

MEDIATION AND THE WORKERS' COMPENSATION SUBROGATION CLAIM

In the last ten years, mediation has become an important part of the fabric of our tort system. In many states, it has become a mandatory part of state court rules, and parties to litigation are required to submit their cases to a mediator. The mediation of large cases has become routine in most jurisdictions, and the process has been successful in reducing court backlogs and the transactional cost of litigation for parties. These developments have created a new occupation, the mediator for litigated cases. Mediators have been used in labor disputes for many decades, but their involvement in tort litigation is relatively new.

Like the attorney and the claims adjuster, the mediator has a job to do, and can succeed or fail at their job. Most mediators view success as settlement of the case, and want to do everything possible to reach that goal. A case that doesn't settle is often viewed as their responsibility (even if the failure is beyond their control). If a mediator can't get cases settled, they are less likely to get new referrals, and mediators (like everyone else) want to attract new business. The mediator thus is focused on the "number" the case can be settled at, which frequently is the most money the defendants are willing to pay and the least money plaintiffs are willing to accept.

In order to achieve this goal, the modern mediation process relies heavily on "shuttle diplomacy". After reviewing the memoranda and conducting an initial meeting with all the parties, the mediator typically "shuttles" between separate private sessions with the plaintiff and the defendant. In these individual sessions, the mediator typically tries to assess the minimum settlement requirements of the plaintiff and the maximum amount the defendant may be willing to pay. As part of this process, the mediator will try to establish a personal rapport with the attorneys and clients, and tries to gain their confidence. The mediator will diplomatically let each party know what their weaknesses are, in the hope of coaxing them to be more

“reasonable”. If there are multiple defendants, the mediator’s job becomes more complex. She must not only spend time with the plaintiff, but must have separate meetings with each of the defendants to assess their maximum individual contributions to the overall settlement. Frequently, co-defendants have serious disagreements which need to be addressed by the mediator as part of any successful settlement.

In any event, the positions of the parties should get closer as this process proceeds. The plaintiff will reduce his demand, and defendants will increase their offer, theoretically until the case is settled. Unfortunately, the custom has evolved that the workers’ compensation carrier is a spectator to this critical shuttle diplomacy process. While the mediator is going back and forth between plaintiff and defendant, the workers’ compensation carrier and its attorney are usually in another room, relegated to reading newspapers and making small talk for several hours while the mediator goes back and forth between the plaintiff and the defendant. Often, it is as if they were not present at all. In the interim, the plaintiff, defendant and mediator are expending time and energy trying to get the case settled.

At some point, the demand and offer are close enough that the mediator’s instincts and experience tell her that a settlement is within reach. Only at this point, when the mediator feels that a realistic settlement is possible, does she involve the workers’ compensation insurer. At that point mediator, plaintiff’s counsel and defense counsel believe that a resolution is at hand. A settlement is so close that they can taste it. The only obstacle at this point is the workers’ compensation carrier, which has a substantial lien. A substantial reduction (or even a waiver) of the lien can perhaps increase the plaintiff’s net recovery and get the case settled.

If, in the eyes of the other parties, the workers’ compensation carrier fails to be “reasonable”, pressure to substantially reduce its lien is then usually brought to bear. Threats are made. In California or Minnesota, the plaintiff and defendant can threaten to “settle around”

the workers' compensation carrier. This means that the defendant agrees to pay an amount directly to the plaintiff in exchange for a release, and leave the worker's compensation carrier to prove its case, frequently without the cooperation of the plaintiff (usually a key witness). In states that have some type of "made-whole" doctrine in place, plaintiffs often threaten to settle the case and claim that their clients have not received full compensation. South Carolina, Arkansas, Georgia, Florida, Arkansas, Montana and Indiana all have some type of "made-whole" doctrine which the plaintiff's attorney can use as a basis for refusing to pay the appropriate amount of the lien. In North Carolina, the plaintiff can threaten to file a motion with the court requesting that the workers' compensation lien be voided.

If you are in a favorable jurisdiction, such as New Jersey, Virginia, Massachusetts or Pennsylvania, the parties cannot "settle around" a workers' compensation carrier or refuse payment on the basis of a "made-whole" doctrine. In these states, the mediator and the parties will apply pressure on the workers' compensation carrier to be "reasonable", and point out that if the case does not settle, and the jury renders a defense verdict, the workers' compensation carrier will receive nothing, and continue to pay benefits (this of course is a factor in every state). Of course it is very easy to say "I will not compromise" and refuse to bow to pressure. This is easy for more experienced and knowledgeable professionals, but the combined effects of the interpersonal dynamics, the pressure, the threats, lack of preparation and/or the fear of a bad result often result in a large compromise.

Although no problem is completely solvable, there are several strategies that can be employed that can minimize the damage to your subrogation interest resulting from the settlement dynamics of the typical mediation.

1. *Prepare Your Own Memorandum for the Mediator.*

In advance of most mediations, the plaintiff and defendant submit either a confidential or disclosed mediation memorandum. This typically contains a summary of the party's position on liability and damages, and a summary of settlement negotiations to date. In the majority of cases, the workers' compensation carrier does not present any such memorandum. If the mediator receives a thorough memorandum from the workers' compensation carrier indicating its position on liability, damages and its right of subrogation under the law of the applicable state, the mediator is more likely to regard the workers' compensation carrier as a meaningful player, and not just a bit part to be dealt with when the case is virtually concluded. You need to set the right tone at the outset.

2. *Consider Whether Attendance is in Your Best interest.*

Some workers' compensation insurers always attend mediations; other never attend. Consider the particular facts and circumstances of the case, and the law of the applicable jurisdiction. If you are in a strong position, you may not want to attend in order to avoid being pressed into a compromise if your rights are clear and you believe the case is going to settle anyway. On the other hand, if your legal position is weak, you may want to be there in order to exercise influence over the outcome. It will be much more difficult to "settle around" you if you are present. If it is a case of hotly disputed case of liability, you may want to be there to help bolster the plaintiff's position. Make an informed decision based on the facts of the individual case rather than a knee-jerk reaction.

3. *Consider Making a Deal Before the Mediation.*

Most workers' compensation recovery professionals have very cordial relationships with plaintiff's counsel until the very end of the case. At that point plaintiff's counsel is anxious to get the case settled. If they are nervous about going to trial, they will put pressure on anyone and

everyone they can in order to get the case settled, including their own clients and the workers' compensation carriers.

A useful strategy is to enter into a pro rata agreement with the plaintiff's attorney long before the mediation, even prior to the filing of suit. Such agreements provide for the distribution of funds recovered in the third party case on an agreed basis. The agreement can specify that for each dollar recovered, an agreed portion goes to counsel fees, payment of the workers' compensation lien and the injured worker. The recovery of the workers' compensation carrier is obviously limited on the upper end by the amount of its lien. Such agreements are especially useful in difficult jurisdictions. In Minnesota, for example, they can provide the neither party will settle separately with the defendant. In North Carolina, they can provide that the plaintiff will not file a motion to avoid the lien.

When the plaintiff arrives at the mediation, counsel can represent to the mediator that any actual or potential differences with the workers' compensation carrier regarding their lien have been worked out, and that the only issue in the case is the amount of money to be paid by the defendant(s). This may even obviate the need to send a representative to the mediation. This solves a dilemma for the workers' compensation carrier, the plaintiffs' attorney and the mediator.

4. Be Prepared.

If you are attending the mediation, be aware of the law governing your recovery rights, the substantive law of the case, and the facts. When the mediator comes to the workers' compensation carrier asking for a reduction of the lien, frequently it will be on the basis of a legal defense in the third party case (contributory negligence, federal pre-emption, spoliation, etc.). The mediator frequently will tell the workers' compensation carrier that the case may be lost because of weaknesses in the plaintiff's case. You will be able to deal with this tactic much more effectively if you are on top of the facts and law. Otherwise you may be forced to accept

what the mediator has to say at face value. Knowledge is power, and this information gives you the ability to effectively deal with these tactics.

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