



Reframe & Resolve: The Alternative Dispute Resolution Toolbox

Chairperson: Phyllis Phillips,
Esq.

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Mediation: The Better Alternative for Resolving Tough Cases

Phyllis G. Phillips, Esq.

Mediation Works, LLC

Williston, VT

Phyllis@mediationworksvt.com



Mediation: Why It's Different

Litigation:

- Expensive
- Time-consuming
- Public proceeding
- Narrow focus on disputed issues
- Litigants have limited control over process or result
- Typically one winner, one loser
- Finality guaranteed (after appeals exhausted)

Mediation:

- Quicker and less expensive, but less information sharing
- Private, confidential process
- Global focus on litigants' needs and interests, not just their legal positions
- Litigants control both process and result
- If successful, all litigants are satisfied
- May end without agreement

Mediation: Why It's Better

- Mediation affords opportunity for litigants to vent frustrations and feelings
- As informed neutral, mediator performs “reality testing” function as to both facts and legal theories
- Mediation allows for more creative problem solving
- Mediated settlement addresses litigants’ underlying needs and interests, and eliminates the risk of a bad litigation outcome
 - Injured worker – regain control over future medical care, vocational path, and financial decision-making
 - Insurance company/employer – close claim; eliminate (indeterminate) future exposure
- Even if unsuccessful, mediation provides litigants with useful information as to settlement value

Three Tips For a Successful Mediation:

- **Be prepared.**
 - Settlement demand
 - Adjuster authority
 - Client education
- **Be realistic.**
 - “Insulting” demands/offers set a tone that is not conducive to settlement
 - Resist “confirmation bias”
- **Be patient.**
 - “Mediation is a process, not an event.”



Mediation: The Better Alternative for Resolving Tough Cases

Why is Mediation Better?

Why is Mediation Different?



Narrow The Issues: The Pre-Hearing Conference

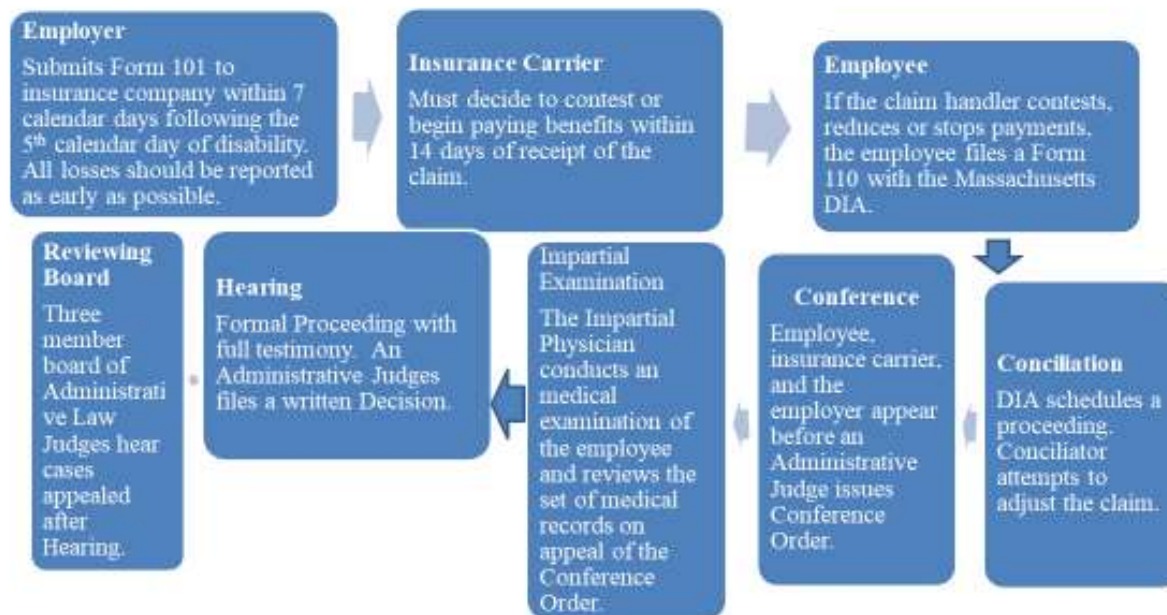
Senior Judge Omar Hernandez

About Us

Massachusetts Department of Industrial Accidents

- The Department of Industrial Accidents (DIA) is the agency responsible for administering the workers' compensation law in Massachusetts.
- With 50,000 to 60,000 workers' compensation claims being filed each year in Massachusetts, the DIA's twenty-seven Administrative Judges adjudicate 10,000 to 12,000 disputed cases annually.
- The Massachusetts Workers' Compensation system is in place to make sure that workers are protected by insurance if they are injured on the job or contract a work-related illness.

Claim Adjudication Process for Massachusetts Workers' Compensation Claim



Pre-Hearing Memorandum and Conference

The parties are required to mark-up the Pre-Hearing Conference with the presiding Administrative Judge **upon receipt of the 11A report**. The parties must file, mark-up and argue all motions in advance of the Pre-Hearing Conference if practicable. If the parties need to use the Pre-Hearing Conference to argue motions, the moving party must ensure that the motion(s) are filed well in advance so that the responding party has sufficient time to file an opposition, if so desired.

The parties are required to submit their Joint Pre-Hearing Memorandum at least **5 business days BEFORE** the Pre-Hearing Conference.

At the time of the Pre-Hearing Conference, the parties shall submit the Joint Pre-Hearing Memorandum and be prepared to discuss the status of negotiations, identifying claims/defenses, stipulations, all motions and the identification, anticipated testimony and time needed for testimony of each expected witness.

Joint Pre-Hearing Memorandum and Pre-Hearing Conference

The Pre-Hearing Conference must occur no later than **10 business days BEFORE** the scheduled Hearing date.

If the parties fail to timely submit a Joint Pre-Hearing Memorandum or schedule a Pre-Hearing Conference *in accordance with Administrative Bulletin 10*, the scheduled Hearing date will become a **MANDATORY** Pre-Hearing Conference and the parties will forfeit one of their three reschedule requests.

The Administrative Judge may reschedule the Hearing back into the queue (or provide a new date if available) if the parties fail to adhere to the aforementioned timeline.

Mediations

The employee and the adjuster are **required** to attend the virtual Mediation.

If the adjuster, for good cause, cannot be present, he or she shall be readily available by phone. This must be confirmed, in writing, by defense counsel.

If the employer plays a major role in whether a case can be settled, an employer representative must be present for the mediation.

Employee counsel must make a settlement demand in advance of the mediation.

Defense counsel must come to the mediation with settlement authority. If the parties are so far apart that settlement appears unlikely (e.g., valuation, liability/no-liability, etc.), please advise the mediating judge in advance so that a conference call can be scheduled to evaluate whether mediation is appropriate.

Parties must submit to the mediating judge, via email, a confidential mediation memorandum which outlines their perspective of the case as well as outstanding medical and legal issues. The mediation memorandum should also provide a history of prior negotiations, i.e., demands, offers, accepted/unaccepted injuries, etc.

The mediation memorandum is due forty-eight hours before the scheduled date *of* the mediation, or it will be cancelled.

Employee's counsel and defense counsel are *required* to share the virtual link to the Mediation with the employee and the adjuster/employer, respectively.

Employee's counsel and defense counsel shall make the necessary arrangements to ensure that the employee and the adjuster/employer have the proper audio and video connection to join the Mediation.

The parties are responsible to arrange the mediation via a virtual platform and send an email link to the mediating judge within 2 days of the scheduled date.

AGREEMENT TO PARTICIPATE IN MEDIATION

We, the undersigned parties, hereby agree to have mediation services provided by in accordance with the following terms:

VOLUNTARY PROCESS: We understand mediation is a voluntary process and the parties retain their right to a judicial or administrative hearing should the participants decide to withdraw before an agreement is reached.

CONFIDENTIALITY: We understand the mediator cannot be subpoenaed to testify or produce records or work product in any future judicial or administrative proceedings relating to this matter (M.G.L.c. 233 § 23C). We also agree to keep confidential all information discussed during the mediation. Notwithstanding, the mediator or may disclose to appropriate authorities' information obtained during the mediation concerning abuse or the planned commission of a crime.

ROLE OF MEDIATOR: We understand the mediator is not acting as a judge and has no decision-making authority. The mediator's role is to assist the parties in their effort to reach their own mutually beneficial agreement.

CONSULTING WITH COUNSEL: We, the parties, understand it not the mediator's role to give legal advice, counsel, or to analyze either party's legal rights. Unrepresented parties are encouraged to review their legal rights and obligations before finalizing any mediated agreement.

Employee _____
(Signature) (Print Name)

Employee
Counsel _____
(Signature) (Print Name)

Insurer _____
(Signature) (Print Name)

Insurer
Counsel _____
(Signature) (Print Name)

Employer _____
(Signature) (Print Name)

Mediator _____
(Signature) (Print Name)

Date: _____ DIA #: _____

JOINT PRE-HEARING MEMORANDUM

Board #: _____.

The Employee is _____.

The Employer is _____.

The Insurer/Self-Insurer is _____.

The Employee is represented by Attorney _____.

The Insurer/Self-Insurer is represented by Attorney _____.

Will there be an interpreter?

Has there been any prior litigation?

- Prior Hearing Decision?
- Reviewing Board Decision?

Employee's Statement of the Case:

Insurer's/Self-Insurer's Statement of the Case:

PROCEDURAL HISTORY

Employee's claim: _____ Insurer's/Self-Insurer's complaint: _____

The resulting Conference Order, dated _____:

_____ Denied Employee's claim

_____ Ordered **Sec. 34** (Temporary Total Incapacity) benefits at the weekly rate of \$ _____
based upon an AWW of \$ _____ from _____ to _____.

_____ Ordered **Sec. 35** (Temporary Partial Incapacity) benefits at the [*maximum*] weekly rate of
\$ _____ based upon an AWW of \$ _____ [*and an E/C of _____,*] from
_____ to _____.

_____ Ordered **Sec. 34A** (Permanent Total Incapacity) benefits at the weekly rate of \$ _____
based upon an AWW of \$ _____ from _____ to _____.

_____ Denied Insurer's/Self-Insurer's Complaint to Terminate EE's benefits

_____ Denied Insurer's/Self-Insurer's Complaint to Modify EE's benefits

_____ Allowed Insurer's/Self-Insurer's Complaint to modify Sec. (34/35/34A) benefits to the weekly
rate of \$ _____ beginning on _____ and (continuing / ending on _____)

Which parties appeal that conference order?

CLAIMS, DEFENSES & ISSUES:

The Employee makes the following claims:

_____ Section 34, temporary total incapacity benefits from _____ to _____.

_____ Section 34A, permanent and total disability benefits from _____ to _____.

_____ Section 35, partial incapacity benefits from _____ to _____ at a weekly benefit rate of _____, and from _____ to _____ at a weekly benefit rate of _____;

_____ Section 35A, dependency benefits.

_____ Section 13 and 30, medical care benefits.

_____ Section 36, permanent injury benefits (Reserved).

_____ Section 50, appropriate interest.

_____ Section 51, natural increase in wage benefits.

_____ Section 28, serious and willful misconduct.

_____ Other:

The Insurer/Self-Insurer raises the following defenses and issues:

_____ Denies liability, the occurrence of an industrial injury.

_____ Denies disability and extent of incapacity.

_____ Denies causal relationship between industrial injury and disability.

_____ Denies entitlement to Sec. 13 & 30, medical benefits.

_____ Denies entitlement to Sec. 36 benefits.

_____ Seeks the application of Sec. 1(7A), a *pre-existing condition*, i.e.: _____ and makes an
Offer of Proof pursuant to 452 CMR 1.11(f).

_____ Denies entitlement to Section 51, natural increase in wage benefits.

_____ Denies entitlement to Section 28, serious and willful misconduct.

_____ Other

STIPULATIONS:

The parties have entered the following stipulations:

_____ The Insurer/Self-Insurer _____ has accepted liability for the work injury that occurred on _____.

_____ Employee/Employer relationship existed at all times material to these proceedings.

_____ Periods of indemnity benefits received to date: _____.

_____ Employee's average weekly wage on the date of the injury was _____.

_____ Employee has _____ dependent(s).

_____ Insurer/Self-Insurer has paid Sec. _____ benefits from _____ to _____ and Sec. _____ benefits from _____ to _____.

_____ Insurer's/Self-Insurer's Complaint to Modify, Discontinue or Recoup benefits was filed on _____.

_____ Accepted injuries are: _____
_____.

_____ Unaccepted alleged injuries are: _____.

_____ Other _____
_____.

MEDICAL EVIDENCE:**Section 11A Impartial Medical Report**

The Employee was examined by _____, an _____ dated _____.

Do the parties have any motions relative to the Impartial report of Dr. _____?

Employee's motion: _____

Insurer's/Self-Insurer's motion: _____

Adequacy of the Impartial Medical Report:

The report of Dr. _____ is **adequate**. No evidence from another medical provider will be admitted contradicting this report.

Or:

The report of Dr. _____ is **inadequate** because _____

Or:

The medical issues are **complex** because of the diagnosis, Section 1(7A) requiring findings on pre-existing condition, combination, and 'major' cause opinions. Other: _____

Section 1(7A):

With respect to the offer of proof on 1(7A), Insurer/Self-Insurer counsel shall refer to specific medical opinions and data that support the defense.

Please list the supporting medical opinion: _____

Employee's counsel shall provide a written response with reference to medical records/reports etc. as to why the 1(7A) defense is either faulty/inappropriate or rebutted, i.e. major cause opinion.

Please list written response with supporting medical opinion: _____

DEPOSITIONS:

Parties shall schedule the deposition of any opinion witness prior to commencement of the hearing.

- 1.
- 2.
- 3.

ADDITIONAL MEDICAL RECORDS:

If the medical record is open, the parties shall electronically provide an annotated index with the additional medicals so the Court knows what medicals apply to the various issues in the case, i.e. dates of disability, causation, 1(7A), loss of function with reference to the subsection of 36. The medical documents must be properly bookmarked.

EXHIBITS:

The following Exhibits are admitted into evidence:

Ex. 1 The Statutory Exhibit, the Sec. 11A report dated _____ submitted by Dr.
_____.

Ex. 2 EE's Hearing Memorandum

Ex. 3 EE's Bio Data Sheet, which I mark and admit as if he/she had so testified.

Ex. 4 INS's Hearing Memorandum

EMPLOYEE'S EXHIBITS

Ex. 1 _____

Ex. 2 _____

Ex. 3 _____

Ex. 4 _____

Ex. 5 _____

Ex. 6 _____

INSURER/SELF-INSURER EXHIBITS

Ex. 1 _____

Ex. 2 _____

Ex. 3 _____

Ex. 4 _____

WITNESS LIST

Witness #1: _____

Anticipated Testimony: _____

Witness #2: _____

Anticipated Testimony: _____

Witness #3: _____

Anticipated Testimony: _____

Witness #4: _____

Anticipated Testimony: _____

Witness #5: _____

Anticipated Testimony: _____

Have the attorneys made an effort to resolve the case? _____

Briefly describe what effort has been taken? _____

Have the attorneys tried to resolve this matter via mediation? _____

THE PARTIES AGREE THAT THIS THESE ARE THE ISSUES, STIPULATIONS, WITNESSES AND
EVIDENCE TO BE PRESENTED:

Atty _____ for the Employee

Atty _____ for the Insurer/Self-Insurer