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The Mississippi Bar Workers Compensation Section

# Our Work and Our Clients

## Letter From the Section Chair

Tommy Dulin

My how time flies. I served as Section Chair 1996 – 1997 and that seems so recent to me. To serve a second time as Section Chair is an honor.

We have an exciting year ahead of us. Amanda Alexander and Carlos Moore as well as the members of the Executive Committee have all contributed to Section plans.

Earlier this month, on November 9, 2011, the Section had its first teleseminar. Karl Steinberger spoke on Ethics and his presentation was exceptional. We hope to offer additional CLE opportunities in the upcoming year. Our Section Newsletters are planned as well as Section Listserve. Additional information will be forwarded to members. And Kids' Chance continues to be a major success. We encourage your continued support of the scholarship. Be sure to mark your calendars for the upcoming MWCC Educational Conference on April 18-20, 2012.

As with our last newsletter, this edition again contains several helpful articles, including a "view from the bench" by Administrative Judge Cindy Wilson, and mediation/practice tips from John Jones and Betty Arinder. Thanks to all of those who have contributed; however, we are always looking for volunteers, so please be sure to let Amanda know if you would like to contribute an article for our future newsletters. Have a wonderful and safe holiday season!

Your comments and suggestions are always welcome.

Sincerely,

Tommy Dulin

**Special points of interest:**

- Mediation Magic
- "One Click, That's It!"
- Mediations on Mediation
- Calendar of Events

## View from the Employer/Carrier:

# *MEDIATION MAGIC*

## *By: Betty Arinder, Esq.*

When we begin our mediation training and practice, we often hear (and speak) of the magic of mediation. When it works, it truly is wondrous. It's easy to see why a mediator feels like a wizard with supernatural powers, enabling lambs to lie down with lions. Based on my experience in the realms of magic and mediation, here is my hope.

Once upon a time, if you could take a cup of water, put it in a box, push a button, and make that water boil — without raising the temperature inside the box — you'd have a miracle on your hands. Ditto for talking to someone, or even seeing them in real time, on the other side of the planet — or even in outer space! How magical is that! And yet, thanks to technology, even the youngest child is jaded by these daily experiences.

My fondest wish is that our social evolution keeps pace with our technological progress, so that the peaceful resolution of disputes will similarly become as commonplace as microwaves and mobile devices. Then it will no longer seem that mystical forces -or card tricks, or magic pennies — are needed to bring together the bitterest of enemies for a common purpose. From Jerry Lazar, a mediator by day and magician by night, who explores the magic of mediation at his blog, Fight Nicely.

Jerry Lazar may be right. A good mediator may be a magician. But, he's not only a magician. He's also part psychic, part counselor, part politician, part reconciliation expert, and always an expert in the field of law involved in the case he is mediating.

Mediation has been an excellent addition to practicing before the Mississippi Workers' Compensation Commission. It allows for cost-effective and time-saving resolution of claims. It can also preserve relationships between the parties, particularly where the claimant still works for the employer. It gives the parties control of the resolution of the case, something they do not have once the case is tried and turned over to the judge for decision.

In my experience, and based upon anecdotal evidence from other workers' compensation defense practitioners, there are generally three types of situations in which mediation is required to resolve cases short of hearing. It has not been my experience that I need mediation to get my clients to the settlement table. Most of my clients insist upon early resolution of claims and welcome the opportunity to settle claims for reasonable amounts. I recommend mediation to my clients in complex cases, most of which have been going on for several years; cases in which the claimant's

Betty Arinder

attorney has indicated that he is having difficulty with client communication or control; and cases in which the other attorney is inexperienced in the workers' compensation area.

In complex, longstanding cases, the parties become lost in the minutiae and entrenched in their positions and often need a mediator to present the case as a whole with all the pros and cons of various settlement scenarios. I just resolved a case in which there were issues as to average weekly wage, the proper periods during which temporary total disability benefits should have been paid, the impairment rating, the restrictions, industrial loss of use, etc. By the time mediation began, the mediator had reviewed the primary treating physician's deposition, other

# MEDIATION MAGIC, continued

relevant documents, and the pre-mediation memo of each attorney. Based upon his review of all the documents submitted by the attorneys, the mediator had calculated what he considered to be the proper average weekly wage and had listed the periods he believed the claimant had been temporarily and totally disabled. Thus, two issues which had stymied the parties were resolved relatively quickly, and the parties moved on to the issues of industrial loss of use and future medical treatment. The case settled for an amount with which both sides could live.

I agree with John Jones that tort reform has had unintended consequences in Mississippi. One of those unintended consequences is the emergence of "new faces" in workers' compensation cases. Gone are the days when it could be assumed that the attorney on each side of the case knew the workers' compensation law and the rules and procedures of the Commission. Gone are the days when the attorneys always knew the attorney on the other side of the case and had a history with the opposing attorney. It is my belief that a combination of tort reform and the economic downturn has resulted in attorneys' practices becoming more generalized and has resulted in more young lawyers' opening solo general law practices. Attorneys who in the past have referred workers' compensation cases to other attorneys for handling are now keeping the cases. Some of these attorneys have never handled a workers' compensation case and have little knowledge of the Mississippi Workers' Compensation Act and the rules and procedures of the Commission, much less the nuances of workers' compensation practice. Few of these attorneys will talk to opposing counsel about the law or procedures involved in workers' compensation practice. Therefore, mediation in cases involving attorneys who are not workers' compensation experts is often beneficial to all involved in the case. The mediator can educate not only the parties, but also the inexperienced attorney, and get the case resolved via settlement.

Sometimes mediation is needed because of a client's mistrust of his/her attorney or of the system in general or because of unrealistic expectations as to recovery on the workers' compensation claim. The advent of the internet and more advertising by attorneys have given some claimants unrealistic expectations with regard to the value of their workers' compensation claims. The client may not understand the limitations of the workers' compensation system. For example, many claimants believe that recovery is or should be available for pain and suffering just as it is in a car wreck case. Even if the limitations of the workers' compensation system are understood, the client may believe that his injury justifies "the maximum" even if the injury is relatively minor. It is often difficult for the attorney to control the unrealistic expectations of a client without the assistance of an experienced mediator. Sometimes a claimant simply wants to tell his story to an unbiased person other than his attorney. Sometimes a claimant does not trust his attorney and needs an unbiased person to reiterate the advice of his attorney. An experienced mediator can serve in these roles. After a claimant tells his story and feels that he has been heard and understood by the mediator, he is ready to listen to the ugly and bad aspects of his case and not rely solely upon the good facts of his claim.

ABOUT THE AUTHOR:

Betty Burton Arinder is a shareholder at Wells Marble Hurst. She handles workers' compensation and litigation in federal and state courts in Mississippi.

Betty was selected to serve as a Kids Chance mediator. She is, by appointment, a past member of the Advisory Council to the Mississippi Workers' Compensation Commission and Past Chair of the Workers' Compensation Section of the Mississippi Bar.

She graduated cum laude with a Bachelor of Arts degree from Millsaps College in 1984, and received her Doctor of Jurisprudence degree from Mississippi College in 1988. Betty was selected as a member of the law school's national trial competition team for 1988.

# View from Claimant's Counsel :
# *"ONE CLICK, THAT'S IT!"*
## *By: John Griffin Jones, Esq.*

John Griffin Jones, Esq.

At a recent seminar, Mississippi's top mediator/arbitrator Larry Latham, Esq., told the participants that in ten years law practice will be completely different than it is now. He was talking about the growth of mediation/arbitration as the "third door to the courthouse" (I'm unclear on the second door; maybe the ladies' room?) that will probably replace the traditional workers' compensation and personal injury litigation models. That change is assisted by the various ways in which technology (e-filings, use of e-discovery on almost every issue, and the ubiquitous e-mail as the primary means for lawyer-to-court and lawyer-to-lawyer communication) is altering law practice, to the extent that paper files are even now the rare exception. Another element presaging sweeping change in the way we practice law are the general limitations, if not overall hostility, emanating from the Legislature and our appellate courts every time they take up a compensation or personal-injury issue. We cannot count on consistent or coherent court rulings based upon precedent and the underlying purposes of our law like we could until the last five or six years. This makes predicting results very difficult, which in turn makes settlement harder. Lastly, the expense of litigating tort cases has become prohibitive to all but the wealthiest firms which can afford to invest substantial money into Daubert-proof experts and engage in the discovery wars that are part of every serious case. The risks are too great for the capped recoveries, the effect of which has taken the most effective weapon in any plaintiff lawyer's quiver — unpredictability of results — away. Tort deform did not have the success it promised in reducing insurance rates in Mississippi or elsewhere, but it achieved exactly what its proponents wanted but couldn't admit: it drove out the plaintiff's bar. Medical malpractice and products liability cases are too expensive to litigate and try, as a result of which these tort theories exist in the most exceptional circumstances, and in the more hopeful world of mediation/arbitration.

On a more personal and practical level, what Latham said about the change that's coming is undeniably true. Think about your law practice ten years ago. Mine was doing correspondence (30 or 40 letters a day) in the morning, talking on the phone to lawyers and clients in the afternoon, and somewhere in there doing discovery and motion practice, dictating pleadings and briefs, occasionally trying a case. I didn't have a computer in my office till 2002. I didn't rely on it as my chief means of communication until 2004. But now it is the medium for all my communications (except with individual clients) as a practicing lawyer. I dictate rarely, then only to communicate with those I can't e-mail and short pleadings. Most transforming of all is that I can do my work wherever I can plug in my computer, which for me in my old age means my own house (e.g., I'm typing this on my home computer on Sunday afternoon), which is a huge change from the old nine-to-five presence that I thought for 20 years was a necessity for a lawyer to stay in the loop when most of his work came on referral from other lawyers. But with all my files accessible to me at any time day or night (a good thing for us intermittent insomniacs), and with the freedom to respond when I want and not waste hours each day on the phone, or, as Mr. Faulkner said when after two months of work he quit the Ole Miss post office, "I am no longer at the beck and call of every son of a bitch with three cents for a stamp!" I am closer to achieving what I'm been struggling for since I came of age as a lawyer: to control my law practice and not let it control me.

All of that is to say this: e-mail has transformed law practice, and the best way to get to me these days is by e-mail. In fact, I will use this article to unfurl my new advertising campaign: Vile click, that's it! iohniones@ifsplawfirm.com."

I think Latham is right on other coming changes. Within the next ten years mediation/arbitration will be the predominant method for resolving civil dis-

# "ONE CLICK, THAT'S IT!," continued

putes. Our appellate courts are clearly for it, enforcing almost every arguable arbitration clause that comes before them. The quite obvious problem with a plaintiff giving away fundamental constitutional rights (to trial by jury and to our "open courts," to name but a few) without informed consent and usually in an adhesion contract that was not negotiated in the least, has not caused our courts a moment's hesitation so far as I can tell. On the other hand, when juries are not trusted and the substantive law is not followed in decision-making, many times the arbitration/mediation process provides the fundamental fairness and level playing field that is the real promise of our civil justice system. A mediator with experience in the areas of law that control resolution, one who knows the admissibility and effect of certain evidence, one who is familiar with the results in terms of jury verdicts and court orders or awards of compensation, is much preferred over an inexperienced judge or magistrate who never tried a personal injury or comp case, even though they benefit from what Latham calls "robe power." Latham mentioned a growing trend for what he called mediation-to-arbitration where the mediator will do all he can to get the parties to agree on a settlement, but if they reach an impasse the parties agree to submit the case to the mediator-turned-arbitrator to pick a number between where the parties left off that will bind the parties and, importantly, resolve the case finally. That sounds promising. So long as the mediator/arbitrator is respected by both sides because of his or her experience and reputation for fairness, and is properly prepared by the lawyers through effective settlement memoranda, the case has a much higher probability of a fair settlement than in any courtroom or chambers. If one party, or (preferably) both, are disappointed at the end of the day (for what good settlement is not based upon compromise of the position of both parties?), each can nonetheless draw comfort from the fact that a respected lawyer with experience actually considered and weighed each factual and legal argument raised. In that sense, it is a much more satisfactory process than what often happens in the courts before overworked judges who've understandably not had the time to review the case in any detail.

Another important factual development was mentioned by Latham that is illusive to plaintiff lawyers but seems to explain a lot about the overall settlement process. Insurance companies and self-insured (including those with high self-insured retentions) tortfeasors have moved to a defense model that is based upon payment of a flat fee for the "service" of defending a case. Often there is a financial disincentive to extended and costly discovery, which is usually a good thing, but it reflects something deeper: a mistrust of their own lawyers. Many times the adjuster will not or cannot rely on the recommendations and advice of the defense lawyer and needs the input of a neutral mediator to justify paying what it will take to settle the case. The days when Curtis Coker had Liberty Mutual's and Jerome Steen had State Farm's checkbook to pay tort cases and Frank Horton and Wade Lagrone had one to pay comp claims are long behind us. I am old enough to remember those days of mutual trust and congeniality among plaintiff and defense lawyers, and I miss them. Twice in 2011 I've had to mediate cases with highly respected contemporaries possessing over 25 or 30 years experience in evaluating cases (meaning together we brought over half a century of experience to the table) because the adjuster wouldn't budge without another legal opinion with which she could document her file. It is an unfortunate turn of events for our profession as a whole, at a time when the profession can't take many more hits, but it does herald the growth of mediation/arbitration as the most effective and cheapest way to resolve civil disputes. I find something deeply comforting in the notion that all it really takes to settle a case is review and participation by a trusted and experienced neutral. Given the alternatives that presently exist for resolving tort and compensation cases, I'll take the trusted and experienced neutral every time, even if and when he disagrees with me.

This development specifically includes resolving comp claims. The monetary limitations on recover of dollar bills under the comp system have always made settlement easier to analyze from the claimant's point of view, and I have often said there is not a comp file in my office that is not ready for settlement as soon as MM1 is reached. The reason is deceptively simple: all comp pays in the end is enough money for the claimant to exist for the two or three years it will take for him to work himself back or close to the pre-injury wage in the same or "other" employment, or to bridge himself and his family until he can get on social security disability

# "ONE CLICK, THAT'S IT!," continued

and Medicare. An injured worker with a permanent impairment that restricts him from doing the work he has done throughout his adult life is facing huge life changes that the statutory benefits are not intended to "compensate" him for in any way, shape or form. Even when we get a good Order or settlement for a seriously injured worker, the dollar benefits really just provide a patch to stop the bleeding during the brief period he is provided to move from his pre-injury life to his post-injury existence. This is why we've always said that the chief promise of the compensation system is the medical. The point for present purposes is that there is no reason to delay settlement for the claimant because he needs to take the fork in the road of his life caused by the injury as soon as he can after MMI.

From the employer/carrier's point of view, the rule should be that no comp claim gets better with age; indeed, in my experience they always, and I mean always, get worse the longer they linger after MMI. The exceptions - catching a claimant water skiing or digging ditches when they've sworn they can't lift a salt shaker- are so rare as to be negligible, to the extent that I have seen maybe three cases turn out better after delay for surveillance or further medical evaluations or treatment against thousands of others which have gotten worse to much worse to nightmarish. Employer/carriers who ignore the evidentiary and substantive presumptions established in comp law (comp law is based upon a series of presumptions tempered by easy rebuttal proof) in favor of a burden-of-proof defense usually get what they ask for: a presumption of total occupational disability from the failure to rehire or proof of unsuccessful job searches. Coming in early after MMI and analyzing the traditional "disability" factors such as age, education, work background, the subject disability (rating and restrictions), rehire, and then settling before the permanent nature of claimant's "disability" and his anger over his plight overwhelm him, has always benefitted employer/carrier more than claimant. In truth, claimants will take less if his benefits aren't terminated at MMI and before he returns to his doctor (or, worse, another doctor) to clarify the impairment/disability opinions and future medical needs his doctor never told him about before he wrote the final report. That is usually when the trouble starts and the claimant gets mad or frustrated enough to go see a lawyer (at which point he should remember "One click That's it!") Honestly, I've never understood why employers and carriers don't move to settle cases immediately after MM1 with a fair offer. It is probably because analyzing settlement fairly that early requires employer/carrier to assume too much that favors the claimant. Or maybe it is because it makes too much sense. I just don't get it.

When Lydia Quarles, with the help of those of us who attended Latham's lecture and a few more lawyers, founded the Kid's Chance Scholarship program in 2001, the way we decided to maintain ongoing funding was to require that the mediators qualified to conduct comp mediations charge for their services (to keep everybody in the game) and pay a healthy portion of their fee to the program. With this funding, we have sent 47 children of deceased or permanently totally disabled workers to college, paid total tuition costs of $161,000, and usually raise around $25,000 annually from mediation fees. Lydia tells me we are not raising as much this year, but there's no time for mediations and resulting settlements like late November and December. I think we have done the best work of any Bar Section in existence with our little program. If you have not taken advantage of it, call - no, e-mail Lydia at lydia@wpf-adr.com, or you can call her at 601-454-9718. Our commitment to the mediation process has produced these great results. And remember, as Leo DiCaprio playing Howard Hughes in the great Scorsese film The Aviator said about jets but which applies with even more force to arbitration/mediation in our world: "It's the way of the future ... the way of the future ... the way of the future." Use it.

**ABOUT THE AUTHOR:**

John Griffin Jones is senior partner at the Jackson, Mississippi law firm of Jones, Funderburg, Sessums, Peterson & Lee, PLLC. A native of Jackson and a product of the Jackson Public Schools, he attended Millsaps College and the University of Mississippi ("Ole Miss") for an undergraduate double major in English and History, returned to Ole Miss for graduate school in history before switching to the Ole Miss law school, receiving the J.D. in 1985.

# Views from the Bench:
# *MEDITATIONS ON MEDIATION*
## *By: Judge Cindy Wilson*

On review of the articles submitted by Ms. Arinder and Mr. Jones, I decided to make some revisions to my article, so for what it is worth, here goes. So much has changed in such a short period of time - mediation in workers' compensation cases and the evolution of technology, both of which have been welcomed visitors. Both of these advances promote the resolution of claims as quickly and efficiently as possible.

Whether by means of mediation or the litigation process, it is my opinion that the individual directing the process must attempt to view the case from that of each respective party. Questions such as, "Why do they view the case as they do? Do the facts substantiate their position and is there a legal basis for the amount of the claimant's demand or an offer tendered by the employer/carrier?" Individuals are exposed to a lot of legal advertising and it is very difficult for an injured worker to accept that his/her workers' compensation case is statutorily regulated and monetarily limited, while he/she observes that his/her friend who was in a car accident appears to be receiving unlimited remuneration. The bottom line is that it is just hard for them to accept that recovery is statutorily regulated. The key to reaching this understanding, whether during litigation or during mediation, is to have an individual who can help each party understand that there are statutory limitations and those may not be altered. A mediator is a facilitator to this understanding and their assistance is priceless.

The group of attorneys who currently mediate before the Mississippi Workers' Compensation Commission is composed of an excellent and extremely knowledgeable group of attorneys, who handle mediation in the same efficient and effective manner as they handle their personal practice. There are times when the impartial third party is a mediator and other times when he/she is the ALJ. Those individuals who hold each of these positions should be an impartial third party, who is solely interested in facilitating the fair resolution of a dispute.

I agree with Ms. Arinder and Mr. Jones that tort reform has had unintended consequences in Mississippi, one of which is the emergence of "new faces" in workers' compensation cases. Numerous attorneys tell me that they are taking workers' compensation cases as the result of a loss in other areas of business. As Ms. Arinder correctly pointed out, rarely do these attorneys engage in discussions with opposing counsel and this is certainly an appropriate venue for mediation. Mediation may not only serve as a learning experience for the parties, but possibly a learning experience for one or more of the attorneys as well.

Mediation is a wonderful tool to expeditiously and effectively move a case forward to a satisfactory conclusion. In those cases where no resolution is reached, the parties still retain

Judge Cindy Wilson

the right to have the case heard by an ALJ, and in a lot of those cases, the parties are able to reach a settlement prior to the hearing. Parties just want to be heard by an engaged individual, whether that is their attorney, a mediator or an ALJ, and in some instances by all three of these individuals.

### ABOUT THE AUTHOR:

Cindy Polk Wilson is an Administrative Judge with the Mississippi Workers' Compensation Commission. Prior to joining the Commission, she practiced with the firm of Wise Carter Child & Caraway, P.A., primarily in the area of workers' compensation, representing both insurance companies and self-insured employers. Judge Wilson is admitted to practice in all state and federal courts in Mississippi.

Judge Wilson received her Juris Doctorate from the University of Mississippi School of Law in 1986. While in law school, she was a member of Phi Delta Phi legal fraternity and received the American Jurisprudence Award in Wills and Estates and Future Interests. She received an undergraduate Bachelor of Arts degree from Mississippi State University in 1980.

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# Calendar of Events

**Worker's Compensation Section Meeting**
TBA

**The Power Behind the Throne Seminar**
Spring 2012

**MS Workers' Compensation Commission Annual Educational Conference**
April 18-20, 2012
Beau Rivage, Biloxi, MS

**The Mississippi Bar Annual Meeting**
July 11-14, 2012
Destin, Florida

If you are interested in submitting an article or would like to announce upcoming worker's compensation events, please forward this information to Amanda Green Alexander, Alexander & Watson, P.A. at aga@alexanderandwatson.com

# About the Editor - Amanda Green Alexander

If you are interested in submitting an article or would like to announce upcoming workers' compensation events, please forward this information to Amanda Green Alexander, Alexander & Watson, P.A. at aga@alexanderandwatson.com

**About the Editor:** Amanda Green Alexander, a native of Kokomo, Mississippi, is a shareholder of Alexander & Watson, P.A. in Jackson, Mississippi. She represents both self-insured employers and insurance companies in the areas of worker's compensation, labor and employment law. She is a member of the Mississippi Bar Association, the District of Columbia Bar Association, the Capital Area Bar Association, Young Lawyers Division of the Mississippi Bar, the Magnolia Bar Association, Vice Chair of the Worker's Compensation Section and Women in the Profession of the Mississippi Bar. She is a certified "Kids Chance" mediator of the Mississippi Worker's Compensation Commission.

Amanda Green Alexander

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