

# **Effective Techniques in Mediating a Workers' Compensation Claim From All The Parties' Perspective**

## **EMPLOYER'S COUNSEL PREPARATION FOR MEDIATION**

1. **Confirmations**: Secure confirmation as to receipt of all discovery and subpoena requests such that the information is reviewed and received prior to the scheduled mediation. Confirm that we have met all elements of the WC Judge's scheduling order and confirm that any items that we requested from Claimant's counsel we received and analyzed.
2. **Secure Demand**: Claims professionals require formal demand and valuation. We recommend providing counsel a detailed request for demand letter in order to secure meaningful information in advance of the scheduled mediation.
3. **Evaluation of the Claim**. Identify for the Client the likelihood of prevailing on the merits of the case before the WCJ and the alternative scenarios upon which the Judge may make his determination by identifying what those alternatives monetarily will mean. Identify Claimant and Claimant's counsel's expectancy interest to be cognizant of how our evaluation of the claim may relate to the expectancy interest of Claimant and counsel in order to not only reach evaluation of the claim but also reach evaluation that leads to an Agreement. Consider and evaluate medical exposure and potential cost of future medical services as well as likely outcomes of any pending Petitions for Review of Utilization Review Determinations considering that recommendations as to how Medicare interests may need to be addressed. (See Mediation Valuation Checklist).
4. **Employer Mediation Submission**. Provide WCJ in accord with their requirements, and in advance, a mediation statement which zealously advocates Employer position which at the same time contains candid analysis of how Employer's case may be adjudicated by the assigned deciding Workers' Compensation Judge along with pointed specific debunking of the key anticipated represented strengths of Claimant's position. Provide independent medical examination report and favorable diagnostics along with any inconsistent histories in treating physician's records so that representations contained in Employer's submission dove tail with anticipated evidence of record. At mediation, recommend negotiating details first and lump sum second. Recommend involving the claims professional in the mediation process to the extent that they are interested in participating including their speaking with the mediating Judge to partner together in securing the result. Suggest aggressive listening and observation of Claimant's counsel and their client and/or spouses during the process. Openness toward continuation of the negotiation dialog.

## **Employer Mediation Valuation Checklist**

The following topics and information may be helpful to be considered in the context of mediating a Pennsylvania Workers' Compensation Claim.

### 1. Claimant's Demographics and Claim Considerations

- Age/Date of Birth
- Marital Status – Is spouse employed?
- City and County of residence and any recent relocation
- Children and their ages – Family members they may provide care.
- Date of hire
- Co-morbidities
- Employment history
- Date of injury position/occupation
- Potential residual skills and the value in the labor markets in which they live and reasonable estimate of alternative earning capacity
- Claimant's healthcare insurance status – The Patient Protection and Affordable Healthcare Act
- Domestic relations arrears or non-disbursement order that affects Claimants net recovery
- Recidivist claimant and results of prior settlements
- Identification of prior open claims with same Employer and/or same carrier
- Employer funded short term disability status
- Employee paid short term disability status
- Claimant's pension receipt and Claimant's pension eligibility
- Claimant's severance benefit receipt or potential
- Claimant's old age Social Security retirement benefit status
- Private health insurance carrier subrogation interest
- Out of pocket medical expenses incurred by Claimant
- Potential third party claims and likelihood of recovery
- Medicare status
- Potential for disfigurement or specific loss claim
- Potential for Supersedeas fund reimbursement
- Content of most recent verifications returned
- Amount of outstanding medical expenses at issue and their repriced value
- Potential disputed surgery and estimation of cost utilizing medical blue book or other means to identify the cost
- Identification as to the amount of medical expense incurred to date and anticipated projection over the next five years
- Identification of the status of any UR Determinations or pending Fee Reviews

## 2. Facts for Valuation and Resolution

- Identity of Claimant's counsel and their history of resolution
- Identity of the nature of the injury accepted and the nature of the injury and conditions alleged
- Nature of injury at issue and likelihood of improvement and return to work force
- The results of any most recent surgery or pending surgery
- Identity of the WCJ and how the WCJ may have ruled on similar matters
- Identity of Claimant's medical experts and their opinions
- Identity of Employer's medical expert and their opinions
- Significance of original records of panel treating physician or original treating physician's diagnostic studies and prior diagnostic studies
- Evaluation of the credibility of Claimant's testimony and the significance to be attributed to Employer fact witnesses including surveillance witnesses
- Claimant's response to any job offer made and the effect thereof
- Whether Labor Market Survey provides leverage and whether imputed earning assists the evaluation of claim
- If decision is adverse, how and how long would we be able to move and change Claimant's status
- Has an IRE been requested and what is the effect thereof
- What is per annum projected receipt of benefits projected and amount of potential partial discounted at 500 weeks and benefit amount under closed potential period
- Tempering wishful thinking versus the desire to score a win in adjudication against projection of future indemnity exposure and/or potential cut-off points in reduction of benefits identifying alternative scenarios.
- MSA quote if any
- Amount of potential quantum merit fee request or penalty exposure

## The Compromise and Release Agreement

1. **Date of Injury.** It is important that the Compromise and Release Agreement reached specifies what date of injuries will be resolved by Compromise and Release so that any secondary dates of injury are addressed for full and final settlement.
2. **Average Weekly Wage.** There is a value to confirming the average weekly wage so that all parties are negotiating the same mathematical perspective and to avoid any disputes as to whether any back claim for overpayment or under payment exists.
3. **Benefits Conclusion.** Under the Agreement recommendation is to specify when weekly benefits conclude and whether Employer is entitled to a credit for any weekly benefits paid thereafter. In addition, Agreement should include when it is anticipated that Claimant will receive their lump sum draft and whether Carrier is indeed going to continue to pay benefits after date of hearing up to issuance of the lump sum draft so that Claimant understands her financial circumstance following the Compromise and Release hearing and when they will receive the lump sum monies.
4. **Description of Injury.** Insuring the nature of the description of injury is relevant to the Agreement particularly with respect to mutual understanding as to what medical benefits will be paid or not paid under the terms of the Agreement. Claimant's counsel may negotiate a lump sum settlement for release of indemnity and then on eve of Compromise and Release hearing insist on a modified description of injury to expand the scope with respect to future medical liability.
5. **Medical Expense.** In the context of a mediation, Claimant's counsel prefers language that carrier shall pay any and all medical expenses with respect to the alleged injury for dates of services incurred up to the date of either settlement or Compromise and Release hearing. We suggest medical stops as of the date of the mediation or settlement to avoid unforeseen medical expense post mediation. Best practice suggests the specific identification of exact medical bills and dates of services to be included in the Compromise and Release.
6. **Specific Loss or Disfigurement Liability.** It is recommended that liability for specific loss and disfigurement be specified that it is released as part of the Compromise and Release Agreement particularly in cases involving cervical surgical conditions. If there had been treatment for any psychological condition, suggest including a release of psychological liability as well rather than remaining silent on the topic.
7. **Precision as to causes of actions released.**
  - a. Insure that all outstanding Petitions are resolved and specify what specific Petitions may be taken to decision.
  - b. Include statement that Claimant is not pursuing claim in other jurisdictions.
  - c. In true dual jurisdiction cases, ascertain whether a separate resolution document is required in another jurisdiction.
  - d. If there are any issues regarding prior period of back benefits potentially payable recommend addressing same in the Compromise and Release Agreement with precise affirmative statement that all prior benefits have been paid in accord with the Act.

e. Include agreement that there had been no violation of the Act up to the date of the C&R hearing and that the Employer had reasonable basis for contest at all times.

8. **Subrogation.** Provide detailed lien information in the Compromise and Release Agreement if available. Secure identity as to the docket term and number of any third party action or actions, as well as the identity of Plaintiff's counsel and the status of same for future monitoring.
9. **Domestic Relations.** Insure that carrier and Employer do not have non-distribution orders in addition to conducting lien search.
10. **Resignations.** Identify whether resignation or employment law agreement is required and whether there is separation consideration, and who and when will the check be issued and insuring that the

**MEDIATION MEMORANDUM OF UNDERSTANDING**

Case Name: \_\_\_\_\_ v. \_\_\_\_\_ Date: \_\_\_\_\_

Date of Injury: \_\_\_\_\_

1. **Full Compromise & Release**- Claimant has agreed to receive lump sum of \$ \_\_\_\_\_ in exchange for full compromise and release of any and all Workers' Compensation claims, including the accepted/alleged occupational injury, releasing medical, indemnity, and possible specific loss and disfigurement benefits under the Pennsylvania Workers' Compensation Act. Claimant agrees that Employer had reasonable basis of contest, and that no violation of the Act occurred. Additional injury dates also released:\_\_\_\_\_.

2. Carrier shall pay weekly benefits up to (Options: today, date of the C&R hearing, or date of the WCJ's Order) \_\_\_\_\_.

3. **Medical**- We have agreed to a full medical release (if an exception, specify): \_\_\_\_\_.

4. If medical is open for any period, specify and the description of injury (does not/does change) to: \_\_\_\_\_.

5. The only medical expenses to be paid for dates of services up to hearing are for those related reasonable and necessary to the accepted work injury as described in the Notice of Compensation Payable, with exceptions as follows: \_\_\_\_\_.

- a.) Address treatment of any pending UR issues:\_\_\_\_\_;
- b.) Address last date of service to be paid \_\_\_\_\_;
- c.) Address any limitation as it pertains to any provider or procedure \_\_\_\_\_.
- d.) Address any fee review issues.

6. **Subrogation**- The parties agree that Employer is entitled to subrogation against any third party claims and that indemnity/medical paid as well as monies paid under this agreement are part of Employer's Section 319 lien.

- a.) There are no Health Carrier, Child Support, or Department of Public Welfare liens involved. If yes, specify treatment:\_\_\_\_\_.

7. **Costs**- Employer agrees to reimburse Claimant's bona fide litigation expenses under Section 440 of the Act in the amount of \_\_\_\_\_.

8. Will Carrier pay for notes of testimony for counsel from the hearing? \_\_\_\_\_.

9. **Medicare**- Claimant is not a Medicare recipient nor anticipated to become within the next 30 months. If yes, the status is as follows: \_\_\_\_\_.

- a.) Are there any known conditional payments? \_\_\_\_\_.
- b.) How are Medicare interests to be addressed? \_\_\_\_\_.

10. Claimant agrees to sign a letter of resignation/employment law separation agreement/confidentiality agreement. Specify: \_\_\_\_\_.

11. Fee Agreement Terms: (Most likely 20%) \_\_\_\_\_.

12. Claimant (agrees) /or/ (does not agree) to waive right to appeal from WCJ approval Order.

13. Claimant will be available for expedited hearing upon Compromise and Release approval.

- a.) Is matter already listed for upcoming hearing? \_\_\_\_\_.
- b.) Interpreter required at C&R hearing? \_\_\_\_\_.

14. Dual jurisdiction Claimant- Claimant agrees not to pursue or accept benefits in any other jurisdiction.

Employer Counsel Initials \_\_\_\_\_

Claimant Counsel Initials \_\_\_\_\_

## NEGOTIATION WORKSHEET

### CLAIMANT DEMANDS

1. \_\_\_\_\_

2. \_\_\_\_\_

3. \_\_\_\_\_

4. \_\_\_\_\_

5. \_\_\_\_\_

6. \_\_\_\_\_

### EMPLOYER OFFERS

1. \_\_\_\_\_

2. \_\_\_\_\_

3. \_\_\_\_\_

4. \_\_\_\_\_

5. \_\_\_\_\_

6. \_\_\_\_\_

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March 9, 2015

Nicholas Racine, Esquire  
100 Market Street  
Harrisburg, PA 17102

**Re: Matty Walker v. PA. Dept. of Corrections**

## Request for Demand

Dear Attorney Racine:

We represent Employer and Insurer in the above-referenced matter. The WCJ has listed this matter for mandatory Mediation for April 20, 2015. In preparation for the mandatory Mediation, we write to request the following:

1. Your demand for full Compromise and Release under the Act with letter of resignation.
2. Identity and specifics of any medical providers and their professional statements which you seek to have paid under the terms of any Compromise and Release Agreement.
3. Identification of your bona fide litigation costs with proofs.
4. Identification of whether your client is presently a Medicare recipient or is anticipated to become Medicare eligible within the next 30 months and whether your client is aware of any conditional payments that have been made.
5. We inquire as to whether you or your clients are aware of the existence of any DPW medical lien that may potentially need to be addressed in the context of mediation.
6. We enclose and request completion of updated Bureau verification forms that our client request receipt thereof in advance of the scheduled mediation.

We appreciate your kind consideration of this request.

Very truly yours,

THE DOMBROWSKI GROUP

Neil T. Dombrowski, Esquire

NTD/ecr  
Enclosure: Verifications