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Workers' Compensation Mediation: Constructive Resolution of Conflict

Conflict exists as a normal part of human interaction. It is this conflict that ultimately results in litigation and attorney involvement.

Within the realm of litigation, there are some cases that are ripe for settlement and others that, for various reasons, evade meaningful negotiation. Because mediation is designed to facilitate communication between the parties, it is an excellent way not only to bring the parties together, but also to empower them to resolve their differences by maintaining control over the outcome. Indeed, one of the benefits of mediation is the flexibility to design the best solution to the client's problem without the constraints of more formal court proceedings.

In addition to issue identification and flexibility in formulating a solution, another benefit of mediation is the facilitator him or herself. It is the mediator's role not only to help the parties clearly identify the issues and interests that must be satisfied to resolve the conflict, but to work with the parties to propose specific solutions to resolve those issues and interests. As a neutral third-party knowledgeable in workers' compensation law and the unique difficulties of work injuries, a mediator can assist the parties in crafting a satisfactory agreement in cases that may otherwise continue without resolution.



Joan G. Hallock



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Both insurers and employers have questioned the necessity of mediation in a workers' compensation setting due to the costs attached to mediation. While the agreement to mediate usually calls on the

employer and insurer to pay the mediator's fees, this cost is nominal in cases where efforts at settlement have failed. Mediation will often, in the long run, save the employer and insurer additional costs incurred during the course of litigation.

HDBOB's own Fred Kaiser and Joan Hallock are no strangers to effectuating settlement as workers' compensation mediators. With more than 30 years of experience in the workers' compensation area, Fred has an appreciation of all aspects of workers' compensation disputes, which has enabled him to achieve a high success rate in his mediation practice.

Similarly, Joan brings her varied workers' compensation background to her mediation practice. Using her years of experience as a Workers' Compensation Judge as a guide to effective settlement, Joan has assisted many parties in designing the best solution to fit their specific situation, achieving much success in resolving difficult and complex workers' compensation cases.

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Timeliness of Retraining Claims

In *Hallman v. Potlatch Corp.*, File No. WC05-279 (W.C.C.A. Aug. 18, 2006), the issue before the Workers' Compensation Court of Appeals was whether the employee's request for retraining was untimely under Minn. Stat. § 176.102, subd. 11(c). The W.C.C.A. found that the record showed that the employee filed a number of Rehabilitation Requests that sought to include retraining in his rehabilitation plan. Additionally, the court noted that the requests were filed before the end of the 104-week period provided in Minn. Stat. § 176.102, subd. 11(c) and resulted in contested administrative conferences. Thus, the Court held that because there was a bona fide controversy between the parties over retraining, the employer and insurer were not being forced to face the significant financial exposure of a retraining claim on a "stale" file.

The employer and insurer also argued that even if the employee's request was timely, he was not eligible for retraining because he had previously returned to suitable employment. The Court held that the statute does not preclude retraining if the employee returns to employment. Rather, the employee's ability to return to work and wage potential are only two of the factors a compensation judge must consider when determining whether retraining is reasonable. See *Poole v. Farmstead Foods*, 42 W.C.D. 970 (W.C.C.A. 1989). Because the Court found that substantial evidence supported the compensation judge application of *Poole*, it affirmed his determination on both issues.



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Voluntary Payment of Benefits After Injury Tolls Statute of Limitations

In *Roemhildt v. Gresser Companies, Inc., et. al.*, File No. WC06-105 (W.C.C.A. Aug. 23, 2006), the Workers' Compensation Court of Appeals, *en banc*, affirmed the compensation judge's finding that the employer's voluntary payment of benefits to the employee immediately after he sustained a back injury constituted commencement of "proceedings" so as to toll the statute of limitations.

The employee sustained an injury to his low back on August 17, 2001 while employed as a bricklayer for employer Met Con. Met Con admitted liability for the injury and the employee was paid wage loss and medical benefits. After making these payments, Met Con filed another Notice of Primary Liability Determination, this time denying liability, contending that the employee had not cooperated with investigation of the injury and also that his symptoms were the result of an earlier injury. Shortly thereafter, the employee went back to work at Met Con. The employee stated his low back pain did not go away after the August 2001 work injury.

The employee allegedly injured his low back on both September 7, 2004 and October 4, 2004 while working as a bricklayer for Gresser Companies. His physician placed him on work restriction that prevented him from returning to work as a bricklayer. The employee served a Claim Petition on October 21, 2004 seeking benefits from both Met Con and Gresser as a result of his work injuries. Pursuant to a Temporary Order, Gresser paid benefits and sought contribution and/or reimbursement from Met Con.

In August 2005, following private mediation, the employee and Gresser settled all of the employee's claims, except future medical, against both Gresser and Met Con on a full, final and complete basis. The settlement agreement provided that Gresser would pay the employee a lump sum payment, while reserving Gresser's right to seek contribution from Met Con.

Employer Met Con argued that amendments to Minn. Stat. § 176.221, subd. 1 altered the effect of a voluntary payment of benefits under Minn. Stat. § 176.151(1). The Court disagreed, noting that the legislature did not amend the language contained in Minn. Stat. § 176.151 concerning "actions or proceedings." In the absence of such amendment, the Court held that it could not find that the legislature intended to repeal existing case law tolling the statute of limitations after voluntary payment of benefits. Thus, by making voluntary payments of benefits to the employee, the employer and insurer initiated a proceeding. Once a proceeding has been commenced, the statute of limitations cannot be revived or re-asserted, despite a subsequent denial of primary liability.

The Court also addressed the compensation judge's finding that employer Met Con was obligated to pay a share of the settlement entered into between the employee and employer Gresser, even through employer Met Con was not a party to the settlement agreement. Because neither the statute nor case law permitted the compensation judge's order, the Court reversed the compensation judge's decision and held that employer Met Con was not liable for contribution.

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Supreme Court Defines Insurance Coverages Triggered by Water Intrusion Claims

On October 5, 2006, the Minnesota Supreme Court, reversing the Court of Appeals in several respects, held that insurance policies in effect on the date of the closing of the sale of a home, and on the date on which the builder receives notice of a defect or claim for water intrusion, as well as all policies in between, are triggered, and each insurer is responsible on a *pro rata* basis for all damages for which the insured is legally liable. *Wooddale Builders, Inc. v. Maryland Casualty Co., et al*, Nos. A04-1442 and A04-1612 (Minn. Oct. 5, 2006). The Court of Appeals had earlier ruled that the completion of remediation would be the ending date for the occurrence that might trigger a policy.

The Supreme Court also held that, under the “known loss doctrine,” no insurer first writing coverage after the insured had been given notice of the loss would have any responsibility for contribution. If there is a gap between the last insurance coverage and the date of notice to the insured, the insured may be personally responsible for a *pro rata* portion of the damages during that gap in coverage, only if the insured voluntarily chose to self-insure for that period of time. If the insured can demonstrate that it simply could not purchase the coverage because it was unavailable, the allocation would include only those periods of time during which the insured was insured.

The court also found that, where *pro rata* apportionment is applicable, the apportionment should be by years, rather than shorter periods of time. The apportionment starts with the inception of the policy on the risk at the time of closing, and terminates at the end of the policy on the risk at the

time the builder receives notice of the claim. Thus, for example, if the first policy covered the risk from January 1, 1995 to January 1, 1996, and the closing occurred on December 1, 1995, the first insurer would have one year of *pro rata* coverage, rather than one month, which has been the past practice in the industry. Similarly, if the last policy covered the period January 1, 2001 to January 1, 2002, and the builder received notice on February 1, 2001, rather than having one month of *pro rata* liability, the last insurer would be liable for one full year of coverage.

Finally, the court held that when insurers agree to jointly defend the insured, attorneys’ fees are to be apportioned on an equal basis. This decision also reversed the Court of Appeals, which previously stated that attorneys’ fees should also be paid on a *pro rata* basis.

The *Wooddale* court emphasized that the parties agreed that “time on the risk” apportionment was appropriate under

the circumstances of this case, and that the parties did not request review of that issue. The court did not, however, indicate that it felt such apportionment was appropriate, noting that, arguably, the damage to the homes is traceable to a discreet and identifiable event, such as installation of the windows or flashing or application of the building paper. Further, the court did not address the general issue of whether *pro rata* by the “time on the risk” method of apportionment is generally applicable to water intrusion claims because the issue was not before the court in this case.

The decision acknowledges that this case will likely not be the last word on these issues.



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Mold and Rot Not Covered by Homeowner’s Policy

In an unpublished opinion, the Minnesota Court of Appeals held that mold and rot caused by faulty construction techniques, such as those normally encountered in connection with water intrusion claims, are not covered by the homeowner’s policy on the residence. *Bloom v. Western Nat’l Mut. Ins. Co.*, No. A05-2093, 2006 WL 1806415 (Minn. Ct. App. July 3, 2006), *review denied*, (Minn. Sept. 19, 2006). The court further held that damages attributed to mold and rot do not constitute “ensuing losses” within the meaning of the policy language. Both holdings alleviate some of the costs attributed to insurance companies in water intrusion cases and thus the decision has found considerable support from the insurance defense bar.


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Announcement Stacey Sorensen Joins Firm

HD BOB is pleased to announce that Stacey Sorensen has joined the firm. Stacey is a 2002 *cum laude* graduate of Macalester College where she received a B.A. in Communication Studies. She is a 2006 graduate of William Mitchell College of Law, where she excelled in trial advocacy. Stacey received top honors in Advanced Advocacy and the Misdemeanor Clinic where she prosecuted misdemeanor crimes in suburban Ramsey County. Stacey was also a member of William Mitchell's American College of Trial Lawyers Competition Moot Court Team.



Stacey participated in both high school and collegiate mock trial and has coached the St. Paul Central High School Mock Trial Team for the past three years. Stacey was selected to be a student member of the 2005-2006 Warren E. Burger Inn of Court where she, along with her group, gave a presentation on the First Amendment and reporter shield laws titled *History of the Use and Abuse of Confidential Sources*.

Prior to joining HDBOB, Stacey worked as a law clerk at a criminal defense firm in Minneapolis and as a Legal Analyst at the Unemployment Insurance division of the Minnesota Department of Employment and Economic Development.

Stacey is licensed to practice in Minnesota.

2006 Workers' Compensation Rate Adjustments Announced

The Minnesota legislature has released the 2006 adjustments and benefit rates applicable to workers' compensation claims. The noteworthy changes are as follows:

- The annual benefit rate adjustment under Minn. Stat § 176.645 is 1.03% — the smallest increase in more than twenty years, effective October 1, 2006.
- The Social Security annual adjustment is 3.30%, effective December 1, 2006.
- The supplementary benefit rate has increased a mere five dollars to \$509, effective October 1, 2006.