

What Really Happens in Workers' Compensation Mediation

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Media Contact

Erica Gianetti
Marketing & Communications Supervisor
erica.gianetti@mgclaw.com

In May of 2013, the South Carolina Workers' Compensation Commission approved new Mediation Regulations (67-1801 through 67-1809), which provide that certain types of cases must be mediated, as well as a regulation (67-1801) that allows a Commissioner to order mediation in any claim. Because such a large number of cases will go to mediation moving forward, it is helpful to establish good practices in order to achieve the most favorable outcome and bring files to resolution more quickly.

Some of the cases that must be mediated include claims in which permanent and total disability is alleged, third party lien reduction claims, contested death claims, mental/mental injury claims, occupational disease claims and cases of concurrent jurisdiction under the South Carolina Workers' Compensation Act and the Federal Longshore and Harbor Workers' Compensation Act.

What really happens in mediation?

A mediator must be selected within 10 days of the filing of Form 51 or Response to the Form 21, and the mediation must be completed within 60 days of the filing of the Form 51 or Response to the Form 21. Each party must provide a representative other than the attorney, in person or by telephone, who shall have authority to enter into negotiations, in good faith, to resolve the issues in dispute. Parties share the cost of the mediation equally, unless otherwise agreed to by the parties or ordered by the SCWCC.

The mediation typically begins with introductions. The parties meet together with the mediator, who explains the mediation procedure. These introductions allow both parties to face each other and express their positions in a non-threatening manner. While styles vary, it is important to remember that a mediation is often the last ditch effort to resolve the claim before a Commissioner decides the case at a hearing. While it is helpful to highlight the strengths and weaknesses of each position, a less adversarial approach may be preferred. After introductions, the parties separate. The mediator meets with each party separately, providing guidance on how to effectively move negotiations forward. A mediator is not only helpful in advocating for each side as needed, but also often promotes more effective communications between an attorney and his or her client.

Prior to mediation, it is crucial for each side to examine all evidence and provide a thorough summary for the mediator. Communication between the parties is also very important. For example, if there is evidence of additional involved body parts to support a permanent and total disability award, it is helpful for the Claimant's attorney to disclose these medical reports prior to mediation rather than during. This allows the Defendants' attorney to properly prepare his or her client and obtain settlement authority in time to reach an agreement. If surveillance and/or social networking findings or favorable witness testimony has not been disclosed and might be helpful to discredit a witness, Defendants may choose to disclose this information during mediation. The timing of these disclosures is very important. For example, a party may decide not to reveal a "smoking gun" until the settlement figures are close; this disclosure may be the factor that allows the other side to understand the claim's value. Alternatively, if the parties are not close to settling the claim, it may be preferable to wait and use the element of surprise at a hearing to obtain a favorable decision.

A successful mediation requires both parties to compromise. This usually means that the insurance carrier pays slightly more than desired, while the claimant accepts slightly less than desired. In a case where the positions and/or values fall on extremely opposite ends of the spectrum, the parties may use the mediation process as an opportunity to gain solid ground on their case. Mediations are completely confidential, so any statement a party makes cannot be used against that party at a hearing. Therefore, the parties are able to explore theories that they may decide not to pursue later at a hearing. Mediation will force the parties to resolve more cases together by fully examining potential hearing outcomes and performing effective cost-benefit analyses. Ideally, this will decrease the lifespan of claims by avoiding hearings and future appeals.

In our experience, better than 80% of cases that are mediated on the workers' compensation side are settled at the mediation or shortly thereafter. According to the SCWCC, for the period July 1, 2013 to April 30, 2014, a total of 1,485 claims submitted to the Commission involved mediation: Regulatory (1,315), Requested (130) and Ordered (40). For the same period, the Commission received notice of 1,041 mediations scheduled; the status of the other 444 cases was unknown at the time. For this time period, the Commission received 688 Form 70's (Resolved – 484, Impasse – 198 and Issues Pending – 6), with a resolution rate of 46%. However, this does not account for the 444 cases of which the status is unknown or pending. The regulation does not provide for penalties for failure to report the outcome of a mediation on a Form 70, nor does it provide for a penalty if a mediation is not scheduled within 10 days. After the first year, the Commission has requested a review of procedures, processes and outcomes of the mediation regulations.

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ABOUT THE AUTHOR

[Alaina M. Beach is an attorney with McAngus Goudelock & Courie. MGC is a metrics-driven law firm built specifically to meet the needs of insurance companies and their customers. From ten regional offices, we serve clients across the Southeast. Beach may be reached at 864.239.4029 or by email.](#)