MEDIATING A WORKERS' COMPENSATION CLAIM: NUTS, BOLTS, CARROTS AND (NOT ENOUGH) STICKS

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An attorney dutifully searching through a copy of The Virginia Workers' Compensation Act Annotated as published by LexisNexis and sold by the Virginia Workers' Compensation Commission ("the Commission") would be unable to find a single reference to the term "mediation" either in the statutes and rules contained therein or even in the index. Consequently, what is known about the mediation of workers' compensation cases is largely based on kernels of information gained via first-hand experience or learned anecdotally through colleagues. The intent of this article is to share some of that information with other attorneys who may not have had those experiences themselves or who may not have access to other attorneys who have mediated claims before the Commission.

Nuts and Bolts

Until the mid-1990's, if counsel for the parties in a workers' compensation claim wanted to mediate the case to reach a final settlement, the options were limited. Many practitioners did not often discuss or even know about the existence or potential for mediating claims. If counsel for the parties wanted to mediate a case they would have to follow in the footsteps of their personal injury attorney brethren by hiring a private mediator. Following the personal injury model, however, presented two difficulties. First, the methods for evaluating -- and valuing -- a workers' compensation claim is largely confined to attorneys who actively handle workers' compensation claims, and there were very few of those promoting their services as certified

mediators. Just as importantly, from the perspective of the claimant's attorney who was charged with efficiently protecting his client's limited resources, expenditures for the significant hourly rates charged by most mediators were difficult to justify. As a result, the often limited monetary value of many workers' compensation claims precluded paying for private, third-party mediators.

To the benefit of many practitioners, the economics of that model changed significantly in the late 1990's. The three members of the Virginia Workers' Compensation Commission, acting pursuant to the authority granted by the Virginia Workers' Compensation Act ("The Act"), Virginia Code § 65.2-100, *et seq.*, made the decision to offer mediation services as a public service to parties appearing before the Commission.[1] Although the procedures for mediations have evolved in practice somewhat over the years, there are certain general principles which apply.

First and foremost, the mediation services offered by the Commission are available at no charge to any party with a claim pending before the Commission. In the early stages of offering this benefit to litigants, most mediations were conducted by Deputy Commissioner R. Temple Mayo, who quickly proved himself competent and capable at mediating even the most difficult and intractable workers' compensation claims. The Commission also wisely insured that Deputy Commissioner Mayo became certified as a mediator by the Supreme Court of Virginia.[2] Although initially the Commission would also occasionally offer the services of a staff attorney to mediate a claim, Deputy Commissioner Mayo appeared to be performing the bulk of mediations being conducted by the Commission. Thus, from the outset, the Commission

[1] *See* Virginia Code. §§ 65.2-200 & -201 (2010).
[2] *See* Virginia Code § 8.01-576.4, *et seq*. and § 8.01-581.21, *et seq*.

successfully addressed and navigated around the two drawbacks for parties to mediate workers' compensation claims. Mediation cost nothing and the mediators had significant exposure to and familiarity with the Act and the valuation of claims.

In recent years, Deputy Commissioner Mayo's role at the Commission has evolved both into serving more frequently as a hearing officer who hears and decides claims and as one of the point-men on the Commission's ongoing transition to a WebFile system akin to the paperless or electronic filing available in federal courts. As a result, Deputy Commissioner Mayo has had less time available to perform mediations, and multiple other deputy commissioners have become certified mediators and begun to mediate cases. Deputy Commissioner Brooke Anne Hunter and Deputy Commissioner Deborah Blevins are the two deputies who currently spend the greatest percentage of their time performing mediations. Whereas Deputy Commissioner Hunter will mediate cases throughout the Commonwealth based on her availability and schedule, she generally performs most of her mediations in the greater Richmond area along with some dates regularly set aside for Roanoke and Manassas. Deputy Commissioner Blevins, meanwhile, mediates many cases in Southwest Virginia and Roanoke.

Other deputies who are also trained and available to perform mediations include Deputy Commissioner Lynne Ferris (Tidewater); Deputy Commissioner Jimese Sherrill (Northern Virginia); Deputy Commissioner Daniel Lahne (Tidewater and Harrisonburg); and Deputy Commissioner Philip Burchett (Southwest Virginia). Although not a deputy commissioner, Billy Crawford, who works in administration at the Commission has also been certified and has served as a mediator in some cases.

The mediation services offered by the Commission can be used to resolve specific issues that are being contested in a case or for purposes of settling an entire claim. As discussed more at length below, because there is not a procedure under the Act whereby a workers' compensation claimant receives a single, all-encompassing verdict or award, a settlement in a workers' compensation claim generally involves a claimant forfeiting his right to future indemnity and medical benefits in exchange for receipt of a lump sum settlement. However, in certain circumstances – unfortunately becoming rarer over the years -- a settlement may provide a lump sum representing only the future indemnity benefits while medical benefits are left unchanged or else left open for some defined period of time after which they are terminated.

Unlike many private mediators or groups, the Commission does not maintain statistics on the rate of success of its mediations. This rationale for this decision has been attributed to the fact that the Commission mediates not only monetary settlements but also contested issues where the claim may remain open. Additionally, based on an internal policy, the Commission will not mediate lump sum monetary settlements for *pro se* claimants.

To mediate a workers' compensation claim, both parties must make a request in writing to one of the deputy commissioners. The administrative assistant for Deputy Commissioner Hunter performs many of the scheduling services although she is not the sole person capable of performing that responsibility. In order to schedule a mediation, both parties must confirm in writing the desire to mediate the claim or the specific contested issue. At least one deputy commissioner has suggested that the written communication asking for and agreeing to mediate a claim is interpreted as each party's commitment to negotiate in good faith. Although most mediations are conducted in one of the Commission's various statewide offices, a deputy commissioner may be willing to travel to one of the attorney's offices for the mediation in

unique circumstances. Additionally, if they are potentially willing to travel, the parties can always obtain the specific mediator of their choosing from the roster of deputy commissioners performing mediations. For example, counsel from Roanoke can always have a deputy commissioner from Virginia Beach mediate the case as long as they are willing to travel there for the mediation. Depending on the intangibles of a specific case, the opportunity to select the deputy commissioner of counsel's choice to mediate a claim may make that travel worthwhile.

The Commission also offers two different models for mediations, each available based on the desire of the parties. In "evaluative mediations," the deputy commissioner will offer opinions regarding the value of a claim, usually in the form of a range of values, or will offer an opinion as to how he or she would rule if deciding on specific legal issues. While such legal opinions may offer some guidance, there is obviously no guarantee that the deputy commissioner actually assigned to the claim will rule accordingly. In "facilitative mediations," meanwhile, the deputy commissioner essentially serves as a messenger who delivers the position or negotiation movement from one party to the other and otherwise limits involvement to keeping the conversation going. Although many attorneys find the facilitative model less effective in resolving issues or reaching settlements, the option is available to those who so desire.

The Commission schedules most mediations for a two-hour block of time unless additional time is requested. After the parties request mediation, they are required to sign a consent form similar to those used in other civil cases. At the request of counsel or the parties, information provided to a mediator is confidential and nothing that occurs in a mediation may be used as evidence at a hearing. Similar to federal court mediations, the deputy commissioner who mediates a case will not thereafter serve as the hearing officer in any evidentiary hearings or contested proceedings.

One aspect of the Commission's mediation program that aggravates many attorneys is the lack of – and unwillingness to enact -- a blanket policy regarding continuances and pending hearing dates. Unlike the typical personal injury case where a trial date is obtained either by the parties agreeing upon a specific date at a scheduled docket call or by filing a praecipe, in workers' compensation claims, the Commission simply issues a notice setting a case for a date that is often selected with no input from the parties, thus leading to numerous continuance requests. Moreover, it is often difficult to predict or estimate when a case will be set for a hearing because so many variables -- including in which of the Commission's field offices the claim is set, which deputy commissioner is assigned to the claim, and how much time has been requested for a hearing – can affect the amount of time between filing a claim and being assigned a hearing date. One of the touted benefits of the Commission's new WebFile system is the ability to prevent multiple hearings from being inadvertently scheduled for an attorney on the same date and time in different offices. Some attorneys have noted anecdotally that the new web-based filing and scheduling system has expedited this timeline and led to hearings being scheduled much more quickly after a claim has been filed.

In general, decreasing the time between filing claims and evidentiary hearings is beneficial to attorneys representing claimants because their clients may not receive any monetary relief or necessary medical treatment until after a decision has been rendered by the presiding deputy commissioner. The downside of this expedited process is that – in the absence of a firm Commission policy regarding the granting of continuances, when parties request mediation – a short hearing date may make mediation impossible or impractical. The lack of a uniform policy or rule on continuances has led to a scenario where different deputy commissioners have enacted different policies. For example, many deputies appear not only willing, but indeed eager, to

grant a continuance to allow the parties the opportunity to resolve a claim through mediation as opposed to an evidentiary hearing and a subsequent opinion authored by that deputy. Although such a policy arguably promotes judicial economy and a more efficient use of the Commission's resources, some deputies will simply not grant a continuance to allow the parties to engage in mediation. In response to complaints regarding these disparate and non-uniform policies, the Commission makes every effort to provide a mediator to the parties prior to the hearing date. The difficulty, however, is that as a result the parties may not be able to obtain the specific mediator of their choice because of time and scheduling constraints.

The final point of discussion regarding the Commission's approach to mediations relates to lump sum settlements. Attorneys experienced in mediating personal injury cases know that a mediated settlement agreement is enforceable and thus presents a certain level of finality. However, all lump sum or "final" settlements in workers' compensation claims must be approved by the Commission.[3] Consequently, regardless of any agreement reached by the parties and counsel at a mediation, the settlement does not become final until Commission-approved documents signed by the parties and counsel are submitted to and endorsed by the Commission. Even after the resulting order is signed by the Commission, either party has twenty days to seek review of the award and seek to have it vacated.[4]

While mindful of the Commission's role in approving settlement, attorneys mediating workers' compensation claims should likewise be aware of the responsibilities imposed on their clients by the Center for Medicare & Medicaid Services ("CMS"). CMS requires an approved Workers' Compensation Medicare Set-aside Arrangement ("WCMSA") when settling any

[3] *See* Virginia Code Ann. §§ 65.2-522 and -701(C); Rule 1.7 of the Rules of the Commission
[4] *See* Virginia Code Ann. § 65.2-705.

workers' compensation claim for claimants who are either (1) Medicare recipients and the settlement exceeds $25,000.00 or (2) has a "reasonable expectation" of Medicare enrollment within thirty months of the settlement date and the settlement is for more than $250,000.00.[5] As a practical matter, the parties generally do not know for certain what figure CMS will require for a WCMSA at the time a claim is mediated for settlement because of the length of time it takes for CMS to respond to set-aside proposals. Consequently, the Commission will generally not approve a settlement without prior CMS approval unless the defendants agree to fund any additional sum above that amount allocated towards a WCMSA by the settlement. In recent years, this uncertainty has led many insurance carriers and defense attorneys to obtain a set-aside proposal from a contractor or vendor prior to the mediation and then later to agree to fund any additional amount above the set-aside proposal required by CMS for approval.

Carrots and Sticks

Most personal injury attorneys know, and often look forward to, that magical date in every case -- hopefully written in stone -- when all the purported defense shenanigans, obfuscation, and delays come to an end and a jury is finally allowed to render judgment and dispense justice to the client. Since long before they read *A Civil Action*[6] or *The Runaway Jury*,[7] attorneys handling personal injury cases have been buoyed by the prospect of obtaining a large verdict that delivers much-deserved justice to their client while simultaneously proving to the opposition -- be it defense attorney or adjuster -- that they should have been more reasonable during settlement negotiations.

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[5] *See* 42 CFR 411.46; Ref: 7/23/01 Memo Q1(c).
[6] Jonathan Harr, A Civil Action (Vintage 1996)
[7] John Grisham, The Runaway Jury (Doubleday 1996)

By sharp contrast, workers' compensation attorneys representing claimants never get to experience that singular moment. There is no provision under the Act by which a claimant is awarded a singular lump sum based on the discretion of a jury or other fact-finder that has heard their pain and delivered justice to them in that fashion. Rather, the Act purports to establish a "no-fault" system based on mathematical formulas the goals of which are to pay an injured claimant's incurred medical expenses, a percentage of lost wages during periods of total or partial disability, and compensation for permanent impairment to injured extremities, vision and hearing.[8]

Removing the threat of a large jury verdict in essence emasculates the injured party's trump card in a mediation. In many cases, it is impossible to underestimate the effect that the "stick" of a large jury verdict can have on how an insurance company evaluates a personal injury case and its willingness to be tempted by the "carrot" of the finality offered by a settlement. By contrast, the absence of that stick for claimants in workers' compensation cases undermines their position and power when negotiating a settlement in a mediation setting. Whether true or not, almost every personal injury attorney has told the story of the time he was so offended by a ridiculously low offer during a mediation that he told the defense attorney and adjuster to leave his office while reminding them that the jury would have the opportunity to have the final say.

In the absence of the threat of an unpredictably large jury verdict, settling a workers' compensation claim in mediation becomes an exercise in which the insurance carrier determines how much it is willing to pay to purchase the company's exposure for payment of future benefits or how much of a discount off that figure the claimant will agree to in exchange for the benefit of

[8] The Workers' Compensation Act is also rumored to provide vocational benefits to help an injured claimant locate or be retrained to return to employment; however, Bigfoot has been seen with more reliable frequency.

a lump sum settlement. Consequently, while the opening demand in many personal injury mediations is constrained solely by the imagination -- or gall -- of the plaintiff's attorney, in most workers' compensation mediations, the adjuster and defense attorney have already calculated a close approximation of the insurance carrier's future exposure or "worst case scenario." Thus, the claimant's attorney should enter a mediation knowing that success depends less on the defendant's fear of the "stick" if the claimant's settlement demands are refused but rather the "carrot" of enticing the carrier to pay as large of a percentage as possible of the future exposure.

In fact, if any "stick" exists in workers' compensation mediations, it is generally aimed squarely at the back of the claimant. For example, the Act contains loopholes, exceptions, and counter-intuitive requirements too numerous to list here by which a claimant can be denied an award of benefits; once awarded, a claimant's benefits can be easily terminated on the barest of allegations; and unquantifiable financial pressure can be easily applied so as to push a claimant beyond any reasonable breaking point. While the individual deputy commissioners and Commissioners for the most part do their best to apply the law fairly and evenly to the parties before them, it is the Act itself along with the Commission's procedural rules that are particularly susceptible to an insurance carrier or even individual adjuster or defense attorney that seeks to gain an advantage by "starving" or pushing a claimant to the brink of financial ruin in order to gain an advantage in settlement negotiations. What claimant with a mortgage, car payment, tuition payments and a dependent family would not be more likely to accept a lower settlement offer during a mediation when basic, supposedly "no fault" benefits have been denied or withheld for no discernible reason or when denials have been premised upon an enlightening answer to an interrogatory seeking the carrier's defenses to a claim such as "the claimant will be

held to his burden of proof."[9] While it is indisputable that there are certainly many competent, ethical, and reasonable adjusters and defense attorneys, it would be naïve to deny that insurance carriers and defense attorneys have this power over claimants under Virginia's workers' compensation system or that this power is at times used for a tactical advantage.

Meanwhile, most injured workers' are eager, or at least highly motivated, to settle their claims even before they reach that breaking point. The reason is simple. Workers' compensation benefits pay, at a maximum, two-thirds of the average wages earned by the injured employee during the 52 weeks prior to the accident.[10] Moreover, many lower income employees receive wages from second jobs and side work. Such wages are not included in the calculation unless they are earned in the course of similar employment. Likewise, wages earned from any side work or any other source derived from the efforts or work of the claimant must be reported to the insurance carrier and are thereafter applied as an offset against owed compensation. Similarly, while the claimant's accident-related medical treatment may be paid under the workers' compensation claim, there is no requirement that an employer maintain or continue to offer health insurance to that claimant after he is injured and can no longer work. Consequently, health insurance that covers a claimant and his family is frequently cancelled or the claimant faces the prospect of paying unaffordable COBRA premiums in order to maintain coverage during the period of disability. The net effect of these pressure points is obvious: a claimant faces significant pressure or enticement to settle a claim.

The insurance carrier's goal in mediation is obviously to settle the claim for less than the likely future exposure. The claimant's strategy, meanwhile, is to maximize the value of the

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[9] This exact response or a close facsimile, which the author routinely receives in response to discovery requests, has been upheld or ratified following a subsequent motion to compel.
[10] *See* Virginia Code Ann. § 65.2-101 (*defining* "Average weekly wage").

likely future payments in the form of a lump sum with the hope of avoiding or minimizing the risks associated with giving up future wage and medical benefits. The fact that insurance carriers can estimate but not always reliably quantify the claimant's future medical needs presents the one semblance of a "stick" for the claimant in workers' compensation mediations. Many claims are not mediated, however, until after the claimant has obtained the majority of the expensive treatment such as surgeries and invasive procedures. It remains advisable, however, to make the effort to convince the carrier that the claimant will require a substantial amount of future medical treatment. For example, a letter from treating doctors recommending or suggesting the likelihood of future total knee replacement and subsequent revision or having a report estimating the cost of likely future medical expenses prepared by a life care planner can be invaluable for increasing settlement value in mediation.

In some instances, almost always at the insistence of the claimant, a carrier may be willing to include some specific, defined period of time within which accident-related medical treatment will be covered after the settlement is approved. The frequency and duration of these periods of future medical expenses being covered has steadily declined over the last ten years.

The question thus becomes what strategies are available for the claimant either to threaten via the "stick" or to entice with a "carrot" the carrier into paying a higher percentage of the maximum future exposure figure during a mediation. In mediating a workers' compensation claim, many of the assumptions routinely relied upon by attorneys in personal injury cases are turned on their head. For instance, in most personal injury cases, attorneys want their client to have "jury appeal" whereby a jury will not only be impressed with the client but be motivated to help them via a large verdict. In a workers' compensation case, by contrast, the neat, well-groomed client has the opposite effect by convincing the insurance carrier that a new, light duty

job can be found for the claimant, thereby allowing the carrier to terminate or reduce the weekly benefits and thus reduce the "worst case scenario." Consequently, claimant's attorneys often must argue in a mediation that their client makes such a bad impression, has so little formal education or has such other obvious impediments to employment that the carrier would be wise to pay a higher percentage of the maximum exposure to settle the case because the likelihood of locating light duty employment for the claimant is so remote. To that extent, factors such as extensive tattoos, minimal job skills, lack of education, prior criminal convictions, suspended driver's licenses and residing in rural areas are all negotiating points that can be used to increase settlement value in mediation.

Finally, under most circumstances a claimant is limited to a maximum 500 weeks of weekly workers' compensation benefits.[11] However, near the conclusion of the expiration of the 500 weeks, an injured worker who can establish the existence of a brain injury severe enough to permanently prevent gainful employment or an injury to two extremities severe enough that the those extremities cannot be used in gainful employment may be entitled to lifetime wage benefits.[12] The threat or prospect of filing one of these claims, referred to as "permanent and total" claims, down the road can also be utilized to increase the value of a settlement in mediation.

When all is said and done, however, the absence of a fear-inducing threat like the risk of a large jury verdict robs the claimant of negotiating power when mediating a workers' compensation claim. Consequently, most mediations boil down to a calculus made by the adjuster or defense attorney of whether the lowest figure the claimant will accept offers enough

[11] *See* Virginia Code Ann. § 65.2-518.
[12] *See* Virginia Code Ann. § 65.2-503(C).

of a discount from the carrier's perceived maximum exposure or whether a claimant is motivated, or hungry, enough to accept that figure as calculated by the carrier. Within the context of those parameters, the mediation services offered by the Commission represent a valuable tool to maximize a claimant's recovery.