

WORKERS' COMPENSATION SHOP TALK

QUESTION: A trial court has ordered us to mediate a workers' compensation appeal -- Is this a good idea?

Workers' compensation claims that are appealed pursuant to R.C. 4123.512 can often become subject to local rules, including those requiring Alternate Dispute Resolution (ADR). Most often ADR in these cases takes the form of mediation, a process by which a neutral mediator will sit down with the parties and attempt to negotiate a settlement. Mediation can be a very effective tool in settling workers' compensation claims, and many courts facilitate or provide mediation services free of charge. However, if an employer chooses to engage in mediation, it is necessary that proper preparations take place in advance of the mediation. Here are some things to consider when your court appeal is referred to mediation:

- **Use a mediator who is familiar with terminology:** Many courts have mediators who specialize in workers' compensation matters, and that is where you want your case to be. The value of workers' compensation claims lies mainly in future lost time and medical expenses, and it is convenient if your mediator "speaks the language."
- **Assess value before the mediation, not during:** Long before the mediation date, an analysis should be undertaken to determine the potential remaining value should the claim be allowed. This analysis should include future medical payments (including potential surgery) potential future compensation (temporary total, permanent partial, and permanent total) and any statutory attorney's fees which may be assessed in the event of an adverse verdict.
- **Mediate before you have incurred defense costs:** Mediation is most cost-effective when conducted early, before expert fees and other pretrial expenses are incurred. Often the identity of potential experts has been revealed in the administrative proceedings anyway, so the parties have a good idea of an expert's potential as a witness. In addition, early mediation can provide an evaluation of the claimant's stomach for further litigation. However, mediation should not be undertaken in most cases until after written discovery is completed, and the claimant's deposition has been taken.
- **Use mediation to set parameters for settlement:** At times, mediation can be used to set parameters for a settlement which may occur later in time. This is particularly true in cases where a resignation from employment is desired. If this requirement is disclosed during mediation, it allows the claimant and his attorney

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time to formulate a demand which includes resignation, or at least start a conversation.

- **Preparation is key:** It is absolutely necessary that the employer be aware of all risks and potential factual issues before mediation. Medical records should have been obtained, potential defenses explored, and a good faith demand from the claimant made. Mediation can also be the time for a frank discussion about what a trial will entail from both sides. While early mediation can be beneficial, unprepared mediation can be a disaster, resulting in ineffective negotiations, unrealistic expectations, or worst case, hardened positions on both sides. Settlement is much more likely to occur when the parties and their attorneys know the numbers before heading to the mediation room.
- **Communication with the mediator:** It has been my experience that the more information you can provide to a mediator before the mediation, the better. While most mediators require only a cursory mediation statement, I often provide a much more substantial mediation brief in letter form, discussing what I believe the evidence will show. Notably, I also do not normally disclose this letter to opposing counsel, which permits me to speak frankly about the issues in the case, as well as potential points of leverage that the mediator may use at the hearing.

Mediation can be an effective tool if utilized early and with substantial preparation. It provides both sides with an opportunity to evaluate the strength and weaknesses of their case, and whether trial is necessary. There is very little downside to engaging in good faith mediation if and when it is offered.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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