CHAPTER THREE

THE ARBITRATOR WEARS MORE THAN ONE HAT;

Does This complicate the arbitration hearing?

START ON TIME...NO "OYEZ OYEZ":

While there is no one best way to begin, this arbitrator usually calls the hearing to order at the appointed time, by calling the name of the case. The parties and their counsel are introduced and recognized. Any witnesses and others present are acknowledged, noted and identified. Any requests for sequestration of witnesses is then addressed. Inquiry may be made as to whether there are any loss of consortium claims? An announcement is made that a brief recess will be held every hour and a half, or, as needed; that rest rooms are out in the hallways, telephones are available as are coffee, soft drinks, mountain water, candy and cookies at the intermissions.

SOCRATES ON ARBITRATION:

It is then appropriate to provide a short summary as to the qualifications, background and experience of the arbitrator. It is usually my procedure to point out that after forty years at the bench and bar that I retired in 1990 and have been active in Alternative Dispute Resolution almost five years. That I have taken sixty hours of training in mediation and have conducted several hundred sessions and conferences,

including appellate, domestic and all types of other civil cases. That likewise I have conducted several hundred arbitration hearings including complex multi-party disputes. At times, Socrates may be quoted, as having said that a good arbitrator will do two things: listen carefully, and decide impartially. That, I will strive to "do my best," as your arbitrator. That is also the pledge of the boy scouts, to be always ready to do your best. We are called "neutrals"; everyone knows where forward and reverse is, in the car; neutral is in the middle. That is why the arbitrator is sitting in the middle, and at the end of the table; we cannot lean either way or favor either party.

WHAT OCCURS DURING AND AFTER THE HEARING?:

Generally, it is my procedure to then, very briefly, cover two points: (1) what will occur during the hearing, and, (2) the format used by the arbitrator during the following twenty-four hours; what occurs after the hearing has adjourned. That the arbitrator is really in the jury box until the final drafting of the award. This is mostly done for the benefit of the non-lawyers present. First, we will have a housekeeping call to see if either attorney may have any pre-hearing questions such as the advance furnishing of medical or lost wage documentation to the other side or any other matters that may arise. Then each side will make an opening statement, which educates the arbitrator as to the facts and legal position of each party. All witnesses present will then be given the oath; they may either swear or affirm to tell the truth. Then we will enter into direct and cross-examination of the witnesses and submission of exhibits, first by the plaintiff and then the same procedure is followed by the defendant; the arbitrator may also ask questions; after closing arguments are made the hearing is then adjourned. The parties seem to like

to know what is forthcoming, during and after the hearing.

Next, it is pointed out, that all of the evidence submitted, that is admitted in evidence, will be taken home and reviewed again by the arbitrator, a second time, that same evening. Tentative notes may be made. I will then sleep over the case, (hopefully not dream about it), and then the next day make my third and final review, and the award is then made, and mailed to the ADR provider. It is emphasized that this arbitrator, not having the benefit of a court reporters record, likes to make a decision while all testimony is fresh and can be remembered; so, in most all cases I try give 24 hour service. While other arbitrators might do better by thinking about and studying the case for a week, I believe I do my best in providing a correct and prompt decision, while I'm focused on and thinking about all the facts, the evidence and applicable case law.

A

WEARING MORE THAN ONE HAT:

Before the hearing commences, counsel for both parties are reminded that as their duly selected arbitrator I may be wearing two to three hats! That I am the judge, jury and appellate court, all three rolled into one, or as a type of 3 in 1. Holding a binding arbitration hearing, without any appeal, results in an awesome responsibility for the arbitrator. While I consider a mediation session a challenge, (can we help in getting these two parties to settle their case without letting them out of the room?), an arbitration is a tremendous responsibility. As the judge, we rule on all questions as to admissibility of evidence; as the jury, we are the trier of the facts; and since there is no appeal we must make every effort

to properly evaluate the facts and apply the applicable law in the case. Both parties are bound by what we do. There is no re-hearing and no reconsideration.

ADMISSIBILITY OF COLLATERAL AND SAME SOURCE EVIDENCE: IN THE COURTS? AT THE ARBITRATION HEARING?

WHAT DOES THE LAW SAY?:

In the case of McDaniel v. Gysel, 155 Ga. App. 111, (1980), the court of appeals held: The "Approved way to prevent double recovery for economic loss covered by Motor Vehicle Reparations Act is by consent at pre-trial, or in event of contest, by presenting facts showing such coverage and payment to court outside presence of jury." This indicates that the best policy is to keep this information of other sources of payments away from the fact finder. "If evidence of such damages is introduced for the purposes of proving the extent of injuries, the court should charge the jury to exclude consideration of such evidence on the issue of damages." The supreme court case of McGlohon v. Ogden ,251 Ga. 625 (1983), gave a little different twist: "Defendant's insurance company should not be required to pay duplicate damages. The collateral source rule is inapplicable in no-fault insurance cases, (emphasis supplied) where the collateral source (plaintiff's insurance company) is subrogated to plaintiff's right of recovery." They were making clear that "plaintiff's recovery must not include damages which plaintiff's insurer is entitled to recover by virtue of its right of subrogation...any claim he had against the tortfeasor for these same losses was extinguished." (emphasis added). Subrogation adjudication will be according to tort law and inter company agreement if possible, or, by arbitration between the insurers.

LEGISLATURE SAYS TO LET IT ALL IN:

It appeared that up until July 1, 1987, evidence of other collateral source funds or payments made to a plaintiff, except for the exception in McGlohon, supra, were generally best kept from the trier of fact, and that any applicable offsets or reductions were made by the judge outside the presence of the jury. On the latter date the General Assembly abolished the collateral source rule. See OCGA 51-12-1. The new policy was that everything should be told to the jury. "In any civil action, whether in tort or contract, for the recovery of damages arising from a tortious injury in which special damages are sought to be recovered or evidence of same is otherwise introduced by the plaintiff, evidence of all compensation, indemnity, insurance (other than life insurance), wage loss replacement, income replacement, or disability benefits or payments available to the injured party from any and all governmental or private sources and the cost of providing and the extent of such available benefits or payments shall be admissible for consideration by the trier of fact." (emphasis supplied). The trier of fact could consider all the available benefits but were not directed by the court to make any reduction from any award of damages made. This new law was held to be inapplicable in the case of ORNDORFF v BROWN, 197 Ga. App. 591, 592, (1990) as the accident considered there occurred prior to July 1, 1987. Since the same insurance company (involving the same insurance policy) was the same insurer for the plaintiff and defendant in this case, the damages received from defendant would be from the "same source" and not from a "collateral source." The collateral source rule has "never applied so as to require an insurance company to pay 'duplicate damages'." The trier of fact was not apprised of the previous payments of

funds and the trial judge outside the presence of the jury made the reductions of the prior payments from the jury verdict.

LEGISLATIVE POLICY OVERRULED:

Later the supreme court spoke in DENTON v CON-WAY SOUTHERN EXPRESS,INC.ET AL., etc., 261 Ga. 41 (1991), "Our courts have adhered to the principal that evidence of collateral sources is inherently prejudicial because its infectious nature tends to contaminate the entire trial." The majority of the court held that the General Assembly's act abolishing the collateral source rule was unconstitutional and void. This case indicates that the collateral source rule has been resurrected and was very much alive again. A year later the supreme court in GRISSOM et al. v. GLEASON ET AL. 262 Ga. 374 (1992), "Disapprove[d] of Denton v. Con-way to the extent that it suggests a new equal protection analysis". This case affirmatively stated that joining a motor carrier and its insurance carrier as a defendant in the same action was permissible and was not unconstitutional. No discussion was made as to the Denton ruling unconstitutional the act abolishing the collateral source rule, so it could be assumed that the heart of the Denton ruling was not changed. The court of appeals held in CINCINNATI INS. CO. v. REYBITZ, 205 Ga. App. 174, 177, 178, (1992) that a pedestrian struck by an insured may not bring actions against both the insured and the insured's no-fault carrier in the same claim as there was no law authorizing such joinder; see and compare Grissom, supra. This case also concludes "that the holding in Denton is still the law of this state, even if the analysis suggested therein is not." The supreme court in AMALGAMATED TRANSIT UNION LOCAL 1324 v. ROBERTS ET AL., 263 Ga. 405 (1993) reiterated that the collateral source rule was alive and well but stated it was inapplicable in contract cases. MARYLAND

CASUALTY INSURANCE COMPANY v. GLOMSKI, 210 GA. App. 759 (1993), sets forth that OCGA 34-9-11.1 "again extends to the employer or insurer the right to be subrogated to an employee's claim against a third party to the extent it has paid workers' compensation," but that the act has prospective operation.

The case of FIRE & CASUALTY INSURANCE COMPANY OF CONNECTICUT v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, 213 Ga. App. 532, (1994), holds that a defendant still has the right to deduct PIP payments from a judgment. "Defendant's right to deduct PIP payments and subrogation together ensure that the appropriate party pays for the damage but that no party receives a windfall." The recent case of ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA v. RIEDL, 264 Ga. 395 (1994), held that an assignment of health care benefits under an insurance policy to a health care provider divests [emphasis supplied] the assignor/insured of the right to bring an action against the insurer to collect benefits under the insurance policy. Generally, at a mediation session, where a party has been placed on notice of liens or subrogation rights of others, they either want these paid as a condition of settlement, or, possibly an indemnity agreement might be acceptable. At an arbitration hearing the arbitrator and counsel for both sides must briefly discuss these issues and seek to jointly arrive at the best answer and approach.

ATTORNEYS AND ARBITRATOR MUST KNOW THE CODE AND THE FORUM'S RULES:

Counsel for the parties before the forum must be made aware of the rule that a decision of the arbitrator is not collateral estoppel or res judicata to the same or similar issues

in companion claims or any other claim between the arbitrating parties. It is conclusive only of the controversy in the claim or suit arising out of the same incident or occurrence. The decision is not binding on third-persons not a party to the arbitration. Rights of persons not a party to the arbitration may not be adjudicated by the arbitrator.

(ARB. A) OR (ARB. B) METHODS CAN BE CHOSEN IN 2-3 MINUTES:

With the above principles of law in mind it should really only take two to three minutes at the beginning of the arbitration hearing to decide which approach to take. My question now to counsel for both parties is would both of you wish to take a brief recess outside of my presence and agree in writing on a yellow pad or come back inside and stipulate to me in open hearing that neither of you will bring up any collateral, or ultimate same sources, or any payments or advancements from any type sources, no subrogation issues will be brought up or referred to during the hearing? If both of you mutually agree to this proposal which I refer to Arb. (A), then as your arbitrator I can focus and concentrate more clearly on the issues of liability and damages. If liability is not disputed, or, if it is, and the burden of proof is carried as to liability, and if further the causation of the damages is proven, then the arbitrator can do one of two things: the total award can be listed in one amount; or, at the option of the arbitrator, separate amounts may be given for any medicals proven, any lost wages found, and any pain and suffering given, and adding these amounts to show how the total award was arrived. Either method is about the same; the total award may be listed, or, the total award may be listed with a breakdown showing its components. After the award is made the parties and attorneys may then make any proper offsets and

reductions, affecting the rights of the parties before the forum, that may have been previously agreed and stipulated. Any offsets or reduction of this nature are thus made outside of the presence of the arbitrator. Arb. (A) prevents any alleged "contamination" of the trier of fact. Any decision made by the arbitrator is not binding on anyone not a party to the case.

Many might select this approach as it appears to comport with the rule and spirit of keeping the trier of the fact [arbitrator] from becoming involved with other collateral sources. The bottom line of Arb. (A) is the arbitrator will come up with a total award and the parties, if they mutually agree, will make any offsets or reductions.

B

TWO GOOD CHOICES A OR B:

If Arb. (A) is not agreed to, can the parties mutually agree to what is labeled Arb. (B)? That is, the attorneys and advocates will affirmatively advance, admit and advise the arbitrator of all funds derived from any and all collateral sources, same sources, any no fault, pip, health insurance, workers compensation, liens, subrogation and any and all other economic monies and benefits received by claimant and then agree to leave it up to the arbitrator to decide as to possible proper reductions and offsets, affecting the rights of the parties before the forum, if any. If this is agreed to the arbitrator can then do one of two things when making an award: if the claimant is entitled to an award the arbitrator may list one net award sum, with any reductions and offsets affecting the rights of the parties before the forum already considered and having been made. The net award would not be subject to any further reduction by the parties. Or, at the option of the arbitrator, the net award rendered could show

how it was arrived by separating any medicals, lost wages, and pain and suffering, that is given, totaling these items into a gross award, and then make any proper reductions or offsets deemed advisable, affecting the rights of the parties before the forum, finally then listing the total net award. Either way is about the same; one just gives the total net award and the other shows how the total net award was arrived; by first listing any different components granted as the gross award, less any offsets made, and then listing the net award.

C

ARB. C IS THE ONLY OTHER ALTERNATIVE:

In the event neither (A) nor (B) listed above is mutually agreed to and chosen, then ARB.(C) is the only remaining option and alternative. This result is probably because the parties cannot agree as to the applicability of collateral sources and subrogation issues in the case; they cannot therefore make any offsets themselves, and, do not desire for the arbitrator to make any offsets. Since both parties have agreed to binding arbitration this Arb. (C) approach means the arbitrator will rule on the admissibility of any and all collateral and same sources issues, individually and unilaterally, when, if, and as they may arise. The bottom line for Arb. (C) is the trier of fact will be involved in all possible collateral source questions that might come up affecting the rights of the parties before the forum. Without the stipulation of the parties in advance it will be more difficult than Arb. (A) or Arb. (B). It seems proper to take a brief moment and seek to establish and make crystal clear which approach will be taken before the opening statements are made. This might eliminate or limit future problems and misunderstandings and pave the way for a smoother and more productive hearing.

OUT-PATIENT SURGERY AND ARBITRATION..WE ALL GO HOME THE SAME DAY!:

This arbitrator likes to remind all that binding arbitration is similar to out-patient surgery. One difference is that we make a "decision" rather than an "incision" but we all do go home the same day. (Major litigation at the courthouse is sometimes necessary although lengthy and very much like Major surgery at the hospital. The latter is lengthy but sometimes also necessary. I equate mediation with preventive medicine. If we can sit down with the doctor and discuss diet, rest, exercise [sit down with the judge and discuss interests, options and case settlement] the surgery [litigation] may be avoided). We must all remember this is binding arbitration, with no rehearing, and no reconsideration, and, is important to all concerned; with the wearing of many hats, the arbitrator must do justice promptly, fairly and impartially, in accordance with the forum's rules and regulations, and in keeping with the Arbitration Code and other laws of the jurisdiction. If problems can be eliminated, before they arise, we can enhance ADR.