

SECTION XIV

Mediation Panel

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Mediation Panel Overview – Martha Krone, Workers' Compensation Adjuster,
Great West Casualty Co.

When mediation occurs – What is helpful from Adjuster's perspective

Parties have taken first step toward agreement to resolve the dispute – proceed toward goal to conclude claim. Parties are in control of the outcome of the mediation and preparation pre-mediation will be beneficial to reach agreement in mediation.

1. Prior to Mediation

- A. Defense attorney – verify all medical records are forwarded and claimant's attorney has forwarded their records and IME's.
- B. IME – determine if needed based on available medical records or injury claimed and claimant's IME if done.
- C. Medical Bills – exchange those covered by work comp and denied. Obtain bills that claimant's attorney may claim are related. Will have bill review estimate conducted on disputed bills if needed.
- D. Witness Statement – available to support mechanism of injury if disputed.
- E. Exposure – need analysis from defense attorney for proper reserves and authority at mediation.
- F. Demand – helpful to have prior to meditation as well as counter.
- G. Subrogation – need to know position of subrogation attorneys if we expect to close medicals. Helpful to know status of third party claim if any.
- H. Medicare/Medicaid status – helpful for claimant attorney to know client's status for SSDI, Medicare applications or beneficiary status. This will determine whether MSA is needed.

- I. Claimant preparation – educated on the process, the questions that may arise, decisions to be made and expectations. Inform that parties have control of this process. This is often new experience for them, will help their comfort level.
- J. Time – please be prepared to devote the time toward meaningful negotiations and consider the importance of the proceeding to all parties involved to work toward resolution.

2. During Mediation Proceedings

- A. Defense attorney mediation statement – helpful in presenting highlights of parties' positions for Mediator consideration. This is a more concise method to present parties' support for claim than hearing setting.
- B. Mediator – promising for both sides to know Mediator has reviewed medicals and attorneys' statements if presented. Don't just be a messenger, provide suggestions and parties' support for their position or lack of to help parties find creative alternative to resolve their dispute.
- C. Negotiations – expect to hear not just the “message” and demand from other party, want to discuss Mediator's impression and case law to support or thwart arguments.
- D. Open Minds/Attitude – Mediator's impression of the case and direction can help both parties keep an open mind and focus on strategies that may be outside the box to conclude the claim.
- E. Client Control – Mediator impression is helpful for clients on both sides to hear a third party's impression of the case based on the arguments and support the parties present.
- F. MSA – if it appears medicals will settle and claimant is Medicare beneficiary or expected to be Medicare/Medicaid beneficiary we will need medical authorizations signed and list of medical providers and pharmacies for last 2 years. This is a good time to obtain the information from claimant.

G. Global release – will often be asked to sign, helpful for claimant to know prior to mediation that it may be offered.

3. Post-Mediation

- A. Settlement not reached – communicate willingness to continue negotiations toward resolution of dispute.
- B. MSA – if needed please help obtain and provide the names of medical providers, pharmacies and signed medical authorization to obtain the MSA projection amount. We will need part A, B, C, D etc information from client to verify payments, please help in obtaining this to help finalize claim.
- C. MSA submission – please assist in obtaining claimant’s signatures on forms needed to submit MSA to CMS.
- D. Settlement language – often determined during mediation if agreement reached keep open mind when drafting settlement documents, we want the same result, let’s reach agreement on language to conclude claim.

The end result of the mediation may be that parties feel they either didn’t receive enough or gave too much and that is still success and a win-win for all parties.

Mediation is useful tool for all parties who actively participate and are prepared to resolve the claim.

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MEDIATION – THE QUICKEST WAY TO SETTLEMENT

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The Opening:

Explain the advantages of settlement

Avoids future litigation that may take years

Workers' compensation claims can involve a hearing and four different appeal stages; typically can take 4-5 years to come to a final decision. After years of litigation and appeals can even result in case being remanded to start over from the beginning.

Avoids the cost of litigation and appeals.

The parties have input in the final result. At a hearing, the outcome is outside of the parties' control.

Have an opportunity to say what you would like to say. Unlike a trial or hearing, there are no objections preventing a party from asking the other side to consider information you would like them to know.

With a settlement, the parties have certainty as to the outcome.

Psychological benefit of a settlement. If the case settles, no longer have to worry about testifying at hearing.

Often the claimant is frustrated with the employer, adjuster or the insurance carrier. With the finality of a settlement, the claimant knows that he or she will no longer have to deal with the company.

May be able to choose his or her own care in the future. With a settlement, claimant no longer has to worry about surveillance or worry about whether future actions will harm his or her case. With a settlement parties can "move on with their lives".

The time value of money. The costs of delays in litigation if the claimant has credit card debt or other debts that can be paid off with the settlement proceeds.

The Process:

Always two side to every claim. Parties have the opportunity to consider possible outcomes.

Explore possible benefits to settlement:

- Settlements may result in the lessening of potential offsets of other benefits a party may be receiving or could receive in the future. "Social security language" can be included in some settlements.
- Opportunity to explore other potential recoveries, e.g. Second Injury Fund, Long Term Disability, unemployment, Social Security.
- Mediator provides a "new set of eyes" that may see other avenues to settlement or other potential advantages or pitfalls that a party did not consider.

Litigation is an adversarial process. Mediation is the one time during this process that the parties work together to try to resolve the claim.

Timing of settlement. Can often avoid Medicare set-aside issues.

Expertise of mediator. A second opinion as to exposure or outcome at hearing.

Global releases and resolution of other issues.

Mediating Iowa Workers' Compensation Claims

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Introduction

The term "mediate" is defined by Merriam-Webster as to bring accord out of by action as an intermediary.

Over the years, mediation has become increasingly popular as the quickest and most efficient way to reach a resolution of complex and difficult claims. At mediation, the mediator will typically explain to the parties the advantages of settlement. The advantages include:

- Avoids future litigation that may take years. Workers' compensation claims can involve a hearing and four different appeal stages; typically can take 4-5 years to come to a final decision. Even after years of litigation and appeals the process can result in the case being remanded to start over from the beginning.
- Avoids the cost of litigation and appeals.
- The parties have input in the final result. At a hearing, the outcome is outside of the parties' control and determined by someone else.
- The parties each have an opportunity to say what they would like to say. Unlike a trial or hearing, there are no objections preventing a party from asking the other side to consider information they would like them to know.
- With a settlement, the parties have certainty as to the outcome.

- Psychological benefit of a settlement. If the case settles, no longer have to worry about testifying at hearing and concerns of the outcome.
- Often the claimant is frustrated with the employer, adjuster or the insurance carrier. With the finality of a settlement, the claimant knows he or she will no longer have to deal with the company.
- The claimant has the advantage of being able to choose his or her own medical care in the future. With a settlement, claimant no longer has to worry about surveillance or worry about whether future actions will harm his or her case. With a settlement, the parties can “move on with their lives”.
- The time value of money. The costs of delays in litigation can be substantial, especially if the claimant has credit card debt or other debts at high rates of interest that can be paid off with the settlement proceeds.
- A resolution of the claim may allow the insured’s reserves to be lowered that may result in lower future premiums paid by the insured.

The process of mediation often allows the parties to stop and take the time to consider multiple factors that often assist in resolving the claim. These factors include:

- Always two side to every claim. Parties have the opportunity to consider possible outcomes.
- Explore possible benefits to settlement;
- Settlements may result in the lessening of potential offsets of other benefits a party may be receiving or could receive in the future. “Social security offset language” can be included in some settlements.

- Opportunity to explore other potential recoveries, e.g. Second Injury Fund, Long Term Disability, unemployment, Social Security.
- Mediator provides a “new set of eyes” that may see other avenues to settlement or other potential advantages or pitfalls that a party did not consider.
- Litigation is an adversarial process. Mediation is the one time during this process that the parties work together to try to resolve the claim.
- Timing of settlement - can often avoid Medicare set-aside issues.
- Expertise of mediator. Provides a second opinion as to exposure or outcome at hearing.
- Global releases and resolution of other issues.

Types of settlements which can be reached at mediation

There are multiple types of settlements authorized under the Iowa Workers' Compensation Act. Some are commonly referred to as “open file” settlements. These settlements resolve some issues of the claim, but allow for other issues to be determined at a later date. Other types of settlements are commonly referred to as “close file” settlements. These settlements are generally designed to allow for all issues to be decided on a full and final resolution basis.

The first issue to consider when entering into a workers' compensation settlement is that the Iowa law provides that a workers' compensation settlement must be approved by the workers' compensation commissioner to be enforceable. See Iowa Code §86.27. However, a settlement that has not yet been approved may still be binding on the parties. An action for specific performance may be permitted in some circumstances that may order the parties to present the terms of parties' settlement to the workers' compensation commissioner for consideration of approval.

- **Open file settlements**

There are essentially three types of "open" file settlements provided for by the Iowa Workers' Compensation Act. The most common is the Agreement for Settlement. See Iowa Code 86.13(3). An Agreement for Settlement provides that the parties may stipulate as to the amount and type of benefits that are owing. An Agreement for Settlement requires that the parties stipulate that the employee sustained an injury arising out of and in the course of employment. Because this type of settlement requires an admission of liability, this form of settlement may not be advisable in cases where the parties wish to contest liability for matters that arise in the future. For example, if the employer and/or insurance carrier wish to preserve their defenses for possible future

issues that may arise in a review-reopening proceeding, a different type of settlement may be preferred.

Another example when an Agreement of Settlement may be inappropriate is when the parties have concerns that there other entities, such as a disability carrier or health insurance, that may use the Agreement of Settlement to form the basis to assert a subrogation or lien interest against the parties.

Another drawback to an Agreement for Settlement is that the parties are generally not able to include social security offset language in this type of settlement. An Agreement for Settlement may not be advisable if the claimant will have a significant social security offset caused by agreement's stipulation as to the claimant's weekly compensation rate and period of time when benefits would be owing.

Another "open file" settlement is the Partial Commutation. See §85.48. A Partial Commutation typically pays the present value of some part of the remaining future weekly benefits in a lump sum. Like an Agreement for Settlement, this type of settlement may not be advisable if the stipulations necessary for approval of the settlement will result in offset issues, subrogation and/or lien issues or waiver of future defenses that wish to be preserved. Also, this type of settlement is not available unless there are future benefits that will be owing.

The third “open file” settlement is the Combination Settlement. Iowa Code §85.35(4) was amended to allow the parties to combine an Agreement for Settlement with a Compromise Settlement. The Combination Settlement allows the parties to establish liability for part of a claim and fully and finally resolve other parts of a claim.

- **Closed file settlements**

There are essentially two types of “closed” file settlements provided for by the Iowa Workers’ Compensation Act. The first and most common “closed file” settlement is the Compromise Settlement. See Iowa Code §85.35(3). In order to obtain approval of a Compromise Settlement, there generally must be some dispute as to the benefits that may be owing.

One advantage of a Compromise Settlement is that this type of settlement allows social security offset language to be included in the settlement documents that may allow the employee to receive greater social security disability benefits than the employee may receive if another form of settlement is used. One disadvantage of this type of settlement is that Iowa Code section §85.35 provides that approval of this type of settlement constitutes a final bar to any further rights under the Iowa Workers’ Compensation Act regarding the subject matter of the settlement. Consideration should be given to make sure that the approval of a Compromise Settlement does not result in unintended

consequences, such as the wavier of subrogation rights for the insurer to recover against a negligent third party, or waiver of the employee's right to pursue benefits against another party like the Second Injury Fund. Approval of a Compromise Settlement has been held in some cases to bar a claim for bad faith.

The other form of "closed file" settlement is the Full Commutation. See Iowa Code §85.45. A Full Commutation pays all remaining benefits, including medical benefits, in a lump sum. It has essentially the same advantages and disadvantages as a Partial Commutation.