



## Workers' Compensation Facilitation - The New Trial?

Michael D. Sanders

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There are four basic statutory approaches to workers' compensation - the impairment rating approach; the loss of earning capacity approach; the bifurcated or hybrid approach, which has attributes of both the impairment rating and the loss of earning capacity systems; and, the wage loss approach.

Impairment rating systems dispense "average justice." These systems, and to a large extent the loss of earning capacity and hybrid systems, rely heavily on published schedules and ratings, as opposed to actual economic loss, for determining wage loss benefits. Michigan and about ten other states use the wage loss approach. The wage loss approach used in Michigan provides more "individualized justice." Injured workers receive wage loss benefits for as long as they are disabled.

The wage loss approach therefore presents more factual and legal issues than the other systems. Consequently, there is more opportunity for disagreement and contention. The 2011 amendments to Michigan's Workers' Compensation Act require even more factual and legal determinations, such as the degree to which a claimant has a "residual wage earning capacity;" whether the claimant has pathologic change, meaning a condition medically distinguishable from any preexisting condition, sufficient to create the requisite "personal injury;" and, whether there is a "work-related disability," as now more narrowly defined in the recent amendments. Because there are so many factual and legal issues, litigation is more likely. Therefore, alternative methods for resolving these disputes are necessary.

Former MCL 418.223 provided for an alternative dispute resolution technique called "mediation." Section 223, which was subsequently repealed in 2011, provided that certain *types* of litigated cases would automatically go before a mediator employed by the Workers' Compensation Agency. Basically, any case involving an unrepresented claimant, only a medical bill, an employer without the required workers' compensation insurance coverage, or a claim involving only vocational rehabilitation issues, would go before a mediator. The policy behind that statutory section was to resolve those types of disputes without

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### **AUTHORS/ CONTRIBUTORS**

Michael D. Sanders

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protracted litigation.

Although that section was repealed in 2011, our statute still envisions mediation of some claims:

If the Agency or the Michigan Administrative Hearing system determines that a case may be resolved by mediation, the case may be mediated by the parties.

The statute contains no explanation of how this service will be carried out or who will act as the mediators. At this point, there are three mediators to whom certain cases are automatically referred.

If the mediator is unable to resolve the matter within twelve weeks of the plaintiff's filing of his/her Application for Mediation or Hearing, the case is referred to a magistrate for further review and ultimately, a hearing.

Although not specifically mandated by statute, another alternative dispute resolution process called facilitation has been put in place. It has become an important and significant part of the pretrial litigation process. All of Michigan's workers' compensation magistrates now require the cases on their trial dockets to be facilitated before they proceed to trial.

The plethora of legal and factual issues that are part of our wage loss system, and the recent statutory changes have, to a large degree, muted litigants' willingness to proceed to trial. For example, in 2005, magistrates issued 702 opinions. Thus far in 2016, magistrates have issued fewer than 60 such opinions. Last year there were only 118 opinions. Facilitation has largely replaced trial.

While there is no predetermined point at which a case must be facilitated, it usually occurs about one year after the employee filed his/her Application for Mediation or Hearing. Magistrates act as facilitators for one another. While some presiding magistrates will make a specific referral to a specific magistrate for a facilitation hearing, the parties' attorneys are generally allowed to choose the magistrate before whom a case will be facilitated. Generally speaking, cases pending in a particular jurisdiction are facilitated in that jurisdiction - although there are occasional exceptions.

Facilitations take place in the courtroom, but are "off the record." The hearing generally lasts between thirty minutes and two hours. Most facilitations occur during regular docket hours, although sometimes cases proceed to facilitation on Mondays and Fridays - when there is not a trial docket in most Agency locations.

Occasionally, a facilitation will get divided into segments because the facilitator is required to handle other matters, such as pretrials, status conferences, and control date hearings. Clients may be present, although some of the magistrates prefer they not be in the hearing room during the facilitation hearing itself, since they believe it tends to promote grandstanding by the lawyers.

Facilitators expect the lawyers to be fully prepared. The lawyers must know the law, the facts, the medical evidence, and what the lay witnesses will say.



The facilitator will generally ask a series of questions at the beginning of the facilitation - such as whether the injury was initially deemed compensable by the employer or carrier. The facilitator will ask for the proper weekly workers' compensation rate, and whether there are any fringe benefits that discontinued at any point. The facilitator will ask whether wage loss or medical benefits were previously paid, and if so, the reason for their termination. The facilitator will generally also ask many questions about the claimant - such as her age; her tenure with the employer; and her work history.

The facilitator will also ask about coordinatable benefits such as unemployment insurance benefits, old age Social Security, short-term disability, long-term disability, and pensions. The facilitator will inquire about potential liens from Friend of the Court, Medicare, Medicaid, or any provider or health insurer. The facilitator will want to know whether Medicare has any potential "interest" in the case.

Then each attorney will have an opportunity to present his or her client's side of the case. The plaintiff's lawyer generally goes first.

There are no live witnesses. Rather, the lawyers simply summarize what he or she can prove regarding the injury, the medical evidence, the disability, etc.

When the plaintiff's lawyer has addressed all of the issues, the defense lawyer is permitted to present his/her client's version of events and arguments. The defense lawyer will be expected to refute the plaintiff's contentions and summarize his client's anticipated proofs regarding personal injury, disability, residual wage earning capacity, and all other factual and legal issues. The defense lawyer must strategically decide whether to reveal the results of investigation and surveillance in front of the plaintiff's lawyer.

The facilitator will generally pepper the lawyers with questions throughout the proceedings, making thorough preparation essential.

Near the end of the facilitation, the facilitator often will meet individually with each lawyer. The lawyers can reveal anything they want at this point. It is unclear whether this is as effective as revealing information and evidence in the presence of the other lawyer - this entirely depends upon the receptiveness of the facilitator.

The facilitator will also take some time to review exhibits and medical records before providing his or her assessment of the case. The facilitator will then reconvene the lawyers and give an assessment of settlement value and the rationale. Oftentimes, the facilitator will then meet with the plaintiff or the defendant or both, if their lawyers request that the magistrate do so - in order to explain the assessment and describe the difficulties in his/her case. The parties must then decide whether to accept the facilitator's assessment - it is entirely discretionary, and there are no sanctions for not accepting the facilitator's assessment. If both parties agree, the case will resolve on that basis. If the case does not settle, it is transferred back to the presiding magistrate, who is not made aware of the facilitator's assessment.

These are the things that impact most on the facilitation results:

- The effectiveness of the facilitator - some magistrates are more effective at facilitation than others.



- The philosophy of the facilitator - some magistrates are more "big picture" and others are more "detail oriented." Some are more conservative than others.
- The philosophy of the magistrate who will preside over trial - this will be considered and impact upon the facilitator's assessment of the case.
- The identity of the doctors involved in the case and the facilitator's and the presiding magistrate's feelings about those doctors - some doctors have more credibility with certain magistrates.
- The identity of the rehabilitation counselor who prepares the residual wage earning capacity assessment and labor market survey - some have more credibility than others.
- The strength of the defenses - for example, whether there is an actual offer of favored work versus a simple residual wage earning capacity assessment and labor market survey.
- The identity of the parties - some parties have reputations that precede them.
- The identity of the lawyers - the facilitators are generally not moved by theatrics. A lawyer who is well-prepared and willing to try a case will be more effective at facilitation.

The mistakes most often seen during facilitations:

- Lack of preparation.
- Rudeness, fist pounding, irrational, overly aggressive behavior, or personal attacks.
- Disrespectful behavior towards anyone, including the claimant, the opposing lawyer, or the magistrate.
- Failure to point out and address weaknesses in one's own case.
- Unwillingness to compromise or even acknowledge the opposing view.
- Dishonesty - this is the mistake that keeps on giving, even in future hearings.
- Refusal to address factual or legal issues the facilitator wants you to address - this is called "skirting the issue" and is often seen during political debates.
- Ex parte communication with the facilitator or the presiding magistrate in order to "poison the well."

Facilitation has worked wonderfully in Michigan. Some estimate that it results in settlement of 90 to 95 percent of all of our litigated cases throughout the state. It truly has become the "new trial."