**Mediation In Workers' Compensation**

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The differences between a Workers' Compensation Appeals Board Mandatory Settlement Conference or similar hearing and mediation come up much more often in California now that "carve out" programs to certain industries have been established and functioning. These programs utilize mediation as a critical component to their operation as well as functioning. Clients have asked what the differences are between mediation and a Workers' Compensation Appeals Board Mandatory Settlement Conference.

There is no single answer or set of answers to questions about such differences. I often tell clients "every mediation is different, so prepare for the unexpected." I also tell them "go into every mediation with a plan, but once you go into mediation that plan may go out the door."

However I do have some general thoughts on mediation and the differences between it and any form of litigation in a "formal legal forum." I base my thoughts on many years of experience both as a party to mediation and as a selected mediator who has acted in that capacity for parties both in California Workers' Compensation "carve-out programs" and private workers' compensation matters.

This information is by no means comprehensive. Further, others may have different thoughts or experiences. However I think differences simply stated boil down to one principle: mediations are solely focused on settlement. The acting mediator will do everything he or she can to "bring the parties together and agree on a settlement" of all disputed issues.

Every mediator and mediation is somewhat different but they all follow a "general" format.

1. A mediator is selected or appointed;
2. A date, time and place is coordinated with the parties;
    a. Date.

i. There may be a short-time frame in which such mediation is required;
ii. Any legal or contractual authority bearing upon this timeline must be reviewed.
1. Example: Carve-out agreements for workers' compensation.
a. Each is an individual negotiated agreement that may or may not have required time limits.
b. Call the Ombudsperson if there is any doubt.
2. Example: Private arbitration agreements;
3. Example: Personal written preferences or agreements by parties.

b. Time.
i. Sooner is better than later as mediation should be sought at least partially to avoid costs, hazards and risks of litigation;
ii. Ensure at least a "half-day" is scheduled as rare is the mediation which resolves in less than 4 hours particularly with complicated legal, factual or "personal dynamic" issues involved.

c. Place.
i. The location should be comfortable for everyone;
ii. It should be designed to put everyone at ease to the extent possible;
1. All personal comforts should be accessible such as restrooms;
2. Food should be available;
3. Water and/or refreshments should be available.
iii. Often the parties offer their own offices or office space for the site of mediation.
1. This saves costs;
2. However this also may give an appearance of "non-neutrality," thus:
3. Consider a private, non-affiliated facility for the location such as a hotel or conference site.
a. Expect the mediator to require either 2 or more rooms.
b. Each mediator is different.
i. Some have a room for each party and a "general" room in which he/she may meet with all parties and attendees at once;
ii. Some "keep it simple" to only enough rooms to keep the parties separate for private discussions with and amongst them.
c. Discuss the mediator's preferences if necessary directly with him or her; also discuss with opposing party. The whole purpose of a mediation is to get "everyone comfortable with settlement" on every level.

3. The mediation commences.
a. Typically the mediator meets, greets then introduces him or herself to the parties.
i. He or she gives some general background about qualifications if necessary;
ii. He or she generally gives the parties an idea of how he or she sees the case;
iii. He or she may engage in initial discussions with and/or make inquiries about the case;
iv. He or she may require the parties to sign a "mediation agreement."
b. Typically there are meetings separately with each party and/or their representatives.
i. Depending on the arbitrator different things will happen in this meeting;
1. Mostly they will break down into a few basic things:

a. Obtaining the party's position(s);
b. Obtaining the party's offers/demands;
c. Obtaining information about the law/facts bearing upon disputed issues;
d. Obtaining "money offers" or other "settlement" values/offers/demands.

2. Conveying 1. Information to the "other side;"
3. Convincing parties to "meet" at a settlement point on all disputed issues.

ii. Each mediator is as different as people.

1. Some will be very "hard" on the parties, pointing out strengths and weaknesses of cases;
2. Others will be more "understanding" and appear to be "advocates" for your position;
3. Regardless of how a mediator presents, he or she should have one goal in mind always: get any disputed issues settled by mutual agreement.

c. Typically settlement documents are circulated if the case settles or the mediation is adjourned, or perhaps scheduled for another day as mediation is unsuccessful.
   i. Each mediator has different agreements and forms;
   ii. Many are similar if not identical.

Some general tips I have learned as a mediator and party to mediation, particularly in distinguishing between Workers' Compensation Appeals Board proceedings and mediation are below. The first and perhaps most important rules in Workers' Compensation mediations particularly related to carve-out programs is very simple: know your file and review the "master carve-out agreement" applicable to your mediation. The agreements may be found at http://www.dir.ca.gov/dwc/carveout.html.

After your review here are some things to think about:

A. Mediations typically are not successful if considered by parties or mediators to be "adversarial proceedings;"
B. Defense arguments should be presented with the following intent and tone:
   a. Getting opposing parties to understand your position;
   b. Getting opposing parties to understand facts relevant to mediation and resolution of disputes;
   c. Getting opposing counsel to understand law relevant to mediation and resolution of disputes;
C. Bring necessary persons the mediation, but only necessary persons:
   a. Person or people with final decision making authority;
   b. Financial
   c. Settlement terms.
D. Be up-front and forthcoming with the mediator and opposition;
   a. Concede the obvious weaknesses;
   b. Persuade the mediator of marginal positions he/she takes that do not appear favorable to you;

c. Avoid becoming adversarial to any extent that alienates the mediator as:
    i. Mediation is about resolving not arguing;
    ii. A sincere mediating party should come to a mediation wanting to settle not argue.

E. Always remember: part of a mediation is always going to be assessing your opposition, regardless of the informal nature and/or goals of resolving issues as opposed to litigating them thus:
    a. Do not lose sight of the fact that mediation is NOT the place to make all your arguments, present all your witnesses, argue all your legal arguments;
    b. The Workers' Compensation Appeals Board or other legal litigation forum is the place to present your case in full.
    c. Be wary of questions from the opposition and/or mediator that appear more like "cross-examination" than "resolution" related.

F. If your opposition has an attorney at mediation you should.
    a. Mediators are generally attorneys, judges or well-trained in the law and mediation;
    b. Mediators generally expect attorneys;
    c. Mediators generally "think like" attorneys;
    d. Attorneys as opposition are required to zealously represent their clients even at mediation thus while mediation is not adversarial in nature lawyers always are if not by nature than by their codes of ethics.

G. Lastly, mediation is and/or should always be informal. The Workers' Compensation Appeals Board or court is not. A court of law has rules (evidentiary, procedural and otherwise) and thus is by nature of the "forum" going to have many more consequences if mistakes are made than a meditation. The worst result of a mediation is the matter does not settle and the costs, hazards and risks of litigation survive the mediation.