



VWC
2016
**EDUCATIONAL
CONFERENCE**

How Mediators Evaluate Cases

Retired
Commissioner
William Dudley



SUGGESTIONS FOR A PRODUCTIVE MEDIATION

MEDIATION FROM THE INJURED WORKER'S PERSPECTIVE

1. No Last Minute Surprises

It may be advisable to transmit your demand in advance.

2. The Problem Of The Increased Demand.

*Let the insurer know in advance what to expect.
Provide a basis for the increase.*

3. Procedural Status Of The Case.

To the extent possible make sure the posture of the case works to your client's benefit.

4. The Problem Of Pre-Hearing Suspension.

What can you do?

MEDIATION FROM THE EMPLOYER/INSURER'S PERSPECTIVE

1. Address the claimant directly.

Use everyday language, not legal terminology.

2. Show empathy.

Many aspects of the system are burdensome to an injured work even though they do not enter into case settlement value.

3. Explain in plain language how an insurer evaluates a case.

It is a financial evaluation by the insurer based on probable future exposure and not what may possibly occur in the future.

4. If the claims representative is local, encourage his or her presence at the mediation.

How Mediators Evaluate Cases

Deputy
Commissioner
Angela Gibbs



Successful Mediation Tactics

Effective representation
in mediation.

Be Nice!

- The most effective participants in the process recognize the value of treating the other party with kindness and respect.

Why?

- Why is being nice in a mediation effective?
 - Mediation is voluntary.
 - Does not place the other side as much “on the defensive.”
 - It is a lot easier to strike a deal with someone who is friendly than someone you think is trying to back or trick you into something.

What does “being nice” look like?

- One technique I have seen is to start off the mediation by explaining what the parties actually agree about before beginning to discuss what they disagree about.
 - Starts the parties out on a positive note.
- I have then seen defense attorneys mirror this back, even ones that I have mediated with before and not seen use that technique.

What does “being nice” look like?

- For the defense attorneys, even if you cannot say you believe the injury is as bad as the claimant says it was, there is likely something that you can agree upon.
 - Example: If there is no contest that the claimant was injured, it can be effective to recognize you are sorry he or she suffered and stress that the defense is just rooted in whether the event that gave rise to the suffering is compensable under the law.
- Equally effective is when a defense attorney talks to the claimant like he or she would talk to a friend or neighbor about weaknesses in their case as opposed to posturing and taking an aggressive stance.
 - Example: “You are going to lose because...” vs. “Here are some things that my clients see as weaknesses in your case. Those things make it hard for them to evaluate the case the same way you are.”

“Show your work”

- Applies to claimants and defendants alike.
 - Claimants: A high demand seems more reasonable if there are reasons behind it.
 - Some of the most effective mediators on the claimant’s side come in with a printout showing how they arrived at their initial demand.
 - Defendants: A claimant may already feel like he or she has been reduced to a number. Cushion that blow by making them understand how insurance companies work and why your offer may be lower than the demand, even if significantly lower.

What does it look like to show your math?

- Map out your strategy.
 - Potential bases for demands and counter offers.
 - Some of the most effective negotiators I have seen have pre-mapped out points they are willing to concede if necessary and the value that goes along with that.
- If you like to take a more flexible approach, whenever you can, try to send the mediator back with a rationale, not just a dollar amount.
 - The most effective defense attorneys are doing their best not to make the claimant feel like they are being reduced to just “a number.”

Encourage your client to speak

- Hearing from a claimant can be helpful for the defendants to remember they are dealing with a person.
 - Know your client. Some are comfortable enough to speak at length if asked an open ended question, but others respond much better to directed questions, as if you were walking them through their case on the witness stand.
- Hearing from a claimant also helps the mediator know the claimant's level of sophistication.
- Hearing from the employer or an adjuster can also be helpful, particularly where he or she uses the opportunity to make it clear that no one wanted the injured worker to be hurt.

Recognize there is a range for a reasonable settlement

- This will set the stage for any evaluation from the mediator, who is almost certain to give a range if evaluating the case.
- Recognize that a reasonable settlement is likely going to be somewhere between the opening demand and opening offer.
- Make sure your client comes into the process with an open mind, not certain that there is a “magic” number where their case should settle.
 - The best negotiators are prepared to hear and account what the other side says in their evaluation of the case if they have not already done so.

No right or wrong way...

- There is no absolute right way to evaluate a case.
 - Each case is different
 - Make sure your client knows that ahead of time.
 - The most uncomfortable mediations are those where the attorney has not prepared the client for any view of the case but the one they had adopted prior to the mediation.



Preparing for the Mediation

- Fill in the mediator about what has happened before the mediation.
 - The most effective attorneys tell the mediator about this in their opening statement.

Preparing for the Mediation

- If there are proposed medical procedures, the most effective mediators try to find out how much it will cost.
 - Websites
 - Speaking with the medical providers
 - Based on experience in other cases
 - Professional evaluations (e.g. nurses)

Preparing for the Mediation

- Pre-mediation briefs.
 - The Commission's mediators vary as to how they feel about them.
 - I am generally happy to receive a concise brief, laying out what is and is not in dispute and explaining your position.
 - A pre-mediation brief can be very useful if you have a difficult legal issue or to outline medical history.
 - Our new ADR Tab allows this to be uploaded in such a way that only the submitting party and the mediator can review it.
 - Allow enough time for it to be reviewed prior to the mediation.

Preparing for the Mediation

- For the claimant's attorney:
 - Discuss the mediation process generally.
 - Discuss difficult concepts that may come up during the mediation process.
 - Annuities.
 - Present day value and compounding interest.
 - Vocational rehabilitation.
 - Medicare Set Asides and what it means to protect Medicare's interest.
 - Discuss the strengths and weaknesses of your case.

Preparing for the Mediation

- For the defense attorney:
 - Discuss both the strengths and weaknesses of your case with your client.
 - If you have a relatively inexperienced adjuster, discuss the same topics that were reviewed above.
 - Make sure they have the ear of the next person up the line for obtaining authority.

Preparing for the Mediation

- Prepare your case
 - Discovery
 - Benefits of pursuing before mediation and after
 - Know the facts.
 - Impresses your client and helps move the discussion along.

The most effective attorneys avoid last minute surprises

- If there are terms that are important to your client, the best negotiators do not save them until the very end.
- For example, if you want to discuss a resignation and release, bring it up early in the process. While it may not seem that significant to the employer, it can be for the claimant.

Factors in My Evaluations

- While recognizing every case is different, there are issues that come up over and over.
- Some of the things I think about each time I am asked to evaluate a case for settlement value are:
 - Temporary total disability on a doctor's instruction.
 - Temporary total disability while awaiting a new job (assuming an open Award)
 - Temporary partial disability, often accounting for a couple of phases with raises.
 - Permanent partial disability
 - Any exposure for permanent and total disability
 - Vocational rehabilitation
 - Mileage, particularly if significant
 - Medical expenses
- And of course, if there is anything unusual about the case, I factor that in as well.

How Mediators Evaluate Cases

Deputy
Commissioner
Deborah Blevins



Every Case is Different

But there are some common
themes in Neutral Evaluation

Ethical Concerns for Mediators

Mediator's Ethics E (3) – Self-Determination

“The primary role of the mediator is to facilitate a voluntary resolution of a dispute. The mediator may not coerce a party into an agreement, and shall not make decisions for any party to the mediation process.”

Mediator's Ethics F (2, 3)– Professional Information

“A mediator may give information only in those areas where qualified by training or experience and only if the mediator can do so consistent with these Standards.

When providing information, the mediator shall do so in a manner that does not interfere with the mediator's impartiality or the self-determination of the parties.”

Indemnity Factors

1. Weeks paid/weeks left to be paid
2. Average Weekly Wage/Compensation Rate
3. Likelihood of Return to Work
 - Temporary Partial?
 - Vocational Rehabilitation Costs?
 - Job Market/Geographical area
 - Residual work capacity – physical and otherwise
(education, experience, etc.)

Indemnity Factors

4. Permanent Partial Disability
5. Other case specific issues – legal issues such as statute of limitations, whether employer is requesting resignation & release, etc.

Medical Factors

1. Current Medical Status
2. Payments made to date, especially average monthly cost for last year.
3. Recurrent treatment costs (often annual costs of prescriptions and office visits).
4. Possible future treatment and projected cost (surgery).

Medical Factors

Value of medicals = recurrent treatment x life expectancy + other future treatment costs, reduced to Present Day Value?

PRESENT DAY VALUE ?

That is the question



Present Day Value Issues

How to calculate?

Discount Rate – VWC uses 4%

Annuitized payments or straight formula?

Commission uses annuitized payments for PPD lump sum

Longer period of potential payout, more significant

Case Study: The Lumber Jack

Indemnity:

The Lumber Jack is a 40 year old white male with a 10th grade education. He is currently on an outstanding Award for temporary total compensation at a comp rate of \$400.00 per week. 200 weeks of comp have been paid, and the parties agree that the Lumber Jack is likely to receive all 500 weeks of comp. His life expectancy is 37.2 years.

Case Study: The Lumber Jack

Neutral Evaluation:

300 weeks x \$400 = \$120,000.00

Yearly annuitized PDV @ 4% of \$20,800.00 for 5.76 years = \$109,355.79

Straight PDV @ 4% for 5.76 years = \$95,734.66



Case Study: The Lumber Jack

Neutral Evaluation/Indemnity Range:

$$70\% \times \$120,000.00 = \$84,000.00$$

$$70\% \times \$109,355.79 = \$76,549.05$$

$$70\% \times \$95,734.66 = \$67,014.26$$

My range: \$67k – 84K

Case Study: The Lumber Jack

Medical:

The injury sustained was to the Lumber Jack's left knee. He has undergone two surgeries and is currently in pain management. He sees a pain management specialist every month. The doctor charges \$150.00 per visit. The Lumber Jack is on pain medication which sells at retail for \$600.00 per month. No further surgeries are scheduled. The carrier argues the claimant will not stay in pain management for the rest of his life. Medicare is not an issue.

Case Study: The Lumber Jack

Neutral Evaluation/Medical:

$\$750.00/\text{mo} \times 12 \text{ months} = \$9,000.00/\text{yr.}$

$\$9,000.00 \times 37.2 \text{ years} = \$334,800.00$

Yearly annuitized PDV @4% of \$9,000.00 for 37.2 years = \$179,602.91

PDV of \$334,800.00 @ 4% for 37.2 years = \$77,829.68

Case Study: The Lumber Jack

Neutral Evaluation/Just the numbers:

Indemnity	67k	84k
Medical	78k	180k
Total:	145k	264k



Case Study: The Lumber Jack

Neutral Evaluation:

Other factors: Over-treating doctor/ Narcotics/ RX
negotiated discounts/ Health insurance

My Range: \$150k - \$200k