



Workers' Compensation Seminar

Private Mediation: A New Alternative for Workers' Compensation
Settlements

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Columbus, OH

Ohio Academy of Justice Seminar

Mediation of Ohio Workers' Compensation Claims

Friday, December 2, 2011 - Columbus, Ohio

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I Ohio Rev. Code §4123.65

This allows for parties to settle their workers' compensation claim concerning one or more of the claims, one or more parts of the claim, or the compensation or benefits pertaining to either or any combination thereof.

II Ohio Rev. Code §2710 - Uniform Mediation Act (Effective October 29, 2005)

2701.01 (A) - Mediation: means any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. Applies to any court ordered or administrative agency ordered mediation, voluntary agreement between parties.

III Ohio Rev. Code §2710.03 - Mediation communications are privileged.

- (A) Communications in a mediation are not subject to discovery or admissible as evidence in a proceeding unless waived. Privilege extends to the parties as well as to the mediator.
- (B) See also Evidence Rule 408.
- (C) The privilege may be waived by the mediator and may be waived in a record or orally during a proceeding if it is expressly waived by all mediation parties.
- (D) The privilege does not extend to the situation where a person intentionally uses a mediation to plan, attempt or commit a crime or conceal an ongoing crime or ongoing criminal activity.
- (E) See also Ohio Rev. Code §2710.05 for additional exceptions.

IV Ohio Rev. Code §2710.06 - Communication or disclosure by a mediator.

- (A) A mediator is prohibited from making a report, assessment, evaluation, recommendation, finding or other communication regarding the mediation to the court, department agency, or officer of the state, or its political subdivisions that may make a ruling on the dispute that is the subject of the mediation.

(B) A mediator may disclose any of the following:

- (1) Whether the mediation has occurred or is terminated;
- (2) Whether settlement was reached;
- (3) Mediation communication as permitted by Ohio Rev. Code §2710.07;
- (4) Mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual.
- (5) Communication made in violation shall not be considered by a court administrative agency or arbitrators.

V Ohio Rev. Code §2710.07 - Mediation communications are confidential to the extent agreed by the parties or provided by other sections of the Revised Code.

VI Ohio Rev. Code §2710.08 - Impartiality of the mediator

(A) An individual who is requested to serve as a mediator shall do both of the following:

- (1) Make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator including a financial or personal interest in the outcome of the mediation and an existing or past relationship with the mediation party or foreseeable participant in the mediation.
- (2) Disclose any known fact described in division A1 of the section to the mediation parties as soon as practical and before accepting a mediation.

(B) At the request of a mediation party a mediator shall disclose the mediators qualifications, the mediated dispute, and a mediator shall be impartial. The mediator does not have to have special qualifications by background or profession.

(C) The purpose of Ohio Rev. Code §2710 was to extend the mediation privilege statute and broaden the protection of the confidentiality of the mediation. That is the lynch pin of why a mediation is successful. If the parties believe that what occurs in the session will remain in the room and will be kept confidential, they are more likely to put a better effort into resolving their dispute and be more willing to brainstorm solutions that may resolve the conflict.

VII Why have mediation?

The simple answer is to bring resolution to a case. Mediations would seem to work best with self-insured employers who have a more direct control over the process. With the Bureau of Workers' Compensation there are too many people involved and too many layers and no one seems to have the ultimate authority, other than the amorphous settlement committee. If the state mind set would change, I think it might be a valuable process. It would require face-to-face discussions with an appropriate person with authority to settle the case and there would have to be a change from the current take it or leave it position.

VIII Who should attend a mediation?

Obviously, motivated parties to try to resolve a dispute. There must be an explanation as to the options for settlement and a mediator can bring another voice to explain the realities of workers' compensation to both clients and employers.

IX How to select a mediator?

- (A) There are many choices which are available.
- (1) Judicial Alternatives.
 - (2) Private attorneys.
 - (3) Columbus Bar Association has a number of listings of mediators. Franklin County Court of Common Pleas has its own list of mediators in the court house if the matter in controversy is in excess of \$50,000.
 - (4) The Court of Appeals has David Doyle.
 - (5) The Supreme Court has its own settlement coordinator.
- (B) What is the process of mediation?
- (1) Clearly identify the parties.
 - (2) Clearly identify the mediator's role.
 - Impartiality
 - Non-binding
 - Non decisive on the merits or the relative legal positions of the parties

- (C) Both the mediator and the attorneys must have a good grasp of the case.
- (D) What are the issues?
 - (1) Is there a Medicare Set Aside Trust? That should be resolved beforehand. In other words, the workup for the MSA should be done before mediation is approached. In bigger cases this becomes the source of breakdown. Consequently, the money must be established as to what the MSA is going to require prior to mediation.
 - (2) Are the parties talking about same case? The question is whether or not the parties are taking positions which are outside the realm of workers' comp reality.
 - (3) What is the value of the case?
 - (4) Is there a requirement for job restoration?
 - (5) Are the expectations unreasonable?
 - (6) Care should be taken as to what is being asked or what should be accomplished.
 - (7) What is the line in the sand position for the parties?

X Breaking log jams

- (A) Attorneys fees
- (B) Can the employer make one final call?
- (C) Are there emotions preventing resolution?

MEDIATION WORKSHEET

Employer:
Claimant:
Claim No.

ISSUES:

1. Mandamus Court Case

Total loss of use
Claimant value: \$135,000
Employer value: -\$20,000 overpayment
2. Psychological condition Court Case

Return to baseline
3. Resumption of temporary total - March 2, 2011

TT termination
MMI Psychological March 1, 2011
MMI Physical April 14, 2010
Claimant Value: \$54,604
Employer Value: zero
International Harvester case 2008-Ohio-4494
4. PPD award

Claimant Value: 60%, if total loss equals \$30,000
Employer Value: 20% equals \$7000
5. Wage Loss

Must be good faith job search
6. PTD

Claimant Value: \$209,482 (50% reduction at present value)
Employer Value: zero
Young, Educated, no effort at rehabilitation
7. MSA Value

Any workup