

VI. ACHIEVING GLOBAL SETTLEMENT – IN THE CONTEXT OF WORKERS’ COMPENSATION CLAIMS HANDLING AND LITIGATION

The parties may reach a point where there is an interest in settling any part or future obligation for wage loss or medical expense benefits.

There may exist a corresponding interest to resolve any past, present or future claims for separate benefits, in conjunction with the worker compensation settlement, i.e., a “global” settlement.

These ancillary claims can be diverse, including past accrued benefits, union grievances, civil actions, human resource issues (discrimination and harassment), unemployment compensation, pension, and governmental agency claims.

Many attorneys will remark “any case can be settled.” The parties must draft the necessary documentation of the precise terms of their agreement.

1.00 Resolving the Workers’ Compensation Claim.

Prior to 1996 a workers’ compensation case could not be settled. Settlement of future wage loss and future medical expense was considered to be against public policy. There was a concern that an injured worker would require public assistance if their settlement proceeds were exhausted.

1.02 The method to “settle” a worker compensation case was to seek a “Commutation” of future wage loss benefits. A claimant could request a Commutation – a lump sum payment – of partial disability benefits.

1.03 The parties would stipulate to a post injury earning capacity. The partial disability benefits were calculated based upon comparison of pre-injury average weekly wage earnings to the stipulated amount of post injury earning capacity. The claimant would be entitled to 66 $\frac{2}{3}$ of the difference for duration of 500 weeks. Partial disability benefit status is payable for a maximum of 500 weeks.¹

1.04 The Commutation Petition would request that the 500 weeks of partial disability be paid in one lump sum payment. The statute allows for a 5% “statutory discount” of the lump sum. This discount may or may not be taken before or after the calculation of the 500 week lump sum. In either event, the Commutation is for a sum certain.

¹ Section 306; 77 P.S. §511.

- 1.05 A petition would be filed before the Pennsylvania Workers' Compensation Appeal Board. A petition could be pursued before a workers' compensation judge.
- 1.06 Future medical expenses remained the obligation of the worker compensation insurer. The typical stipulation would reflect this obligation to continue to pay for "all reasonable and necessary" medical expenses. Future medical expense reimbursements could not be settled for a lump sum.
- 1.07 Spears – "Illegal Settlement."

Shortcoming – A stipulation which was not based upon the facts was invalid and a Commutation could be set aside, typically returning the parties to their prior status, with a credit for lump sum amounts paid.
- 1.08 The credit was typically on a weekly basis, although a suspension could be entered until the credit was exhausted.
- 1.09 Standard in Commutation Petition – Is it in the "best interests" of claimant?

2.00 Compromise and Release.

2.01 Since 1996, the Pennsylvania Workers' Compensation Act allows a final settlement of wage loss and/or medical expense for past or future payments.

The parties could agree upon the specific terms for the amount of wage loss benefits, any credits, and the amount or duration of any medical expenses.

2.02 The Petition to Seek Approval of a Compromise and Release Agreement if filed with the Bureau of Workers' Compensation and assigned to a workers' compensation judge. LIBC Form 378.

2.03 The settlement agreement is reflected in the Compromise and Release by Stipulation Form LIBC Form 755.

2.04 The standard for review of the agreement by the workers' compensation judge is "Does the claimant understand the terms of the settlement and its legal effect upon workers' compensation benefit entitlement?" The workers' compensation judge does not determine if the Compromise and Release is in the "best interests" of the claimant.

PRACTICE NOTE: Be precise, explicit and detailed.

2.05 A workers' compensation judge must issue an order which establishes - - the employee understands the full legal significance of the agreement.

2.06 Finality –

A Compromise and Release is final, where the record reflects claimant's understanding of the agreement. Claimant's post settlement "change of heart" is not a basis to set aside a Compromise and Release settlement case:

2.07 Claimant Death -

If claimant die before a hearing to seek approval of a Compromise and Release Stipulation, there is not a valid settlement as claimant must testify regarding his/her understanding and the workers' compensation judge must issue a decision reflecting approval based upon claimant understanding. Cite: *Facchine v. WCAB (Pure Carbon Co.)*, 883 A.2d 720 (Pa. Cmwlth. 2005).

2.08 Other Issues –

The workers' compensation judge does not have statutory authority to approve or address settlement terms which deal with issues beyond the worker compensation benefits for wage loss or medical expense reimbursements.

2.09 If the parties seek to “settle” non-workers' compensation issues, best practices dictate the preparation of a companion stipulation and separate general release documents.

2.10 A Compromise and Release Stipulation may include additional terms as agreed upon by the parties. We recommend these terms delineate topics “related” to workers' compensation such as average weekly wage calculation, unemployment compensation credit – dates of disability, corresponding reinstatement of exhausted accrued benefits, pension credit; medical/URO/causation, pending petitions and pending appeals.

3.00 **The Third Party Action and Workers' Compensation Subrogation.**

Third party action and workers' compensation subrogation issues arising from the statutory right of subrogation from a third party action arising from the work injury, can be addressed and referenced in the settlement documents.

3.01 The Compromise and Release Stipulation references the issue of subrogation at Paragraph No. 11, LIBC Form 755.

3.01a **Practice Pointer:** We recommend that Paragraph No. 11 of the Compromise and Release Stipulation is always answered "Yes" to the question "Is there an actual or potential lien for subrogation under §319?"

Add the additional sentence: "At the present time, employer/insurer has not received notice of a civil action arising from the work injury. In the event a legal action is filed, employer/insurer do not waive any right to subrogation lien recovery."

3.01b We also recommend that the Compromise and Release Stipulation reflects any amount of the subrogation lien which is "waived" as a term of the settlement. This figure should be viewed as additional "consideration" for the settlement. One may calculate the Third Party Settlement Agreement figures so as to quantify the amount waived by the defendant.

3.02 Best practices dictate that the resolution of a third party action and the corresponding workers' compensation subrogation lien must be accomplished via preparation of a "Third Party Settlement Agreement." LIBC Form 380.

3.03 If the parties compromise (reduce or waive) the net subrogation lien figure, and/or waive the future grace period credit, best practices dictate the preparation of a Supplemental Agreement, LIBC Form 337, which reflects the reduction or waiver of the figures reflected on the Third Party Settlement Agreement Form. There is no "section" on the LIBC Form to reflect any alteration of the figures calculated on the LIBC Form 337.

3.04 A workers' compensation insurer may settle/compromise its subrogation lien. There are two components to the subrogation lien calculations: (1) the net lien recovery and (2) the future grace period credit. The insurer may waive/settle/compromise either portion of the lien.

3.04a If the workers' compensation insurer waives the net lien, the future credit is not waived, unless the workers' compensation insurer explicitly

waives the future credit. *Reeder v. WCAB (Mercer Lime & Stone Co.)*, 871 A.2d 337 (Pa. Cmwlth. 2005).

- 3.04b **Practice Pointer:** When a claimant request is presented to waive a portion of the workers' compensation insurer subrogation lien, as recommended above, calculate the amount of the net lien recovery and assess the amount of corresponding "credit" that the insurer may request in the pending worker compensation case. For example, if the lien waiver request amounts to \$50,000.00, that is the equivalent of \$100 of partial disability benefits over 500 weeks. Will the claimant stipulate to a post injury earning capacity "in exchange" for the subrogation waiver amount?

4.00 **The Discrimination Claim – Workers’ Compensation Interplay.**

4.01 Claims arising from the employer-employee relationship may be subject to the exclusive remedy provisions of the Pennsylvania Workers’ Compensation Act such that the employee does not have a separate right to a third party action.

4.02 **Case Example.**

A civil action for emotional distress arising from an employee’s termination was dismissed as there was no evidence of any personal malice and the alleged harm arose within the employment relationship; therefore, workers’ compensation was the exclusive remedy for claimant. *Adams v. USAir, Inc.*, 652 A.2d 329 (Pa. Super. 1994).

4.03 Claims beyond the exclusive remedy provisions provide the employee with a separate right to a third party action.

4.03a There may be a separate civil action remedy where the employer has violated a public policy. A civil action can be pursued for discrimination based upon sex, age or race.²

4.03b Actions can be brought against the employer for wrongful discharge.³

4.03c OSHA is not preempted by the Workers’ Compensation Act, and the employee is free to pursue remedies under that federal statute.⁴

4.03d An employee may pursue a civil action based upon the allegation of a termination in retaliation for filing a workers’ compensation claim.⁵

4.03e An employee may pursue a sexual harassment claim in an action against the employer under the Pennsylvania Human Relations Act.⁶

4.03f A civil action for defamation and abuse of process is not barred by the exclusive remedy provisions of the Act.⁷

4.03g **Practice Pointer:** The employee may file a civil action against the employer, as recounted above, **BUT** that does not mean the employee will be successful! The economic value of each claim must be assessed when pursuing a “global settlement.”

² *Michelson v. Exxon Research*, 808 F.2d 1005 (3d Cir. 1987).

³ *Supra*.

⁴ *McMullen v. WCAB (C&D Technologies)*, 858 A.2d 147 (Pa. Cmwlth. 2004).

⁵ *Shick v. Shirey*, 716 A.2d 1231 (Pa. 1998).

⁶ *Wolk v. Saks Fifth Avenue, Inc.*, 778 F.2d 221 (3d Cir. 1984).

⁷ *Urban v. Dollar Bank*, 725 A.2d 815 (Pa. Super. 1999).

- 4.04 Discrimination/harassment claims may be the subject of a “global” workers’ compensation settlement via Compromise and Release ... however, best practices dictate the preparation of separate stipulations, settlement agreements, and general release documents.
- 4.04a Separate “consideration” should be exchanged in addition to the “consideration” reflected in Compromise and Release documents.
 - 4.04a.1 The consideration may be “nominal,” where the “true” compensation is considered in the Compromise and Release settlement figure.
 - 4.04a.2 The separate consideration may be reflective of the actual value of the third party action, as noted above, one must assess the value of the alleged claims.