.

Now, with the mandatory mediation process in place, all Workers' Compensation claims in litigation are subject to mandatory mediation. "In litigation" basically means one of the parties (either the Employer or the Claimant/worker) has filed a Petition, seeking relief in some form from a Decision of a Workers' Compensation Judge. Once the Petition is filed, and the parties are called for a hearing, the presiding Judge will schedule the matter for mediation with a neutral Judge at the same location/office. Typically, the mandatory mediation is scheduled within 30-60 days of the first hearing following a newly filed Petition. The "mandatory" aspect of the mediation is subject to the parties' collective agreement – meaning, the Judge and/or the parties can opt out of the mediation if there is an explanation as to why the mediation process would be fruitless.

Once mediation is scheduled, most mediating Judges will require a "Mediation Disclosure" from each party. This Mediation Disclosure is a detailed form that requires disclosures about the strengths and weaknesses of each party's respective case/claim, and also requires some basic information regarding the anticipated risk/exposure of not settling the claim, and the parties' demands for settlement. On this form, the parties are also able to designate which portions of the claim/case are negotiable, and which are not. The mediating Judge will require that the parties submit the Mediation Disclosure in advance of the mediation, which allows the Judge to familiarize herself with the critical issues in the case. Unlike mediations in civil litigation, where mediators will charge an hourly rate – Workers' Compensation mandatory mediations are handled by Judges at no charge to the parties.

It is important to note that the scope of the mediation need not be limited to the issue involved in the litigation/Petition. For example, if an employer has denied payment of medical bills for a procedure that the claimant/worker alleges is related and necessary to treat a work injury, the injured worker can file a Petition seeking penalties against the employer for the denial of the bills. Once that Petition is filed, a mandatory mediation can address or include only that specific issue of the medical bill, or can be expanded to include other aspects of the claim such as ongoing medical care, and wage loss benefits. In order to expand or contract the issues involved in the mediation – the parties must communicate and agree in advance.

Employers who are protected/represented through Workers' Compensation insurance carriers must be wary of the mediation process because, in many instances, the issues that are negotiated during the mediation will include impactful things such as dates for return to work, accommodations for return to work, or whether the Claimant/worker will agree to resign as part of a settlement. These sorts of negotiable terms will have a direct impact on the workforce. Without input

from the Employer, the insurance carrier attorney may be negotiating things without the employer's knowledge or consent. Employers should also be aware that, without some confidentiality protections in place, the injured worker can broadcast the results of his/her settlement to co-workers, which could lead to litigation from other workers and/or have an adverse impact on workplace morale.

Bottom line: mandatory mediation provides an opportunity for resolving issues in an amicable way, however, employers should be aware of the pitfalls of failing to communicate with their Workers' Compensation defense attorney during the process.

For more information contact Ken Scholtz at [kscholtz@tuckerlaw.com](mailto:kscholtz@tuckerlaw.com)