

Defense Practitioner's View of Workers' Comp System Proposed Rules

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On Sept. 6, the rules committee established by the secretary for labor and industry developed a set of proposed rules to the workers' compensation system. The current administrative rules were last finalized Dec. 7, 2002. The recent proposals were prompted by a desire to clarify and expedite procedures within the workers' compensation system; particularly, in view of recent legislation in general and Act 109 and Act 147 in particular.

The proposed rules are also intended to be cost effective by allowing various bureau forms, including petitions and appeals, to be filed electronically, but I believe the most important changes are in the clarification of alternative dispute resolution enounced in sections 131.59 and 131.60 of the proposed rules, as well as the roles of parties and judges engaged in this activity. Moreover, the proposed rulemaking under sections 131.59 and 131.60 attempt to follow procedures outlined in the Civil Rules under 42 Pa.C.S. § 5949 as it pertains to confidential mediation communications and documents thereby assisting all parties concerned with protecting privileged information, whether it be under the rubric of attorney-client privilege, or other client related information which might fall within the rubric of privileged information.

Prior to Act 147, the terms "mediation," "resolution" and "settlement" were used interchangeably. Specifically, to determine whether a disputed workers' compensation claim could be satisfactorily settled. For some practitioners and workers' compensation judges, the determination of whether a case could be mediated, resolved or settled, depended upon whether the employer (or carrier) had sufficient settlement authority to buy the claim.

For defense practitioners, this could often be a frustrating experience because rarely was settlement authority granted by insureds or self-insureds prior to a pretrial proceeding. In fact, one of the criticisms about the concept of "mandatory mediation" was the concept that decisions regarding their feasibility had to be made prior to any meaningful discovery of the claim. Consequently, for the defense practitioner, the ability to offer advice on the merits of a case was often compromised by the lack of any exchange of evidence prior to the initial hearing.

Now, we know that mandatory mediation conferences serve a broader range of purpose outside the umbrella of settlement. Under the proposed rules, mandatory mediation offers an opportunity for the parties to reconcile any and all disputes arising from the claim including, but not limited to, a narrowing of issues before the adjudicating judge. This opens an opportunity to streamline the time and cost involved in litigating claims which, in time, shortens the turnaround time of a judge's decisions.

The proposed rules also provide specific guidelines as to the role of the mediating judge, who, by law, cannot be the adjudicating judge. The proposed rules strive to mirror the provisions of 42 Pa.C.S. § 5949. Nevertheless, the types of communications, and the confidentiality of such communications; particularly, as it pertains to attorney-client privilege, remains a concern for the practitioner. Rule 5949 provides that all communications and documents arising from a mediation are privileged except for settlement documents that may be introduced in an action or proceeding to enforce a settlement agreement; fraudulent communications during a mediation that was relevant to enforcing or setting aside a mediated agreement; certain communications arising from a criminal proceeding; and, communications, materials and documents not otherwise privileged. Nevertheless, the rules covering the material used in a mandatory mediation arising from a workers' compensation claim often vary; and, therefore, to make the proceeding more meaningful, some judges may require opposing counsel to provide information on the pros and cons of a case, which may fall under the blanket of attorney-client privilege, and which could jeopardize a client's interest if the mediation conference proves futile. In this respect, while

mediating judges have an obligation to protect privileged information, and often establish internal safeguards to address practitioner's concerns, the worry of a compromise, however inadvertent, still remains.

To assure compliance of Rule 1.6 it is advisable that defense practitioners explain to their insureds or self-insureds the potential purpose of the mediation conference and what issues may need to be communicated during the mediation conference. Memoranda, or other prepared documents requested by the mediation judge, should be reviewed with the client beforehand, and, if necessary, informed written consent obtained. However, if clients insist on the confidentiality of certain issues, I believe it is the obligation of the defense practitioners to communicate their client's position to the mediating judge before the mediation conference and determine whether there are any feasible options for going forward. Often, merely limiting the issues or deciding on bifurcation of issues may sufficiently meet the purpose of mediation. It is, therefore, hoped that by taking these measures, defense counsel can meet the needs and objectives of the mediation judge, while assuring compliance of the Rules of Professional Conduct.

The proposed rules also make a distinction between "mandatory mediation" and "voluntary settlement conferences." Under the proposed rules, "voluntary settlement conferences" are defined as a conference conducted by a judge at the request of contending parties, having as its purpose an attempt to reconcile any and all disputes existing between those parties. Unlike mandatory mediation, the adjudicating judge can participate in the settlement conference if there is agreement among the contending parties. Unlike mandatory mediation, settlement authority is a key element to the discussions and strongly recommended.

For defense practitioners, determining fair settlement value is, in most cases, their stock-in-trade. Nevertheless, knowledge of the participating judge's prior methodology in determining settlement value is essential. It goes without saying that determining settlement value must be a realistic exercise and shared openly with insureds and self-insureds. The same holds true with attorneys representing injured workers. Attempts to undervalue or overvalue a claim by either party will often result in wasted time and effort. In some cases, judges desire the presence of a representative with appropriate authority to resolve the claim. In other cases, the claims representative may require approval of additional authority through a higher level or the employer.

Accordingly, in addition to doing an assessment of the claim, the defense practitioner may also want to determine what other factors go into authorizing settlement in order to avoid putting a client on the spot or creating a potentially embarrassing situation that may strain the relationship with the client. In short, if you cannot develop a realistic plan or set of proposals to resolve the claim, a voluntary settlement conference may not be worth consideration. Again, voluntary settlement conferences may pose threats to attorney-client privilege. It is, therefore, advisable that defense practitioners discuss thoroughly with their clients what potential disclosures may arise and where necessary obtain informed written consent.

Although used interchangeably, a resolution hearing has different rules than those of mandatory mediation or a voluntary settlement conference. The proposed rules set forth a mechanism for requesting a resolution hearing and impose time limits for their accomplishment under the PWCA. Resolution hearings must be requested in writing and often on a bureau form. If the matter is in litigation, the request must be made to the assigned adjudicating judge. Resolution hearings may be requested by either counsel or by an unrepresented party. As stated earlier, there are time limits prescribed by the PWCA which are expected to be enforced unless a party is unable to proceed with the time limits. More often than not, resolution hearings are requested by the contending parties when there has been a settlement agreement, such as a compromise and release. If there is no settlement agreement, a defense practitioner may not wish to consider this option.

The proposed rules, likewise, set forth a procedure for withdrawal of appearance. Section 131.56a is closely mirrored to Rule 1.16 of the Code of Professional Conduct and attempts to assure that no party is unduly prejudiced by the withdrawal of appearance by counsel. The proposed rules also set forth a mechanism for assuring that no decision in which there is a monetary award is circulated until such time as there is compliance with the Pennsylvania Child Support Enforcement System.

The proposed rules also set forth a mechanism for special supersedeas hearings consistent with the Supreme Court's decision in *U.S. Airways v. WCAB (Rumbaugh)* .

Overall, for the defense practitioner the proposed rules attempt to clarify certain facets of the workers' compensation system with particular attention to the purpose and roles of the alternative dispute process. This may help expedite the litigation of claims while reducing the costs associated by such proceedings. Nevertheless, I believe there are ethical concerns with the proposed rules; particularly, with the alternative dispute process, that need to be addressed. Accordingly, concerns relating to confidential mediation communications and documents, and the potential risks of inadvertent compromise of privileged information may require further clarification.

I want to take this opportunity to wish my colleagues and friends, as well as our readers a joyful holiday season and a healthy and prosperous New Year. •

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