



KIDS' CHANCE OF MISSISSIPPI SCHOLARSHIP FUND

PILOT MEDIATION PROJECT

Sponsored by the Mediation Project *Ad Hoc* Committee
of the Workers' Compensation Section
of The Mississippi Bar

The Honorable Deneise Turner Lott
Tommy Dulin, Esquire
co-chairs

GENERAL INFORMATION REGARDING MEDIATION*

What is mediation and how does it work?

Mediation is a popular way to resolve claims as quickly and efficiently as possible. It is simple and straightforward. At a mediation session, all sides to a dispute sit down with an impartial person, the mediator, to attempt to reach a mutually acceptable settlement. There are no formal court procedures or rules of evidence, and there is very little preparation involved. Unlike a judge or arbitrator, the mediator has no authority to render a decision or force the parties to accept a settlement. However mediation generally will result in a final settlement.

What types of disputes can be resolved through mediation?

All issues can be resolved through mediation. It does not matter whether compensability is admitted or hotly contested, whether the claimant has filed a Petition to Controvert or the claim is uncontroverted, or whether the case involves a few thousand dollars or millions of dollars.

Why mediate?

Settle disputes now. Most cases will settle prior to trial. So the real issue is not if a case will settle, but when. A mediation session has the effect of bringing settlement negotiations to a head much quicker than if the case proceeds to a hearing. Also, proposing mediation is an excellent way to get the settlement discussion moving.

Save money. An early settlement naturally saves litigation expenses and other costs related to the production of proof.

Maintain control. Mediation differs from arbitration or trial because the mediator does not make a decision. No one is ever forced to accept any settlement offer. When a party agrees to mediate a dispute, that party agrees only to attend and attempt to negotiate a settlement. Consequently, the parties are in full control of the outcome.

Improve everyone's understanding. The mediation session is designed to educate everyone about the legal and factual issues involved, and this can be particularly helpful to people who are unfamiliar with litigation or claims.

Informally explore settlement options. Because of the confidential nature of the private caucus, the mediator can explore settlement options without exposing a party's final position. This can remove the "posturing" that takes place during negotiations.

Organize multiple party negotiations. The mediator can play a major role in simply organizing the discussions. The mediator can work closely and confidentially with each side to explore settlement possibilities and put a settlement package together.

Preserve continuing relationships. Mediation is particularly appropriate in situations where the disputing parties will be working together after the dispute is resolved. Mediation allows the parties to stay on the best terms possible by doing everything they can to settle their dispute as quickly and easily as possible.

How is mediation different from arbitration and judicial settlement conferences?

Arbitration involves the presentation of evidence to an arbitrator for a legally binding decision. Arbitration can be effective, but it is more time consuming and expensive than a mediation, and the parties give up control of the outcome (although high-low agreements can be used to provide a range for the decision).

A judicial settlement conference is also a valid process. Typically parties submit informal evidence to a judge for an advisory decision. However judicial settlement conferences generally do not occur until days or hours before the case is ready to be heard on the merits. The hearing may be several weeks or months after the case is actually ready to be heard and the case has been placed in "Awaiting Hearing" status.

Since almost every case settles anyway, the role of the neutral should be to help parties move toward settlement.

What takes place at the mediation session?

All sides to a dispute are present at a mediation session. For example, the mediator, the claimant, the claimant's attorney, the employer representative, the attorney representing the employer/carrier, and perhaps the adjuster will attend the mediation session.

All parties, counsel, and the mediator first meet in a joint session. After introductory remarks by the mediator and the signing of the Agreement to Mediate, each side is given the opportunity to explain its position. These short and informal opening statements, typically no more than ten minutes long, are a starting point to gaining an understanding of the case. Opening statements may also contain any stipulations reached by the parties.

After the joint session, the mediator will meet with each side individually. These separate meetings, called caucuses, are confidential. In each caucus the mediator will discuss the risks of the case – best and worst outcomes, quality of evidence, and the costs of litigation. The mediator will also explore possible settlement. It is common for the mediator to go back and forth between the parties for a number of caucuses.

What if the case doesn't settle?

Most cases will settle at the mediation session or shortly thereafter. If a settlement is not reached at the mediation session, the mediator may elect to have a second session. If a full settlement is not reached, the parties are free to pursue other options such as arbitration or litigation. Also,

if a mediation is unsuccessful, the mediator is prohibited from divulging any information regarding the merits of the case or the mediation process with any Administrative Judge or Commissioner.

Preparation is simple but crucial to the success of a mediation session.

Preparing for a mediation session is much easier than preparing for arbitration or a trial.

1. Prehearing Statements are not required to mediate a case, although the parties may furnish the mediator with the most recent Prehearing Statements that have been filed in the case.
2. Prior to the mediation session, all parties need to have obtained sufficient information to make settlement decisions. Please make other parties aware of any information you need prior to the mediation session. Most mediations will be most effective if they are scheduled as soon as possible after the last doctor's deposition, as this information is generally needed to assess the value of a case.
3. A critical element of a successful mediation is that each side must be represented by a person with adequate authority to settle the case.
4. A ten-minute opening statement should be prepared. Keep in mind that this is an excellent opportunity to talk directly to the other side. Representatives should consider whether their client should participate in this presentation, i.e., how the injury affected him/her.
5. Obviously, you need to be prepared to discuss the details of your case, including specific medical records or testimony that support your evaluation of the case. More than any other factor, the success of mediation depends on the degree of preparation by the parties.

* This General Information section, the Agreement to Mediate, and the Mediation Procedures are modeled on publications of United States Arbitration & Mediation, Incorporated.

MEDIATION FEE SCHEDULE **OF THE WORKERS' COMPENSATION SECTION**

1. For purposes of the Mediation Program sponsored by the Workers' Compensation Section, mediators are those attorneys with at least five years of workers' compensation experience who have undergone mediation training as provided by the Workers' Compensation Section of the Mississippi Bar.

2. Mediation fees shall be at a rate of \$200.00 per hour; however, the mediator shall contribute \$50.00 for every hour to the Kids' Chance Scholarship Fund. The Workers' Compensation Section has established this fund to subsidize the education of children whose parent is deceased or permanently totally disabled because of a work-connected injury.

If the mediation session exceeds sixty (60) minutes, an additional \$200.00 shall be charged per hour, regardless of whether the full sixty (60) minutes is utilized. Time keeping shall be at the discretion of the mediator.

Counsel shall remit the check for payment of mediation services to the mediator at the mediation session. The mediator shall deposit his portion of the fee and promptly remit a check(s) which totals \$50.00 for every hour mediated, made payable to Spiller Burnham

McLeod of the Mississippi Bar; 643 North State Street; POB 2168 Jackson, MS 39225-2168; (601) 948-4471. The mediator shall also, at the time of remitting checks, forward to Ms. McLeod the document captioned "Conclusion of Mediation Services".

MEDIATION PROCEDURES OF THE AND WORKERS' COMPENSATION SECTION*

1. Agreement to Mediate Parties to the mediation process shall follow the following procedures. Mediation is a voluntary process where the parties to a dispute, with the help of an impartial third-party (the mediator), attempt to negotiate a mutually satisfactory solution. Mediation involves no formal court procedures or rules of evidence, and the mediator does not have the power or authority to render a binding decision or force the parties to accept a settlement.

Mediators are those attorneys with at least five years of workers' compensation experience who have undergone mediation training as provided by the Workers' Compensation Section of the Mississippi Bar.

Mediation is restricted to those cases in which (1) all parties agree to mediate and (2) all parties are represented by legal counsel at all times during the mediation process.

2. Selecting a Mediator To begin the mediation process, counsel for the parties shall select a mediator from a list approved by Workers' Compensation Section of the Mississippi Bar.

The parties will then contact the prospective mediator in writing or by joint telephone conference and request mediation services. Ex parte contact with the mediator regarding the merits of a case is prohibited prior to mediation.

No mediator shall have any financial or personal interest in the result of the mediation. Prior to agreeing to serve as a mediator, the prospective mediator shall disclose any circumstances likely to create a presumption of bias or interest in the outcome of the proceedings or to prevent a prompt meeting with the parties. Should either party thereafter object to such mediator, the parties shall select a new mediator. Parties recognize that mediators are not agents or employees of the Workers' Compensation Section or the Mississippi Bar.

3. Scheduling Once the mediator agrees to mediate a dispute, the mediator will work with the parties to establish the time and location of a mediation session. Mediations may be held at any mutually agreeable location, including the Commission, the local courthouse or the mediator's office. Additional mediation sessions may be scheduled as agreed by the parties and the mediator.

4. Conduct of Mediation Sessions All parties to a controverted claim and their legal counsel must attend the mediation, including those persons having actual authority to settle. If those persons having authority to settle cannot appear at the mediation session, such persons must be available and accessible by telephone during the entire mediation session for the purpose of approving any settlement agreement reached by the parties. The only exception to this rule is in case of an employer who is represented by a board, such as the State Board of

Education. In these exceptional cases, the employer's counsel's recommendation to settle the case per the parties' agreement shall be sufficient.

At the mediation session, the parties shall be prepared to discuss all contested issues. Such discussions may include relevant documents and a description of witnesses and other evidence. For more complex cases, the mediator may ask the parties for written materials or information in advance of the mediation session.

At the mediation session(s), the mediator will conduct an orderly settlement negotiation. The mediator may conduct separate meetings (caucuses) with each party in order to improve the mediator's understanding of the respective positions of each party.

5. Confidentiality The parties recognize that mediation proceedings are settlement negotiations and that all offers, promises, conduct, and statements, whether written or oral, made in the course of the proceedings are inadmissible in any litigation or arbitration of their dispute, to the extent allowed by law. The parties agree to not subpoena or otherwise require the mediator to testify or produce records, notes or work product in any future proceedings, and no record or stenographic record will be made of the mediation session. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or nondiscoverable as a result of its use in the mediation session. Any information disclosed to the mediator in a private caucus shall remain confidential unless the party agrees that it may be disclosed. If the mediation is unsuccessful, the mediator shall not divulge any information regarding the merits of the case or the mediation process to an Administrative Judge or Commissioner.

6. A Mediator Does Not Act as Legal Counsel or Expert. All parties recognize that at the mediation session(s) and at every other point of the proceedings,

- the mediator will not be a legal advisor or legal representative for any party;
- the mediator will not have a duty to assert, analyze or protect legal rights or obligations including lien rights, statutes of limitation, or any other time limit or claim requirement;
- the mediator does not have a duty to make an independent expert analysis of the situation or raise issues not raised by the parties, or determine that additional necessary parties should participate in the mediation; and
- the mediator cannot guarantee that the mediation session will result in a settlement.

Mediators are entitled to an immunity from suit.

7. Termination The mediation shall be terminated in any of the following circumstances.

- (a) by the execution of a "Memorandum Of Settlement Agreement" by the parties;
- (b) by a declaration by the mediator to the effect that, in the judgment of the mediator, further efforts at mediation are no longer worthwhile, or
- (c) by a declaration by any party to the effect that the mediation proceedings are terminated.

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

These Model Standards of Conduct for Mediators are based on The Model Standards promulgated and approved by the American Arbitration Association, the Litigation Section and

the Dispute Resolution Section of the American Bar Association, and the Society of Professionals in Dispute Resolution.

Preface

The model standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

Mediation is a process in which an impartial third party – a mediator – facilitates the resolution of a dispute by promoting voluntary agreement or self-determination by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement. These standards give meaning to this definition of mediation.

Self-determination

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

COMMENTS:

* The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.

* A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

Impartiality

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which he or she can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

COMMENTS:

* A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.

* A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

Conflict of Interest

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

COMMENTS:

* A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.

Confidentiality

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties unless required by law or other public policy.

COMMENTS:

* If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.

* Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.

Quality of the Process

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

COMMENTS:

* A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.

* Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.

* The presence or absence of persons at a mediation depends on the agreement of the parties and mediator. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.

* The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professionals.

* A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.

* A mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.

* Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

Public Communication

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

COMMENTS:

* It is imperative that communication with the public educate and instill confidence in the process.

* In an advertisement or other communication to the public, a mediator may make reference to meeting state, national or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

* A mediator shall not accept a fee for referral of a matter to any other person.

* Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation: to make mediation accessible to those who would like to use it, to correct abuses, and to improve their professional skills and abilities.

NOTICE OF MEDIATION

MWCC No. _____

Claimant
vs.
Employer
and
Carrier

By agreement of all parties, mediation will be:

Date and time: _____

Location: _____

Mediator: _____

Fees: _____

To assure every opportunity to achieve a mediated settlement, **all parties** to a claim and their legal counsel **must attend the mediation, including those persons having actual authority to settle. If those persons having authority to settle cannot appear at the mediation session, such persons must be available and accessible by telephone during the entire mediation session** for the purpose of approving any settlement agreement reached by the parties. Also, all parties should have exchanged pertinent documentation and reports before the mediation session along with a settlement demand.

cc: mediator defense attorney employer representative
claimant claimant's attorney adjuster (if attending)
any other person whose attendance at the mediation is required/requested

AGREEMENT TO MEDIATE*

We, the undersigned parties, hereby agree to participate in mediated settlement negotiations in the _____ following _____ matter:

in accordance with the following terms:

MEDIATION PROCEDURES: The mediation will be administered in accordance with the Mediation Procedures of the Workers' Compensation Section of the Mississippi Bar. All parties recognize that mediation is a voluntary settlement negotiation, that the mediator is not a judge and has no authority to compel the parties to settle, and that those persons with authority to settle must be present or available and accessible by telephone during the entire mediation session for the purpose of approving any settlement agreement reached by the parties.

MEDIATOR: The parties agree that _____ will be the mediator. The parties acknowledge that the mediator is not an agent or employee of the Workers' Compensation Section or the Mississippi Bar.

FEES: Any party who is represented by an attorney who is on the list approved by The Administrative Law and Workers' Compensation Section of the Mississippi Bar shall receive free mediation services for every case that he/she mediates. Any party who is represented by an attorney who is not a Section-approved mediator shall pay \$150.00 per mediation to the Kids' Chance Scholarship Fund. If the mediation session exceeds sixty (60) minutes, an additional \$150.00 shall be charged per hour, regardless of whether the full sixty (60) minutes is utilized. Time keeping shall be at the discretion of the mediator. Counsel shall remit the check for payment of mediation services to the mediator at the mediation session before mediation shall begin.

CONSULTING WITH ATTORNEYS: All parties are encouraged to consult with their attorneys before and during the mediation and before finalizing a settlement. The parties acknowledge that the mediator will not provide legal advice or counsel.

CAUCUSES: The mediator will conduct brief private conferences with each of the parties. These caucuses serve several purposes and are where the real work of the mediation is done and where movement toward settlement is made. Information discussed therein is confidential unless a party authorizes the mediator to disclose it to the other parties.

INADMISSIBILITY: The parties acknowledge that mediation is settlement negotiations which are inadmissible as evidence. The parties agree not to subpoena or otherwise require the mediator to testify or produce records or notes in any future proceeding.

Date: _____

Signatures of Parties:

MEMORANDUM OF SETTLEMENT AGREEMENT

MWCC NO.

CASE CAPTION: _____

The above referenced matter was mediated on the _____ day of _____, 200____, and a settlement was reached. The terms are as follows:

The parties hereto acknowledge that each has the authority to execute this document to be fully binding on behalf of the person or entity indicated.

The parties further acknowledge and agree that by executing this agreement they are binding themselves to the agreement, subject to final approval by the Mississippi Workers' Compensation Commission or the appropriate court of law. They further acknowledge and agree that, within a reasonable period of time hereafter, they will enter into a formal settlement agreement that will set forth in more detail the terms of the agreement, including the amount of any and all payments and an agreement to release, discharge, and forever hold harmless from any and all claims arising from or related to the injury or injuries which are the subject matter of this case.

Done and signed in _____, Mississippi, this the _____ day of _____, 200_____.

_____, attorney of record for claimant

_____, attorney of record for
employer/carrier

_____, attorney of record for

_____, attorney of record for

CHECKLIST FOR MEDIATORS

- I Initial Joint Session
 - A. Mediator reads "Agreement To Mediate" in presence of all parties.
 - B. Counsel for all parties sign "Agreement To Mediate."
 - C. Mediator hears opening statements of counsel (10 - 15 minutes each).

- II Private Caucuses: Mediator conducts private caucuses with parties.

- III. Final Joint Session
 - A. Mediator confirms status: settlement or inability to settle.
 - B. Parties complete and sign memorandum of settlement in mediator's presence if agreement has been reached.

POST MEDIATION: Mediator receives mediation fees and forwards to the Mississippi Bar; ATTN: Ms. Spiller Burnham McLeod; 643 North State St. POB 2168, Jackson, MS 39225-2168 (601) 948-4471. *Mediator also forwards to Spiller Burnham McLeod a "Conclusion of Mediation" form.*

CONCLUSION OF MEDIATION FORM

I, _____ (MEDIATOR) have completed the mediation of
_____ v. _____,
MWCC No. _____.

This mediation was [] SUCCESSFUL
[] UNSUCCESSFUL.

I charged \$_____ for this mediation, representing _____ hours, and enclose
\$_____ in a check made payable to the Kids' Chance Scholarship Fund.

DATE: _____