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ARTICLES

MEDIATION OF INDUSTRIAL COMMISSION CASES

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I. INTRODUCTION

Skyrocketing medical costs and the increasing number and complexity of disputes have in recent years caused the workers' compensation claims process to become much more time consuming and expensive.¹ Increasingly, states have responded to these

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The author gratefully acknowledges the invaluable contribution of his colleague Thomas A. Robinson to the research and drafting of this Article.

¹ Data published by the United States Department of Labor, Bureau of Labor Statistics, indicates that within the private sector of our economy, workers' compensation costs, which represented 2.14 percent of payroll in 1987 now represent 3.38 percent of wages and salaries paid. See generally U.S. Department of Labor, Bureau of Labor Statistics, Employment Cost Indexes and
pressures by incorporating mediation and/or other types of alternative dispute resolution ("ADR") programs into their administrative processes.\(^2\)

Effective October 1, 1993, North Carolina joined sixteen other states\(^3\) in providing some form of mediation for the resolution of workers' compensation disputes. The North Carolina legislature empowered the Industrial Commission (the "Commission") to order parties to participate in mediated settlement conferences under rules substantially similar to those approved by the North Carolina Supreme Court for the Superior Court division, except as to the allocation of costs.\(^4\) This extremely general one-sentence statutory authorization left the Commission free to develop, by rules and practice, the details of the system.

On July 29, 1994, the Commission adopted Rules for Mediated Settlement Conferences,\(^5\) and later created and filled the position of Mediation Coordinator to manage the caseload.\(^6\) In

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2. Two other types of ADR commonly used in workers' compensation systems are arbitration and the use of an ombudsman. For a general discussion of what the various states are doing with mediation and other forms of ADR in the workers' compensation setting, see LARSON, WORKMEN'S COMPENSATION LAW, §§ 77A.90-77A.96(g) (Matthew Bender 1995).

3. For a list of the other states utilizing mediation in the claims administration process, see LARSON, supra note 2, at § 77A.92.

4. N.C. GEN. STAT. § 97-80(c) (1995) now reads:
(c) The Commission may order parties to participate in mediation, under rules substantially similar to those approved by the Supreme court for use in the Superior Court division, except the Commission shall determine the manner in which payment of the costs of the mediated settlement conference is assessed.

Originally, this provision was contained as a sentence within G.S. 97-80(a). See House Bill 658 (1993). On July 5, 1994, the North Carolina legislature ratified Senate Bill 906 which moved this language to its own subsection. SESSION LAWS 1993 (Reg. Sess., 1994) c.679.


6. The position of Mediation Coordinator is at this writing occupied by Frank C. Laney, formerly Mediation Coordinator for the North Carolina Bar Association.

In supplementation of the Rules, Mr. Laney has issued a written guideline called "How Does This Mediation Stuff Really Work?" [hereinafter "Laney"].

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mid-September 1994 the Commission began to issue mediation orders, and by February, 1995, it had sent almost four hundred cases to mediation.\(^7\) The results thus far look very promising: of those cases for which the mediation process was completed, seventy-seven percent were settled either before or as a part of the mediation.\(^8\)

The incorporation of this new system into the claims process has thrown just about everyone involved onto a learning curve. Many attorneys with workers' compensation practices had had little or no exposure to mediation.\(^9\) There was a plentiful supply of experienced mediators, but almost none were familiar with workers' compensation law and practice or with the special problems that mediation presents in the workers' compensation context. As for the Commission itself, the program can be considered to be in a pilot mode in that (1) the cases now being sent to mediation are a fairly small fraction of the total pending claims,\(^10\) and (2) the Commission is soon going to have to go back to the Legislature for which sets out in detail how the Commission is going about assigning cases to mediation and otherwise managing the mediation system. This guideline may be obtained by writing Mr. Laney or calling him at (919) 715-2791.

7. Statistical data provided by the North Carolina Industrial Commission, February 15, 1995. This amounts to an average of about seventy-five cases per month during the indicated period.

8. More precisely, of the 378 cases sent to mediation in the five-month period between September 1, 1994 and February 1, 1995, mediation was dispensed with on request of a party in seventy-three cases, and in one hundred ninety-three cases the mediation was still pending, leaving one hundred nine cases in which the mediation process was completed. Of these, forty-two settled before the mediation, forty-two settled in mediation, and twenty-five did not settle. \textit{Id.}

One can argue about the degree to which the mediation process should claim credit for those cases settled before mediation. Very likely, in at least some instances the prospect of upcoming mediation prompted settlement to occur earlier than it would have otherwise.

Even as to those cases which settled in mediation, it is difficult to assess the effectiveness of the program because one does not know whether those cases would have settled anyway. A forthcoming study by the Institute of Government, assessing the effectiveness of the Superior Court Pilot Mediation Program, may indirectly shed some light on this question.


10. The number of cases in which a hearing is requested is running at about 5800 per year. Thirty-second Biennial Report of the North Carolina Industrial
Moreover, the system has not been in effect long enough for the Commission to draw firm conclusions about its effectiveness.

This Article describes the North Carolina system of mediating Industrial Commission cases and discusses some of the important issues that are being faced. Where appropriate, North Carolina's system is placed in the context of what other states are doing.

II. WHAT IS MEDIATION AND WHY DOES IT WORK?

Mediation is a process in which a neutral third party assists in the settlement of a dispute. The mediator is unlike a judge or arbitrator in that he or she has no power to decide the controversy. The mediator does control the course of the settlement conference, encouraging discussion and behaviors that move the parties toward agreement, and discouraging those that do not.

Introducing such a third party neutral seems to be helpful even when the parties and/or their attorneys are skilled negotiators. The parties usually address the mediator rather than each other; explaining their case to a disinterested person who is relatively unknowledgeable about the case tends to defuse any negative emotions, and the individuals are less likely to face off and become hostile. Each party has a chance to see how the other side's story is going to look to a judge, hearing examiner, or jury. And the mediator may, by skilled questioning, cause the parties to gain a more realistic view of their chances of success in a later legal proceeding should the case not settle.

Mediation sessions are confidential, which permits the parties and their attorneys to be more forthcoming and engage in less posturing and rhetoric. Also, the parties, their attorneys, and the mediator can proceed without fear of later being dragged into court to testify as to what was said in the mediation.

Formally incorporating mediation into the claims process has the positive effect of encouraging settlement at an earlier stage than it would otherwise occur. Lawyers are busy and always seem to have pressing matters at hand, so even settlement-minded attorneys can tend to put these kinds of discussions off until just

Commission, p. 6. This means that something in the neighborhood of fifteen percent of these cases are currently being sent to mediation.

before the hearing or trial. By then, considerable expense or hardship may already have been incurred and the parties may have ground themselves into a position of hostility, making settlement more difficult.

Mediation has been common for some time in labor-management disputes, divorce litigation and in community dispute settlement, but in recent years it has been subsumed into many other areas. Workers' Compensation is one of these newer areas. Because of its relative success in promoting settlement, mediation is the fastest growing alternative dispute resolution technique in the workers' compensation setting.

III. THE NORTH CAROLINA SYSTEM

A. Initiating a Mediated Settlement Conference

In North Carolina, the parties to a workers' compensation claim or a state tort claim may join to voluntarily initiate an attempt to settle the claim through mediation, or the Commission may order a case to mediation. In the case of a voluntary mediation the parties simply file a consent order stating that they agree to settle the matter through mediation, and they later report the


13. Mediation is now used regularly in the public policy arena (addressing such matters as siting and development issues), and in the international arena. There are now mediation programs for the federal courts, and the Equal Employment Opportunity Commission has a pilot mediation program for employment discrimination complaints in four jurisdictions. In North Carolina, in addition to the Superior Court Pilot Program, the Office of Administrative Hearings now incorporates a mediation program. For a broader perspective on mediation, see R. A. BARUCH BUSH & J. P. FOLGER, THE PROMISE OF MEDIATION (Jossey-Bass, San Francisco 1994) and DEBORAH M. KOLB & ASSOCIATES, WHEN TALK WORKS: PROFILES OF MEDIATORS (Jossey-Bass, San Francisco 1994).

14. According to John L. Lazzara, Judge of Compensation Claims, District A-East, Tallahassee, Florida, as many as seventy percent of all workers' compensation disputes are settled at, prior, or within a short time after the Florida mediated settlement conference. Virtually all workers' compensation disputes in Vermont are settled via mediation. In 1994, for example, only one true workers' compensation case was decided by the Vermont Supreme Court. It involved complex issues as to whether the state could be required to defend a state employee sued in a workers' compensation case. See McLoughlin v. State, 642 A.2d 683 (Vt. 1994). Jerry Stuyvesant, Director of the New Mexico Workers' Compensation Administration, indicates that well over a majority of its workers' compensation disputes are disposed of during the mediation process.

15. LARSON, supra note 2, at § 77A.91.
results to the Commission. No order of the Commission is required.16

A Commission-ordered mediation may either be prompted by petition of one or more parties,17 or may be unilaterally initiated by the Commission. For these mediations, the requirements are much more specific. The Order will specify a limited time within which the parties may select their own mediator.18 If the parties fail to do so within that time, the Commission will appoint a mediator from a list of qualified mediators which it maintains. Normally the Commission makes this selection by rote or random order, unless it determines that unusual circumstances demand the appointment of a particular mediator. The Commission's Order specifies what the mediator's fee will be. The Order will also set a deadline for completion of the settlement conference, and it may set deadlines for exchanges of documents and other discovery.19

B. Preliminaries

The mediator has the responsibility of scheduling the conference and reserving or arranging for a place for it to be held. He or she will make an effort to set the conference at a time and place


17. Such a petition must specify the reasons the order should be issued and, if the case is pending on a hearing docket, what the party's preference is as to what should happen to the hearing schedule. (The choices are for the case to be set for hearing on the next docket, for it to not be heard until further notice from the parties, or for it not to be set for hearing prior to a specific date.) Opposing parties have ten days from service of the motion to object. Thereafter, the Commission may rule on the motion without further hearing, whether an objection has been filed or not. Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rule 1B(e) (1994).

18. The parties must select the mediator within twenty-one days of the order; the defendant or its counsel is given the responsibility for filing a stipulation of mediator selection. The stipulation must include the name, address and telephone number of the proposed mediator, and indicate whether the mediator is certified by the Administrative Office of the Courts to mediate Superior Court cases. If the proposed mediator is not so certified, the stipulation must indicate whether the mediator is a member of the Bar, and provide information as to other pertinent certification, training or experience. See Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rule 2(a) (1994).

19. Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rules 1B(c) and 2(b) (1994).
agreeable to the parties, but if no agreement can be had, the mediator is authorized to specify the time and place of the meeting. Unless the parties and the mediator agree otherwise, the conference is required to be held in the county in which the case is pending.

As to timing, the effort is to schedule the conference after sufficient information, such as medical reports, are available, so the parties have a good idea of their respective positions, but before the deadline specified in the Order. The Rules provide the mediated settlement conference is not to delay other proceedings.

C. Who Must Be in Attendance

During the mediated settlement conference, the parties are represented by their attorneys, and, in fact, the attorneys customarily take the lead in the discussions. This follows the pattern of the Superior Court Pilot Program, and is in marked contrast to community mediation, where direct attorney involvement is unusual and is often discouraged.

The rules are very specific as to who must physically attend the conference. First, in addition to the parties’ attorneys and the mediator, the claimant must personally attend. Second, a representative of the insurance carrier or its equivalent must be present and must have full authority to settle the case. Third, in compensation cases, the employer at the time of injury must attend if it is offering the claimant employment and the suitability of the employment is being contested, or if the mediation also

20. Not infrequently the agreed location is the offices of one of the parties’ attorneys.

21. Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm’n, Rules 3(a) and (b) (1994).


24. For example, at the Durham Dispute Settlement Center, attorneys are generally not permitted to be present or to participate in the session, although it is made clear to the parties that they are free to consult with their attorneys at any time.

25. Under the North Carolina Workers' Compensation law benefits can be cut off if the claimant refuses an offer of “suitable employment” by the defendant-employer which he or she is capable of performing. See N.C. GEN. STAT. § 97-32 (1991).
involves non-compensation issues arising from the injury.\textsuperscript{26} Dispensing with the presence of any of these parties requires the written permission of the Commission through its Mediation Coordinator.\textsuperscript{27}

These rather rigid attendance requirements have a twofold purpose. First, they are designed to assure that the conference is not a futile exercise because one or more of the parties has no meaningful authority to settle. Second, they constrain the participants to meet each other face to face and get an impression as to how the other side will come across later in a hearing. This may be the first time a representative of the insurance company has ever even seen the claimant.\textsuperscript{28}

While the parties and their representatives are required to attend, they are not required to settle the case or, indeed, to agree to anything at all. If the case does not settle, the parties suffer no penalty, except the case will of course continue relentlessly through the hearing process as it would had there been no mediation.

\textbf{D. The Conference Itself}

The mediator is charged with maintaining control of the settlement conference and its procedures.\textsuperscript{29} At the outset, the mediator will explain the mediation process, the procedures to be followed, the duties of the mediator and of the parties, confidentiality aspects, and costs of the mediation.\textsuperscript{30} As the conference pro-

\textsuperscript{26}. Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rule 4(a) (1994). If there is an alleged third-party tortfeasor, this rule also requires the presence of a representative of a carrier liable for the acts of that third party. \textit{Id.}

\textsuperscript{27}. \textit{Id.} In the event an individual who is required to be present at the conference fails to attend without good cause, the Commission may impose sanctions, including attorneys' fees, mediator fees and other expenses incurred by the persons attending the conference, as well as contempt and any other sanction authorized by Rule 37(b) of the Rules of Civil Procedure. \textit{See} Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rule 5 (1994).

\textsuperscript{28}. Insurance companies tend to rely on paperwork and doctors' reports; however, doctors generally are focused more on physical condition than on such things as what kind of a witness the claimant would make.


\textsuperscript{30}. Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rule 6(b) (1994). Rule 6(b) contains a laundry list of nine introductory points that must be covered by mediator at the beginning of the conference.
gresses, the mediator typically attempts to channel the discussion in productive directions and works to create an atmosphere in which the parties will genuinely express their views and come to understand and appreciate the position and interests of the opposition.

During the conference the mediator may meet privately with some or all the parties. In these private sessions the parties often feel more free to test out ideas or to reveal information to the mediator which may be useful to the process. Before leaving such a private session, a skilled mediator will make sure he or she understands what information can be shared with the other party and what must be held in confidence.

The rules allow the mediator to recess the conference and to set times for reconvening. The conference must be completed within the time period set by the Commission in its order, unless an extension of time is requested and granted.

E. Agreement

If agreement is reached, it is good practice for the terms of the agreement to be sketched out in writing and signed by all present. A full-fledged, polished agreement is usually left for the attorneys to work out later. However, at a minimum there should be a clear understanding as to who is responsible for the final agreement, when it will be completed, and when and by whom it will be submitted to the Commission. The agreement must be submitted to


32. See Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rule 3(c) (1994) (containing the procedure for such an extension request).

Currently the Mediation Coordinator sets the deadline for the mediation conference at approximately sixty days after the end of the twenty-one day period allowed for the parties to designate their own mediator. See Laney, supra note 6, at 4. This is a shorter time than that provided in the superior court system, but the faster track is considered necessary to avoid delays in the hearing schedule. Id.

the Commission within twenty days of the conclusion of the conference.\textsuperscript{34}

\textbf{F. Impasse}

Some disputes cannot be settled, and there are others that should not be settled. The mediator's goal is not to try to settle the case at all costs: if further efforts are most probably futile, it is the duty of the mediator to recognize this in a timely fashion, to declare an impasse, and to terminate the conference.\textsuperscript{35}

\textbf{G. Mediator's Fee}

In the case of voluntary mediations, the mediator's fee, and who pays it, are up to the parties and the mediator to agree to.

In Commission-ordered cases the mediator's fee is fixed by the Order.\textsuperscript{36} The fee is split evenly among the parties\textsuperscript{37} and is due on completion of the conference.\textsuperscript{38} The Commission's Order can (and customarily does) specify that the defendant-employer or its insurer temporarily carry the plaintiff-employee's share.\textsuperscript{39} The defendant-employer can recoup this amount later when the contested matter is concluded, and it is authorized to offset it against an award or other payment.

\textsuperscript{34} Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rule 4(b) (1994).

\textsuperscript{35} Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rule 6(b)(3) (1994).

\textsuperscript{36} Currently, Commission Orders specify $100.00 for preparation plus $100.00 per hour of actual conference time, billed in quarter hour segments. Travel time, out-of-pocket expenses, and preparation time in excess of the one hour, are not compensated. Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rule 7(b) (1994). This tracks the fee system used in Superior Court Pilot Program court-ordered mediations (except for the practice of requiring the defendant temporarily to carry the plaintiff's share of the fee). Laney, \textit{supra} note 6, at 4.

\textsuperscript{37} Rules for Mediated Settlement Conferences of North Carolina Indus. Comm'n, Rule 7(d) (1994).

\textsuperscript{38} Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rules 4(c) and 7(d) (1994). In practice, the defendant-employer always seems to have forgotten its checkbook.

An exception is made for the State of North Carolina, which may take up to thirty days to pay the mediator's fee. \textit{See} Rules for Mediated Settlement Conferences of the North Carolina Indus. Comm'n, Rule 7(d) (1994).

\textsuperscript{39} Id.
As discussed below, North Carolina is unusual in requiring the parties to a workers' compensation administrative proceeding to pay for non-voluntary mediation.

H. Reporting the Outcome

After conclusion of the conference, the mediator files a written report of the results with the Commission. If an agreement was reached at the conference, the mediator's report indicates whether the case will be resolved by agreement, consent judgment or voluntary dismissal, or removal from the trial docket, and the report also indicates who is responsible for submitting the agreement, judgment, or dismissal to the Commission.40

If the case did not settle, the mediator's report will indicate the conference was held, but the issues were unresolved. The mediator's report does not comment on the contentions or conduct of the parties.41

IV. ISSUES CONFRONTED BY THE COMMISSION AND BY MEDIATORS

A. Selecting Cases for Mediation

As previously noted, the Commission, through its Mediation Coordinator, is currently issuing about seventy-five mediation orders per month.42 Except for those cases in which mediation has been requested by a party, cases are being ordered to mediation only if (1) a request for hearing has been pending for at least thirty days, (2) the claimant is represented by an attorney, and (3) there has not yet been an order issued setting the case on for hearing.43

The Commission is feeling its way on the question of case selection, and these informal policies could change at any time.


The parties may use one of the Commission forms or, if the agreement compromises claimant's future compensation rights, a clincher agreement meeting the requirements of North Carolina Industrial Commission Rule 502 may be used. See Workers' Compensation Rules of the North Carolina Indus. Comm'n, Rule 502 (West 1995).

41. Laney, supra note 6, at 6.
42. Laney, supra note 6, at 1.
43. Id.
To pose the fundamental question confronting the Commission: Is there really a good way of judging in advance what cases are good candidates for mediation and which are not?

As mediation becomes a part of more and more of the Commission's caseload, the answer to this question will become increasingly important. Certainly the Commission does not want to inflict undue costs and inconvenience on the parties by ordering cases to mediation in which settlement is hopeless. The difficulty lies in telling in advance what is hopeless and what is not.

No doubt the Commission will, in the course of gaining experience with its program, get a better grip on this question. The Commission should not follow Florida's example of moving to universal mediation.\(^{44}\) There will always be cases for which mediation is inappropriate, and the Commission will do well to retain its present flexibility.

**B. Should Mediation Be Ordered Over the Objection of a Party?**

Of course, even if the Commission were to order all cases to mediation, protection nevertheless exists in the form of a procedure whereby one or more parties may file a motion to dispense with mediation.\(^{45}\) Currently the Mediation Coordinator is following a policy of liberally granting such requests,\(^{46}\) in effect leaving to the parties and their attorneys the judgment that mediation would be futile.

The Commission's liberal policy may be appropriate at this early stage, but is it wise in the long term? In the world of Superior Court mediation, it is not an uncommon experience for the mediator to face a party or attorney who arrives at a court-ordered mediation feeling that settlement is hopeless, and, to that individual's amazement, have the case settle in the next two to four hours. Mediation is a relatively new phenomenon, and many people, including some attorneys, still do not fully understand and appreciate its power.

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46. See Laney, supra note 6, at 4. However, Mr. Laney's paper cautions that if a particular law firm, employer, or carrier is deemed to be abusing this liberal policy, then the group will be asked to suggest a substitute case for mediation. Id. at 4-5.
Moreover, even when the case as a whole does not settle, mediation can still be worthwhile when parts of the case can be resolved, thereby reducing the number of issues that must be dealt with in formal proceedings.

C. Mediation of Very Small Cases

The Commission is currently following the practice of not ordering mediation in cases where the total cash benefits which the claimant is demanding are less than $2,000.00. The same policy is followed where the only issue is over medical payments to a doctor; likewise, medical reimbursements which do not result in cash in the claimant's pocket do not go towards the $2,000.00.47

The reason for this policy is the disproportionate share of any such cash award that would be consumed by the claimant's portion of the mediator's fee.48 In other words, the policy is a byproduct of the State's unfortunate decision to have the parties bear the costs of mediation. Indeed, the smaller cases are the very ones that are most likely to settle, and a "smaller" case which goes through formal proceedings can clutter up the Commission's docket just as much as one in which a larger amount is in controversy.

Recognizing these realities, the Commission has sought out and has in place a new program funded by an IOLTA grant, in which smaller cases may be referred to mediation, with the mediator being paid from the grant funds.49

Michigan50 and Florida51 have responded to the special problems of dealing with very small claims by instituting special procedures designed to move them through the compensation pipeline with as much speed and as little expense as possible. Florida contemplates that some settlement conferences should take place over the telephone.52 North Carolina might want to consider this approach.

47. Id. at 1-2.
48. Laney, supra note 6, at 2.
49. Id.
50. Mich. Comp. Laws Ann. § 17.237(223) (West 1993) provides for transfer of cases involving less than $2,000 to a small claims division.
52. Id.
D. Timing of the Conference

The North Carolina system shows important flexibility in the timing of the mediated settlement conference. Here again we should avoid the expediency adopted by our southeastern neighbor, Florida. There, in response to a huge backlog of cases, the legislature placed strict time requirements at each point in its mediation procedure. For example, the Florida statute\(^{53}\) requires a settlement conference to be held within twenty-one days of the filing of the workers' compensation petition. At least one Florida judge\(^{54}\) feels this is too quick for many compensation cases, since it often takes longer than three weeks to gather necessary medical data and to answer critical questions such as whether the claimant has reached medical stabilization. The current practice of limiting orders of mediation to those cases in which a hearing request has been pending for at least thirty days\(^{55}\) offers better assurance that the case is ripe for settlement.

E. Abuse of the Mediation Process by a Party

Since there is no penalty for failure to settle, a party may be tempted to use the mediation forum as no more than an informal discovery tool, attempting to uncover weaknesses in the opponent's case without putting forward a serious effort to resolve the underlying dispute. Also, the employer or carrier, whose interests generally favor postponing payment to the latest date possible, may tend to give the mediation stage less than their full attention.

It is perhaps too early to tell whether these are serious problems in North Carolina. However, the problem has become serious enough in at least two other states to warrant special attention by the legislature. Oklahoma empowers the Workers' Compensation Court to enter sanctions against any party who fails to appear at a conference or who appears but is "substantially unprepared."\(^{56}\) The sanctions can include entering an order by default and the assessment of expenses and fees.\(^{57}\) Vermont has

\(^{53}\) FLA. STAT. ANN. § 440.25 (West 1994).
\(^{54}\) The Honorable John L. Lazzara, Judge of Compensation Claims, District A-East, Tallahassee, Florida.
\(^{55}\) Laney, *supra* note 6, at 1.
\(^{56}\) Oklahoma Rules of the Workers' Compensation Court, Rule 38G (1993).
\(^{57}\) *Id.*
dealt with this problem by awarding interim compensation in borderline cases.58

F. The Potential for Unfair Settlements

It must be remembered that the parties coming into mediation do not necessarily possess equal bargaining power or stamina. The fact that the weaker party is represented by an attorney does not necessarily solve this problem.

Nor should it be forgotten that the workers' compensation bargain between the employer and employee is already a compromise. Statutory policy as to what a truly injured worker is entitled to may already be based on economic necessity, raising the question whether it is good social policy to encourage further compromise.

Consider, for example, a construction worker with a serious back injury who claims permanent disability and whose claim, lump-summed, amounts to $300,000. At the mediation stage, and before any administrative hearing, the most the insurance company is willing to offer in settlement is $40,000. Under tremendous financial pressure and anticipating that resolution of his claim could take a year or more, the claimant is actually considering taking the $40,000, even though he is unable to work and there is no way he could survive on that amount for more than two or three years. Is it really good policy to encourage this kind of settlement?59

Also, the mediator confronting this kind of situation faces the Hobson's choice of either being a party to an unfair agreement or — by making the judgment as to what is fair or unfair — abandoning his or her role of neutrality.

Recognizing the potential for this kind of imbalance of power, North Carolina has long required all settlement agreements to be submitted to the Commission for approval. This important safeguard remains unchanged under the new mediation procedure,60

58. Processes and Procedure for Claims under the Vermont Workers' Compensation and Occupational Disease Acts, Rule 6(d).
59. Tennessee's response to this concern is to require the mediator to certify that the claimant is to receive at least what he or she would receive under the compensation statute. See TENN. CODE ANN. § 50-6-236 (1994).
60. Another safeguard is North Carolina's practice of not issuing mediation orders in cases in which the employee is not represented by counsel (see supra note 43). This practice seems premised on the notion that in mediation the parties should be on equal footing. However, this approach is not universally accepted: Michigan, taking the opposite tack, moves virtually all unrepresented
and it should relieve some of the pressure on the mediator to worry about fairness. It would behoove the community of mediators to become familiar with and apply the Commission's approval standards, to help forestall subsequent Commission disapproval of mediated agreements.

G. Requiring the Parties to Pay the Mediator

In most states which employ mediation in workers' compensation disputes, the mediator is a state employee or is otherwise paid by the State. North Carolina is unusual in that parties to a compensation claim can be ordered to mediation and then ordered to pay for it.61 As such, this feature amounts to a use tax. The provision that the defendant advance the plaintiff's share, to be repaid from a later award,62 softens but does not eliminate this impact. At whatever stage the parties must pay, this practice seems contrary to the American tradition that an individual should have access to the judicial system at little or no initial cost, and that the successful party does not normally bear court costs.

To the extent that the mediated settlement conference system reduces the Commission's caseload and speeds up the litigation process, the State will have benefited. Requiring the parties to pay for this benefit seems to be born of political necessity rather than any particular advantage to the administrative system.63

V. Conclusion

The workers' compensation system is already an alternative dispute resolution system: its underlying concept involves the worker's giving up the prospect of large tort recoveries in exchange for certain benefits.64 Among these supposed benefits is employees toward mediation. MICH. COMP. LAWS ANN. § 17.237(223) (West 1993).

61. Lacking appropriation for the payment of mediators, the Commission implemented the rule discussed at note 36 supra. The author is unaware of any other jurisdiction which orders non-voluntary mediation in workers' compensation cases and requires the parties to pay the mediator's fee. In Massachusetts the parties pay for mediation in compensation cases, but there mediation is voluntary. MASS. ANN. LAWS ch. 152, § 10A (Law. Co-op. 1994).

62. See supra note 39 and accompanying text.

63. Indeed, as discussed above (see supra notes 47-48 and accompanying text), this practice stands in the way of decluttering the Commission's docket of the smaller cases.

64. LARSON, supra note 2, at § 1.20. For a discussion of the exclusive remedy doctrine generally found in workers' compensation acts, see id., at § 65.10.
that the injured worker is relieved of the high costs and long delays associated with tort-style litigation. We tend to forget that, not all that long ago, workers' compensation claims generally went to hearing within a month or two of the filing of the claim. It is a commentary on the present state of affairs that we even have to think about employing an alternative to an alternative.

And despite its relative popularity, mediation is not without its problems. Returning to our example of the injured worker who is pressured to settle a large claim for a small amount, if processing claims has become so time-consuming and expensive that this kind of injustice can occur, mediation will not solve the problem. In other words, putting a mediation system in place should never be an excuse for an agency's relaxing its efforts to reduce the time, cost, and complexity of its more formal proceedings.

In the long run North Carolina may find the most important component to a successful mediation system is not any particular procedural detail, but rather the level of commitment brought to the process by the parties and their attorneys, by the community of mediators, and by the Commission itself.

And despite the various cautions discussed above, one important benefit seems clear. In the usual employment setting, both the employer and the employee have made substantial investments in a working relationship. By moving the workers' compensation claim from a forum of litigation to one of settlement, tensions are lessened and the relationship often can be guarded. Colorado's mediation materials say it well:

65. Larson, supra note 2, at § 30.10.
66. See supra text accompanying note 59.
67. As things stand now, only a few Industrial Commission hearings have been delayed because of mediation. Ironically, though, the more successful the agency is in shortening its formal hearing time line, the more difficult it will be to incorporate the mediation stage without causing delays.
68. Interestingly, two of the most successful mediation programs in the United States — Vermont's and New Mexico's — are based on only the most general statutory authority. Vermont and New Mexico have used their general legislative grants of authority to administer the workers' compensation act as a means to institute successful mediation programs. Each state's administrative agency has made a firm commitment to streamline the claims process, to separate those few cases which must be tried from the many which just need a bit of prodding to come to an agreeable end.

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Mediation is much more likely to create this outcome than is the adversarial litigation process at the end of which someone wins and someone loses.\textsuperscript{69}

In this and other ways, the mediation stage, positioned properly in the workers' compensation claims process, will reduce not only regulatory workload but also the human toll extracted by protracted litigation.

\textsuperscript{69} Colorado Div. of Workers' Comp., Mediation Unit Briefing Materials on Workers' Comp. Mediation (1993).