

Section 6

Alternative Dispute Resolution Services

Over the past several years, legal systems nation-wide have experienced an explosion of interest in the use of alternative dispute resolution (ADR) approaches, such as mediation and arbitration, to resolve legal disputes. This interest has been prompted by growing evidence that ADR, particularly mediation, saves courts and litigants time and money, and produces more satisfactory agreements.

Minnesota Statutes §176.261 requires the department to “...make efforts to settle problems of employees and employers by contacting third parties, including attorneys, insurers and health care providers, on behalf of employers and employees and using the department’s persuasion to settle issues quickly and cooperatively.” It offers a variety of alternatives to the formal litigation process in resolving workers’ compensation disputes, with expanded use of mediation as one of the primary tools. Parties may choose to be represented by an attorney in ADR or can participate without representation.

Mediators are available between 8:00 a.m. and 4:30 p.m., Monday through Friday, by calling 1-800-DIAL-DLI (the local Twin Cities number to access the mediators directly is 651-284-5032).

In the majority of situations, the insurer resolves the problems and issues as they arise on a claim. The costs associated with the resolution of problems and issues in this manner are minimal. However not all problems are resolved as quickly and efficiently and this section will explore the types of ADR services and litigation processes can be found at the department and the Office of Administrative Hearings (OAH) along with their associated costs.

General Assistance

Department staff answer questions from employees, employers, insurers, medical providers, rehabilitation consultants, attorneys, and others interested in obtaining information about workers’ compensation. Staff also help parties resolve issues that arise on specific claims.

Cost Drivers: larger adjusting expenses
 minimal department expenses
 possible insurer attorney fees

Certification of Disputes – Medical and Rehabilitation Issues

The department is required by Minnesota Statutes §176.081, Subd. 1(c) to attempt to resolve disputes involving medical and rehabilitation issues as early as possible in the dispute process. Before a Medical and Rehabilitation Request can be scheduled for an administrative conference, a mediator will determine whether a genuine dispute exists, and attempt to resolve the dispute. If it is not possible to resolve the issue, the dispute is certified.

Attorney fees may not be charged, subject to one exception, until the department has had an opportunity to attempt to resolve the issue. Typically, an employee or the employee's attorney will file a Request for Certification of a dispute with the department before filing a Medical and Rehabilitation Request. The request can also be made by telephone. A mediator will then contact the insurer to determine whether the dispute can be resolved. If the dispute is not resolved informally, the department issues a Certification of Dispute.

Certification is not required if an attorney is already representing the employee in other pending litigation.

For example, if a claim petition is pending when a medical issue arises, the attorney may charge for representing the employee in the medical dispute without first getting the dispute certified by the department.

Cost Drivers: growing adjusting expenses
 larger department expenses
 employee and insurer attorney fees

Administrative Conferences – Medical and Rehabilitation Issues

Minnesota Statutes §176.106 provides that administrative conferences be conducted by the department to resolve medical and rehabilitation disputes. The administrative conference is designed as an informal proceeding where parties can receive assistance in resolving disputes without resorting to more formal litigation.

The goal of an administrative conference is to resolve certified disputes involving medical and rehabilitation services. The mediator conducting the conference will help the parties discuss and resolve their differences. If an agreement is not possible, the mediator will issue a Decision and Order. This decision can be appealed by means of a Request for Formal Hearing, which will result in a formal hearing at the Office of Administrative Hearings (OAH).

When a party desires an administrative conference a Medical and Rehabilitation Request form is filed.

Medical Request

Medical Requests are usually filed by employees or health care providers to get approval for payment of a medical service which was denied by the insurer. An insurer may also file such a request to resolve a dispute over treatment.

If a Medical Request is filed by an employee or health care provider, the insurer must file a Medical Response within 20 days after being served with the Medical Request (Minnesota Rules Part 1415.3800, Subp. 3). Failure to file a Medical Response may result in the matter being decided on the basis of the information presented in the Medical Request.

If the dispute involves surgery or medical services exceeding \$7,500.00, the request is automatically referred to OAH for a formal hearing. The \$7,500.00 limit does not apply if the issue is whether the charge is excessive. Otherwise, the matter will be set for an administrative conference with a mediator at the department.

Rehabilitation Request

Rehabilitation Requests are filed by employees, QRCs, and insurers. They are used to resolve issues ranging from the direction of the rehabilitation plan, to requests for approval of a specific retraining plan, to disputed bills for rehabilitation services. A party may also request an order allowing an Independent Vocational Evaluation, where the requesting party believes that would assist in determining the direction of the rehabilitation plan.

If a Rehabilitation Request is filed by an employee or a QRC, the insurer must file a Rehabilitation Response within 10 days after being served with the Rehabilitation Request (Minnesota Rules Part 5220.0950, Subp. 1a). Failure to file a Rehabilitation Response may result in the matter being decided on the basis of the information presented in the Rehabilitation Request.

If a request is for the termination of a rehabilitation plan (usually filed by the insurer), the department will send a letter to the employee and QRC advising them that the plan will be automatically terminated if no response is filed. If a response contests the termination of the plan, an administrative conference is scheduled.

Cost Drivers: growing adjusting expenses
 growing department expenses
 larger attorney fees
 nominal litigation costs

Non-Conference Decisions and Orders – Medical and Rehabilitation Issues

In some instances, if the parties supply sufficient information on the request and response forms, the department may elect to issue a Decision and Order without holding an administrative conference.

Dispute Resolution at the Office of Administrative Hearings (OAH)

Disputes that require a more formal process for resolution are directed to the Office of Administrative Hearings. This includes hearings involving a denial of primary liability, discontinuances of wage loss benefits, medical disputes involving bills that exceed \$7,500.00 (as described above), medical and rehabilitation disputes that are consolidated with other OAH matters, and appeals of administrative orders. When OAH handles appeals of orders provided by the department, the matter is considered *de novo*. A workers' compensation judge makes an independent decision without regard to what was decided in the informal process at the department.

Cost Drivers: growing adjusting expenses
growing department and/or OAH expenses
growing attorney fees
if not resolved prior to hearing, full litigation costs including; fees for expert witnesses, lay witnesses, court reporters, expenses for deposition transcripts, medical records, rehabilitation records, wage and employment records, surveillance and investigation, and travel

Court of Appeals and Supreme Court Decisions

Cost Drivers: growing adjusting expenses
growing department and/or OAH expenses
growing attorney fees
full litigation costs including; fees for expert witnesses, lay witnesses, court reporters, expenses for deposition transcripts, medical records, rehabilitation records, wage and employment records, surveillance and investigation, and travel
filing fees
hearing transcript
legal research and briefing expense
costs associated with possible remands to OAH
costs associated with possible remands to Court of Appeals and/or OAH

Mediation

The department provides **free** mediation services, using extremely skilled and experienced mediators, to all parties to any workers' compensation dispute. Mediation is voluntary. Like an administrative conference, the mediation session is designed to be informal. A mediator assists the parties in resolving their workers' compensation issues. If an agreement is reached, the mediator arranges for the Mediation Resolution/Award to be signed, awarded, and served and filed.

Mediation services are available to resolve disputes ranging from pressing rehabilitation or medical disputes to a full, final, and complete settlement of an employee's claim. Parties use mediation services to assist in negotiating a settlement or to memorialize an agreement they have already reached. Sometimes insurers use mediation to negotiate amongst multiple insurers in order to arrive at a mutually acceptable apportionment of liability.

Attorneys may find mediation useful in assisting their client (or the opposing party) to understand the strengths and weaknesses of the case, as seen through the eyes of an impartial third party (the mediator). This independent assessment can often assist the parties in reaching a settlement, even in particularly difficult cases. The parties save litigation costs by using the department's voluntary mediation services.

When involved in workers' compensation disputes, it can be difficult to see how the parties may actually be able to resolve their differences. The parties' positions may be in such opposition to one another that common ground is difficult to even imagine. Still, all parties want to retain some control over the situation and achieve a resolution. The department's program can assist in achieving those results. Participation in a mediation session is risk-free. If the dispute is not resolved through mediation, the parties have not lost their right to litigate or pursue other options.

Factors to consider in determining if the initiation of mediation is feasible include:

- whether the parties are emotionally ready and motivated to resolve the dispute
- whether sufficient information has been received to properly evaluate the claim

Parties should also consider "turning points" or changes in the dynamics of a dispute in determining when to mediate. Turning points are specific times, events, or results that can influence resolution, such as deadlines for answer or motions.

The Mediation Award is binding on the parties. The agreement will only be approved by the mediator if, in the judgment of the mediator, the agreement is fair, reasonable, and in conformity with the workers' compensation law. Where both parties are represented by counsel, the agreement is conclusively presumed to be fair, reasonable, and in conformity with the law, and will be approved, unless it purports to close out claims for medical or rehabilitation benefits on a full, final, and complete basis. Those agreements require a discretionary review.

FAQs on Mediation:

Q: How do I schedule a mediation?

A: Simply call any of the mediators directly or call our general number (651) 284-5032 to schedule a mediation.

Q: Do I get to pick the actual mediator?

A: Yes. Mediation, unlike arbitration, is completely voluntary. All parties to the mediation must sign an agreement to mediate and any settlement is voluntary.

Q: How long must I wait for a mediation session?

A: It depends. Usually a mediator can be made available to handle a mediation the same day you call and almost always within days. Whether a certain mediator is available, of course, depends on the mediation schedule of that mediator.

Q: Where will the mediation be conducted?

A: It depends. Usually mediations are held at our offices in St. Paul. However, we do handle mediations for out of town parties by phone and sometimes we can have a mediator drive to your location.

Q: What is the overall percentage of cases resolved once they are mediated?

A: Statistically, and historically, the rates of resolution are consistently over 80% and sometimes closer to 90%.

Q: What have I got to lose in scheduling a mediation?

A: Nothing, except the time it takes. The mediator's services are offered by the department at no charge to you, including any required language interpreter.

Q: Can multiple cases be schedule at the same time?

A: If similar issues are present with the same parties on multiple cases, sometimes they can be scheduled together. For example, in a four hour mediation, a health care provider settled 23 cases involving 23 different patients and five different insurers. If you identify the multiple cases you have and want to attempt to schedule together in a "settlement or mediation day" we can try to assist you in that regard.

Q: How long will the mediation take?

A: This depends on a number of factors including the complexity of the case and whether any negotiations or discussions concerning resolution have occurred prior to the mediation. Generally, our mediators like to set aside up to four hours and attempts are made to see if the parties can resolve their differences well within that time. However, sometimes a mediation may take the better part of a day or it may even have to be continued to another date.