A Second Look At Mediation...

By Administrative Judge Deneise Turner Lott, Mississippi Workers' Compensation Commission,

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In February of 2002 the Workers' Compensation Section of The Mississippi Bar began a pilot project for mediation of workers' compensation claims. The project arose with a two-tier purpose: (1) to more amicably resolve disputes through non-binding mediation, and (2) to provide a continual fund-raising mechanism for the Kids' Chance of Mississippi Scholarship Fund, a fund organized by the Workers' Compensation Section of the Mississippi Bar with oversight from the Mississippi Bar Foundation. The fund is dedicated to providing scholarships for children of Mississippi laborers who have been killed or have become permanently and totally disabled as a result of an injury within the jurisdiction of the Act. For information on the Kids' Chance of Mississippi Scholarship Fund, please refer to *The Mississippi Lawyer*, Volume L, Number 2, November-December 2003, pp. 56-57.

In June of 2003, the Workers' Compensation Section, under the leadership of Michael Williams, Esq., Davis, Goss & Williams, determined that the pilot project, which was to be revisited within eighteen months of its inception to determine its viability, should continue in perpetuity. This decision was made because of the percentage of successful mediations of claims (over 90%) and the funding developed for the scholarship fund. The section also considered an unexpected benefit which enured to the workers' compensation bar as a result of mediation: an expanded understanding of the claims process and of the complexity of workers' compensation issues.

Currently, the section is taking another look at the Mediation Project. In this article, we consider a lawyer's description of a positive mediation, a judge's appreciation of the effectiveness of mediation in the system, and an overview of the positive aspects of mediation generally.

The Benefits of Mediation Generally

A leader is best when people barely know he exists,

Not so good when people obey and acclaim him.

But of a good leader who talks little,
When his work is done, his aim fulfilled,

They will say: "We did it ourselves."

–Lao-Tse, Taoist philosopher, 565 B.C.

A Little History

All of the authors have been avid proponents of mediation in our respective law practices before "mediation" was a legal concept and before "ADR" was a bar committee. The value of mediation, for Lydia, is that the parties can say: "*We did it ourselves.*" For Lydia, who came to the Mississippi Workers' Compensation Commission from a general civil practice in a small Northeast Mississippi town, there was an immediately noticeable similarity between the workers' compensation claimant and her former domestic clients. The similarity: the legal process had over-

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taken their lives. They often felt they were not responsible for their situation (be it the domestic situation or the work injury), they had to rely on the advice and counsel of professionals that they often did not otherwise know (be it the attorney or, in the case of the injured worker, the physician), and they received ample unsolicited and unprofessional advice from well-meaning family members, friends, church members, co-workers and often from people they hardly knew – advice that often called into question the professional advice that they had solicited. The result was confusion, confoundment and bewilderment, frustration at the process, and inconsolable dismay at the snail's pace at which the legal process crept forward.

From her experience with her domestic clients, Lydia innately understood the feelings of injured workers and thought that they might benefit from a form of alternative dispute resolution so often effective for her former domestic clients. At an in-service training session in 2002 for Administrative Judges at the Commission, U. S. Magistrate Jerry A. Davis and Tommy Dulin, Esquire, presented advice and suggestions relative to better decision-making and settlement-negotiating. Lydia, as president of the section at that time, named Deneise and Tommy as co-chairs of an *ad hoc* committee to investigate and explore the prospects of a more aggressive mediation program than the Commission had established under its authority for arbitration of claims. The Kids' Chance Mediation Pilot Project was born.

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A Mediation Primer

Alternative dispute resolution (hereinafter "ADR") takes a number of forms. The principal of these are *arbitration* and *mediation*. Arbitration, the most traditional form of private dispute resolution, can be "administered" by a variety of private organizations or managed solely by the parties. It can be entered into by agreement at the time of the dispute, or prescribed in pre-dispute clauses contained in the parties' underlying business agreement. The generally recognized forms of arbitration are: binding arbitration, non-binding arbitration, "baseball" or "final offer" arbitration, "bounded" or "high-low" arbitration, and incentive arbitration.

Mediation is a less formal process in which the disputing parties select a neutral third-party to assist them in reaching a negotiated settlement of their claims. The results of mediation are non-binding; a mediator has no power to impose a solution on the parties. Rather, because of the less formal process, the mediator can assist the parties to shape solutions to meet their interests and objectives, many of which are not results which can be derived from the Act, which has restricted and specifically defined benefit availability.

The mediation process utilized in the section's project, administered (in a very general sense) by the section and the Mississippi Bar's section liaison with Bar Foundation oversight, is non-binding. Regulations require that no party to the mediation, including the mediator, ever reveal to an Administrative Judge to whom the workers' compensation case is assigned that mediation ever occurred. This caveat is a permanent one unless and until counsel determine, by agreement, to inform the Judge. The mediator never dis-

cusses the mediation with anyone; his or her documents, work-product, comments, etc. are excluded from evidence and are not allowed in the MWCC file. The section's project recognizes a two-track approach to ADR: mediation in conjunction with litigation. In other words, mediation proceeds concurrently with litigation. This approach is particularly effective in the workers' compensation arena, where a case is not ready for trial until a claimant has reached "maximum medical improvement" (hereinafter "MMI") and when, due to caseload, a case must be set for trial approximately six months beyond the date that it becomes ready to try. This unfortunate delay between the MMI date and a trial date gives ample time for the parties to know the medical evidence and other factual components and utilize the time and space between the final medical evidence and the hearing to explore settlement possibilities and/or refine the issues which may remain for trial.

Benefits of Mediation in the Workers' Compensation Context

As those familiar with the Act know, workers' compensation is a no-fault system in which the employer provides benefits for a work injury without reference to fault of either party. The benefits to the worker and the liability of the employer are limited by the statute, and the "no fault" concept is generally accepted as the trade -off for the exclusive remedy feature of the Act. Generally speaking, the only remedy an injured worker has is the remedy provided by the Act. It is the "exclusive remedy"; the employer cannot generally be sued in tort as a result of the injury to the employee. As remedial, social legislation, the Act is intended to accomplish its purpose of returning the injured employee to vocational opportunity. This has resulted in the development of two doctrines to insure the viability of the Act. First, the courts have introduced the concept of a liberal statutory construction, *i.e.*, although the statute should be "fairly construed", it should be given a "broad and liberal" construction to advance the Act's objectives. Second, the courts have introduced the concept of the rule that the doubtful case should be resolved in favor of the claimant, *i.e.*, the "un-leveling" of the playing field or, said another way, "the tie goes to the claimant". These doctrines have evolved in order to achieve a purpose variously stated: to achieve the beneficent purposes of the Act, to further the humanitarian aims of the Act, to carry out the broad purposes of the Act, and to avoid narrow or rigid or overly strict readings of the Act.

These facts often cause the employer and carrier to feel that the "law" is stacked against them and that the Judges are on the "worker's side." We have found that mediation can advance a case forward because the employer and carrier have the opportunity to determine the mediator[1] and to advance the strengths and weaknesses of their position before a neutral party without risking loss. Moreover, the employer and carrier, as well as the claimant, can engage in mediation by utilizing the Kids' Chance Mediation Project without losing face – this is not a sign of weakness – *remember, its for charity!* And in cases where the claimant desires to continue at work and can be accommodated by the employer, the non-adversarial approach tends to more effectively preserve these continuing relationships and even resolve misunderstandings that may have developed between two former non-adversarial parties.

Our Approach

The section selected forty-four mediators from across the state. Approximately half generally represent claimants and the other half generally represent employers/carriers. Our mediators have been trained by U. S. Magistrate Judge Jerry A. Davis and have been required to complete reading that he has assigned. They have also role-modeled. Many of them have also completed continuing legal education hours in ADR, although that is not a requirement for involvement as a mediator in our project. We selected our pilot project mediators based on their experience in our particular field – workers' compensation, their integrity, their reasonableness and ability to view both sides of the litigation coin, and their devotion to duty and diligence. You can no doubt find that they are skilled in dispute resolution and have the capacities – based on background, education and experience – to mediate issues other than workers' compensation. The cost is astoundingly low: $50.00 per hour for the first hour, $25.00 per half-hour for all remaining half-hours or parts of half-hours utilized. All fees are paid to the Kids' Chance of Mississippi Scholarship Fund, making it a tax deductible charitable donation.

A Lawyer's Description of a Positive Mediation

I represented a courier driver in a claim against a self-insured package delivery corporation for lower extremity injury. The employer accepted the claim as compensable and afforded my client reasonable and necessary accident-related medical services. My client's average weekly wage was $680.42. Over the course of the claim, my client developed a variety of additional complaints, including back pain, headaches and other assorted complaints. Although the employer secured a medical opinion that my client's injury was limited solely to her lower extremity injury, the employer did provide treatment for her back pain, including chronic pain services.

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A Second Look at Mediation

My client underwent a fusion to her foot, and received a fifteen percent (15%) permanent partial impairment rating to her foot, with appropriate restrictions, which prevented her from returning to her job as a courier driver. My client was terminated by the employer.

My client was deposed. Thereafter, I evaluated her claim for 9 (i) settlement purposes, and computed a 9 (i) value in the range of $35,000 to $55,000. I secured settlement authority from my client, and proposed a 9 (i) settlement offer of $75,000. The employer responded with a $15,000 9 (i) counter-offer.

Next, I discussed the possibility of mediation with my client. We considered the risks and benefits of trial. We decided to invite the employer to participate in Kids' Chance Mediation.

The parties selected a mediator, and each party provided the mediator with a Confidential Memorandum of Mediation.

Mediation began with the respective attorneys making opening statements to the mediator. Then, the mediator separated the parties into different rooms. The mediator placed the employer's counsel in a room with a telephone in order to allow counsel to stay in constant contact with his client.

My client and I explained our position to the mediator. Then, the mediator met privately with the employer's counsel. Negotiations began slowly; however, when I reminded the mediator that my client had restrictions not only attributable to her lower extremity injury but also to her lower back injury, the employer dramatically increased its offer.

We concluded the mediation with an amicable 9 (i) settlement of $50,000. As previously mentioned, this settlement figure is at the high end of the value range that I had originally discussed with my client. Mediation not only allowed an amicable settlement, but it allowed my client to receive her funds much more expeditiously than she would have been able to realize them had we gone to trial. Moreover, although the preparation of the Confidential Memorandum of Mediation by employer's counsel and his preparation for and attendance at mediation took time for which the counsel was paid, it was likely less time than the employer would have paid for counsel to prepare for and conduct the trial.

MEDIATION FROM THE PERSPECTIVE OF AN ADMINISTRATIVE JUDGE

How do I love mediation? Let me count the ways.

1. As an Administrative Judge, I encourage mediation because it facilitates the resolution of claims, controverted and noncontroverted. The Commission and the Supreme Court have explicitly stated that the purpose of the Workers' Compensation Act is to facilitate the payment of compensation without delay and without unnecessary cost. *H. C. Moody & Sons v. Dedeaux,* 79 So.2d 225 (Miss.

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1955). Mediation furthers this purpose by opening a dialogue that can end litigation more quickly and more efficiently than either the Commission or the appellate courts.

2. Mediation allows the parties to control the outcome of the litigation. The parties, not counsel, not the Administrative Judge, not the Commission, not the appellate courts, choose a mediator, control the process, and create an appropriate remedy. "Customer satisfaction" is thereby enhanced in both the means and the end.

3. Mediation is user-friendly. The parties' easy access to a mediation system that is cheap to use, their flexibility to personalize the process and fashion an innovative remedy, and their ability to deduct mediation expenses as a charitable donation to the Kids' Chance Scholarship Fund, all commend mediation as the forum of choice for the savvy litigator.

4. Not incidentally, the Administrative Judges' dockets are "enhanced" by mediation. Every case that is successfully mediated is a case that will not require an evidentiary hearing and, more importantly, an order. Because each of the Administrative Judges *a.* carries approximately 600 cases on their respective dockets, *b.* rides a circuit comprising one-fourth of the state, *c.* schedules hearings five days a week, three of which are spent on the road, 52 weeks of the year (barring personal leave), *d.* do not have law clerks, and *e.* share one secretary, we are delighted when a case can be resolved without a hearing.

5. Mediation will streamline the proof in a case that does not settle, thereby making the evidentiary hearing more effective and efficient. Even if the parties do not settle on the day of or shortly after mediation, they can use mediation to narrow the issues that remain in controversy, fine-tune their evidentiary needs and trial strategy, fill in any gaps that remain in the proof before the hearing, and "try on" their case in terms of strengths and weaknesses for the mediator and for the other side. The end result is a case more likely to settle on or before the day of the evidentiary hearing or, at a minimum, a case whose presentation of the proof at the evidentiary hearing is more likely to be precise and complete. Either product greatly benefits the parties and the Administrative Judge.

What We've Found

For the most part, we have found that the parties who have engaged in the project have found it freeing. Truly, the resolution is one about which they can say: "*We did it ourselves*!" For more information on the Kids' Chance of Mississippi Mediation Project, please contact Commissioner Lydia Quarles, Administrative Judge Deneise Turner Lott, Tommy Dulin, Esquire, or any officer of the Workers' Compensation Section of The Mississippi Bar. ■

1 The project's rules require that both claimant and employer and carrier counsel agree on the mediator. Thus the employer and carrier can always insure that the mediator is defense-oriented.

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