



LAW OFFICES
of
McDERMOTT & CLAWSON, LLP

LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

April 2010

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HAVE YOU CONSIDERED ADR?

It seems like everything old is new again when it comes to problems getting dispositions through formal adjudication of disputes at the WCAB. We noted with some humor an article that appeared in the *Workers' Compensation Quarterly* in 1987 (the official publication of the State Bar Workers' Compensation Section) that quoted a well-known and respected applicant's attorney as saying the delays and backlogs at the WCAB were simply "unacceptable." The same complaints were being voiced in the early 1990's and again in 2006, and now, with EAMS, furloughs, hiring freezes and a deepening state financial crisis, we are facing many of the same problems with delays in getting conference dates, and more delays getting to trial.

We think Alternate Dispute Resolution or "ADR" is a viable option whose time has come (again). ADR can consist of Mediation or Arbitration of disputes, and is not subject

to the delays of WCAB scheduling or judicial availability. ADR offers many advantages allowing parties to a dispute to achieve resolution in relatively short order. Knowing that litigated cases (unlike fine wine) never get better with age, parties should give serious consideration to adding ADR to the available options in moving cases to resolution.

Mediation

Mediation is an avenue that offers a quick and relatively inexpensive potential for resolving disputes by negotiations in which the negotiating process is facilitated by an experienced and impartial third party. The mediator assists each party in negotiating an acceptable resolution of the dispute.

There are no codified rules and regulations for mediation in Worker's Compensation, although within the last few years there has been discussion of implementing some official rules and procedures through the

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

Orange County / Inland Empire
1700 West Katella Avenue
Orange, CA 92867
(714) 288-1700

DWC. The process is not binding, and any competent attorney or retired judge could serve as a mediator. We would suggest, however, that the selection of a mediator would best be undertaken from the official list of arbitrators maintained by the Presiding Judge of each local WCAB office. (A discussion of the required qualifications of an arbitrator can be found below).

Mediations may be conducted anywhere and at any time that is agreeable to the parties, but it is essential that all counsel be present and that persons with settlement authority also be present or immediately available by telephone. Unlike arbitration, which is discussed below, a mediation is conducted by having the litigants communicate *ex parte* directly with the mediator, who then acts as a go-between, relaying information as authorized by each party and simultaneously attempting to cajole the parties into movement in a direction which will settle the dispute. In private discussions with each party, the mediator will likely point out weaknesses in that party's case without undermining their bargaining position. The goal is to help everyone be "realistic" and to thereby achieve an equitable resolution.

The cases with the best potential for resolution by mediation are those where everyone is interested in settlement, but for some reason there has not been a meeting of the minds within a reasonable period of time. If you are absolutely sure your case must go to trial, there is not much point spending time and money attempting to have it mediated. On the other hand, if you have a relatively straightforward case with simple issues,

mediation is probably not going to be necessary to reach resolution. Mediation is a tool that is potentially very helpful for those cases that fall between these two poles.

It is important to understand that a mediator does not hear evidence. Failing a voluntary resolution by the parties, the mediation produces no decision. However, even in such an instance, the parties may come away from the process with a better understanding of their case and their respective positions, and some of the issues that were unresolved at the beginning of the process may be resolved by the end, even if some key issues remain to be addressed at a later trial or arbitration.

Arbitration

Arbitration is allowable in disputes involving employees only where the injured worker is represented by counsel (Labor Code §5370). Arbitration of disputes in Workers' Compensation is mandatory if the issue to be resolved is either 1) insurance coverage or 2) contribution between defendants in a continuous trauma case pursuant to LC §5500.5 (LC §5275(a)(1) and (a)(2)). However, by agreement of the parties, any issue arising out of Division 1 (commencing with §50) or Division 4 (commencing with §3200) of the Labor Code may be submitted for arbitration no matter what the date of injury (LC §5275(b)).

There are also additional situations in which a special arbitration procedure is mandated by contract under the so-called "carve out" provisions of the Labor Code. However, those situations and procedures are beyond the scope of this article.

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The Presiding Judge at each local WCAB office maintains a list of eligible arbitrators. To be eligible, an arbitrator must be an active member of the State Bar and must be either a certified specialist in Workers' Compensation (or eligible to become certified), a retired Workers' Compensation judge, a retired Appeals Board member, or an attorney that has been certified to serve as a judge pro tempore (LC §5270.5).

Labor Code §5271 lays out the procedure for selecting an arbitrator. Failing agreement on the selection of a suitable arbitrator, any party may request the Presiding Judge to assign a panel of five arbitrators selected at random from the official list, and if there are more than two parties to the dispute, the Presiding judge must add additional candidates (LC §5271(b)). Each party or lien claimant must then strike two members from the panel, and the last candidate remaining will serve as arbitrator (LC §5271(e)).

The arbitrator has all the powers of a WCAB judge except the power to hold a party in contempt and the power to order a Qualified Medical Examination. (LC §5272). Unlike the mediation process discussed above, the parties are strictly forbidden to have *ex parte* communications with the arbitrator (LC §5278 and Gov. Code §11430.10).

The arbitration costs, including the fees of the arbitrator, are paid by the employer in a dispute involving the injured worker, and equally by the parties in disputes involving coverage and contribution. Disputes over

arbitration fees are within the exclusive jurisdiction of the appeals board and will be determined by the Presiding Judge if the parties fail to agree (LC §5273).

An arbitration proceeding may be held at any place and time agreed upon by the parties but failing to agree, the arbitrator will order the date, time and place of the arbitration. Absent agreement of all parties to the contrary, the arbitration must commence no sooner than thirty days, nor more than 60 days from the date an arbitrator is selected (LC §5276).

Arbitration in Workers' Compensation results in a Finding and Award at the conclusion of the proceeding . The arbitrator must issue an Opinion on Decision, Summary of Evidence relied upon, and a Finding and Award within 30 days of submission, or the arbitrator's fee may be subject to forfeiture (LC §5277). An aggrieved party may file a Petition for Reconsideration, just as one could following a trial. Deadlines and procedures are almost identical.

The actual arbitration process is much like a trial before the WCAB. A certified court reporter will be needed to make an official record of the proceedings, including any witness testimony that may be required.

As with a trial before a judge, upon agreement of the parties and the arbitrator, a case may be submitted entirely upon the documentary record and the briefs of the parties. In either event, arbitration briefs are a key element in presenting a successful case.

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In addition, the arbitration rules require the parties to file with the arbitrator, no less than 10 days in advance of the proceeding, all documentary evidence to be relied upon (LC §5276 (c)).

Arbitration has many advantages. Perhaps the most significant is that it greatly shortens the time the parties must wait for their “day in court.” Another major advantage is that the parties get to literally choose the person they want to decide their case, thus avoiding casting their litigation fate to the winds of chance. When a case must be resolved by a formal hearing, we strongly recommend consideration of arbitration as an alternative to breaking the litigation logjam.

Article by Howard Stevens, Orange Office

Interested in ADR?

McDermott and Clawson, LLP is pleased to offer arbitration and mediation services. Contact Howard Stevens at 714-288-1700 for further information.

Instant CMS Approvals in 2011?

Well, probably not, but you will evidently be able to submit your proposed Medicare Set Aside on line and get an instant reply acknowledging receipt.

The CMS is moving forward with the development of a Workers' Compensation Medicare Set-Aside Portal (WCMSAP). The WCMSAP will allow for the electronic submission of WCMSA proposals for future medical and future prescription drug costs on a more expedited basis. With the introduction of the WCMSAP web portal, scheduled for

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the first quarter of 2011, WCMSA submitters will receive a real-time acknowledgement of their proposal submissions. CMS advises that comprehensive educational material will be provided on their website for all interested parties before the implementation of the WCMSAP

New Life Expectancy Tables

The Centers for Disease Control (CDC) has recently published its 2005 United States Life Tables. Effective April 12, 2010, the Centers for Medicare & Medicaid Services (CMS) will begin referencing the CDC's Table 1: Life table for the total population: United States, 2005, for WCMSA life expectancy calculations. This means that for any newly submitted WCMSA proposal received by CMS' Coordination of Benefits Contractor (COBC), or where any WCMSA case is reopened on or after April 12, 2010, CMS will apply the CDC's 2005 Table 1 for life expectancy calculations. Go to: http://www.cdc.gov/nchs/products/life_tables.htm to access the 2005 tables.

Need Assistance with Training?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email [Howard Stevens](mailto:Howard.Stevens@mcclawson.com) at (714) 288-1700 or feel free to speak with any of our attorneys for further information.

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[Howard Stevens](mailto:Howard.Stevens@mcclawson.com) (Orange office), Editor