

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: ORDER ESTABLISHING PROVISIONAL RULE 37,
RULES OF THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPELLATE MEDIATION**

Filed June 20, 2001

ORDER

In its continuing efforts to enhance the quality of justice for the citizens of the state of Tennessee, the Supreme Court established in 1998 a pilot program for mediating workers' compensation cases at the appellate level. The pilot program studied the procedures necessary to insure a more efficient and satisfactory resolution of those workers' compensation cases appealed to the Supreme Court under Tenn. Code Ann. §§ 50-6-225(e)(3) through 50-6-225(e)(7). During the course of the pilot program, participating lawyers and mediators evaluated the processes of selection, referral, and mediation of those cases. This provisional rule is a response to the original pilot program and its evaluations and provides for the extension of the pilot program on a statewide basis.

Accordingly, we establish this Provisional Rule 37, Rules of the Supreme Court of Tennessee. The Rule, as stated in the attached Exhibit A, envisions the use of mediation to make the resolution of workers' compensation appeals more efficient, economical, and fair.

It is ORDERED that the rule set forth in attached Exhibit A be and is hereby adopted as Provisional Rule 37 of the Rules of the Supreme Court of Tennessee.

FOR THE COURT:

E. RILEY ANDERSON, CHIEF JUSTICE

EXHIBIT A

TENNESSEE SUPREME COURT PROVISIONAL RULE 37: WORKERS' COMPENSATION APPELLATE MEDIATION

(a) Preamble.

In its continuing efforts to enhance the quality of justice for the citizens of the state of Tennessee, the Supreme Court established in 1998 a pilot program for mediating workers' compensation cases at the appellate level. The pilot program studied the procedures necessary to insure a more efficient and satisfactory resolution of those workers' compensation cases appealed to the Supreme Court. During the course of the pilot program, participating lawyers and mediators evaluated the processes of selection, referral, and mediation of those cases. Provisional Rule 37 is a response to the original pilot program and its evaluations and provides for the extension of the pilot program on a statewide basis. Provisional Rule 37 envisions the use of mediation to make the resolution of workers' compensation appeals more efficient, economical, and fair. It is not the intent of this Provisional Rule to extend the length of time required for final resolution of workers' compensation cases.

(b) Definitions.

As used in this Provisional Rule, unless the context otherwise requires:

- (1) "Presiding justice" is any member of the Supreme Court hearing workers' compensation appeals in the Grand Division in which the workers' compensation case is filed.
- (2) "Motions justice" is that member of the Supreme Court appointed on a rotating basis to hear motions. Applications to the motions justice shall be directed to the appellate court clerk who will direct the motion to the appropriate justice. It is the intent of this section that the motions justice will not rule upon a motion if that justice will preside over the workers' compensation appeal which is the subject of the motion.
- (3) "Supreme Court Special Workers' Compensation Panel" is that panel authorized and set forth in Tennessee Code Annotated, §§ 50-6-225(e)(3) through 50-6-225(e)(7).
- (4) "Workers' compensation appeals" are workers' compensation cases appealed from the trial court to the Supreme Court and referred to the Supreme Court Special Workers' Compensation Panel for findings of fact and conclusions of law.
- (5) "Rule 31 Mediator" is any mediator who has met all the requirements to be listed as a general/civil mediator under Tennessee Supreme Court Rule 31.

(c) Standing Order of Reference.

This subsection shall be considered a standing Order of Reference to mediation. Provisional Rule 37 shall apply to all workers' compensation appeals filed in the Western Grand Division, to workers' compensation appeals filed in the Middle Grand Division and assigned to Justice A. A. Birch, Jr., and to workers' compensation appeals filed in the Eastern Grand Division and assigned to Chief Justice Riley Anderson. Subject to the limiting provisions in subdivision (1) below, all workers' compensation appeals to which Provisional Rule 37 applies are ordered to mediation.

(1) Objection to mediation.

- (A)** Any party may file a motion with the Clerk of the Supreme Court objecting to mediation within seven (7) days of the filing of the Notice of Appeal of the workers' compensation case.
- (B)** Grounds for objection to mediation shall be limited to mediation or benefit review conducted prior to the initial trial of the case.

(2) Selection of a Rule 31 Mediator.

(A) List of Rule 31 Mediators.

The Programs Manager of the Administrative Office of the Courts shall maintain a list of qualified Rule 31 Mediators. The list shall be posted on the Supreme Court website at www.tsc.state.tn.us. Upon request, the Programs Manager shall provide the list to the parties via electronic mail or U.S. Mail.

(B) Selection of a Rule 31 Mediator.

Within fifteen (15) days of either the entry of the Notice of Appeal or the entry of an order denying a motion to suspend the requirement for mediation, whichever occurs last, the parties shall:

- (i)** Agree upon a mutually acceptable Mediator and advise the Clerk of the Supreme Court in writing of the name of the Mediator selected; or
- (ii)** Notify the Clerk of the Supreme Court that the parties cannot agree upon a mutually acceptable Mediator. The Clerk of the Supreme Court shall assign at random a Rule 31 Mediator from the list of Rule 31 Mediators. The parties and/or the Mediator shall promptly notify the Clerk of ground for disqualification of the Mediator selected. See subsection (d).

(3) Initial contact with the Rule 31 Mediator.

The parties shall contact the Rule 31 Mediator directly to arrange for the time and place of the mediation session or sessions and to arrange for payment of costs associated with the mediation.

(d) Mediator disqualification.

A Rule 31 Mediator shall be subject to the Standards of Professional Conduct for Rule 31 Mediators as set forth in the Appendix to Tennessee Supreme Court Rule 31 regarding disqualification for partiality or conflict of interest. Any party may move the motions justice to disqualify a Rule 31 Mediator for good cause. In the event a Rule 31 Mediator is disqualified, the parties or the Clerk of the Supreme Court shall select a replacement in accordance with Subsection (c)(2)(B).

(e) Evidence.

Mediation shall be conducted in accordance with Section 7 of Rule 31 with regard to the inadmissibility of evidence of conduct or statements made during the mediation.

(f) Confidentiality.

Mediation shall be conducted in accordance with Section 7 of the Standards of Professional Conduct for Rule 31 Neutrals, Appendix A of Rule 31, with regard to the confidentiality of mediation.

(g) Scheduling the mediation.

Unless otherwise agreed by the parties and the Mediator, or ordered by the motions justice, mediation session shall be conducted within forty-five (45) days of the filing of the Notice of Appeal. The Mediator is authorized to set the date and time of all mediation sessions, upon giving reasonable notice to the parties.

(h) Continuances.

Continuances of oral argument before the Special Workers' Compensation Appeals Panel of the Supreme Court for the sole purpose of conducting the mediation will not be liberally granted.

(i) Costs.

The parties are encouraged to arrange for the payment of the costs of the services of the Rule 31 Mediator. At the Mediator's request, however, the costs of any mediation, including the cost of the services of the Rule 31 Mediator, may be charged as costs in the case. The presiding justice may in his or her sole discretion waive or reduce costs of a mediation.

(j) Reports.

(1) Report of the Rule 31 Mediator.

Upon completion or termination of the mediation, the Rule 31 Mediator shall report to the presiding justice the outcome of the mediation. In the event no agreement is reached among the parties and mediation is terminated, the Mediator's report shall not contain any detail of the nature or substance of mediation.

(2) Report of the Parties.

(A) Agreement about all issues.

If mediation results in an agreement on all of the issues on appeal, parties' counsel shall forward a proposed order to the Clerk of the Supreme Court remanding the case to the trial court for approval of the settlement and providing for the payment of costs in the case.

(B) Agreement about some but not all issues.

If mediation results in an agreement on some, but not all, of the issues on appeal, counsel will file with the Clerk of the Supreme Court a stipulation as to those matters no longer in controversy. The stipulation shall be included in the record and relied upon by the parties and the Court.

(C) Agreement on none of the issues.

If mediation results in agreement on none of the issues on appeal, counsel shall file with the Clerk of the Supreme Court a non-specific notice of termination of mediation without settlement. Neither party shall report on the nature or substance of the mediation, nor shall the Mediator's report contain any detail of the nature or substance of mediation.

(3) Evaluation of Mediation by the Parties.

- (A) The parties and their counsel shall complete an evaluation form supplied by the Clerk of the Supreme Court and shall forward the evaluation to the Clerk of the Appellate Courts for the grand division in which the panel sits within ten (10) days of the completion of mediation. The evaluation shall be maintained as confidential and shall not be entered into the case file.
- (B) The evaluation shall be placed in an evaluation envelope supplied with the evaluation form and the evaluation envelope shall be sealed. The sealed evaluation envelope is then placed in a cover envelope and mailed to the Clerk of the Appellate Courts for the grand division in which the panel sits.
- (C) The clerk shall open the cover envelope, remove the evaluation envelope, note the receipt of the evaluation envelope in the case file, and forward the unopened evaluation envelope to the Programs Manager of the Administrative Office of the Courts for processing.
- (D) The Programs Manager of the Administrative Office of the Courts shall receive the evaluation envelopes, remove the evaluations, and, periodically as required by the Court, provide information to the Court on the results of the evaluations.

(k) Evaluation of the Appellate Mediation Program.

The results in the cases affected by this Provisional Rule 37 and the efficacy of the procedures outlined herein shall be subject to evaluation by the Court.

(l) Effective Dates.

This Provisional Rule 37 shall apply to cases in which a notice of appeal is filed on or after September 1, 2001, through August 31, 2004.