



**Issue Date: 21 May 2009**

CASE NO.: 2008-LDA-00349

OWCP NO.: 02-163493

In the Matter of:

D.S.,  
Claimant,

v.

PACIFIC ARCHITECTS & ENGINEERS,  
Employer,

and

FIDELITY & CASUALTY CO. OF NEW YORK/CNA  
INTERNATIONAL,  
Carrier.

**DECISION AND ORDER APPROVING SETTLEMENT  
AND AWARDING ATTORNEY FEES**

On April 3, 2009, the parties filed an Application for Approval of Agreed Settlement pursuant to Section 8(i) of the Longshore and Harbor Workers' Compensation Act ("Act"). The Application is signed by Michael W. Thomas, counsel for Pacific Architects & Engineers ("Employer" or "PAE") and Fidelity & Casualty Company of New York/CNA International ("Carrier), by Mark L. Schaffer, counsel for Claimant, and by D.S. ("Claimant").

On April 8, 2009, I issued a notice of deficiency with respect to the parties' Application. I noted therein that the Application neglected to contain certain information required by 20 C.F.R. § 702.132. In correspondence dated May 12, 2009, Claimant's counsel responded to the deficiencies noted in my April 8, 2009 notice.

According to the terms of the settlement agreement submitted by the above-named parties, Claimant is to receive a lump sum payment of \$276,430.08, representing \$251,430.08 for past and future indemnity benefits and \$25,000.00 for the costs of past and future medical care. Carrier further agrees to pay Claimant's attorney a fee of \$22,500.00 plus costs in the amount of \$1,069.92.

With respect to the specific terms of the settlement agreement, I have reviewed it in its entirety in accordance with the requirements of 20 C.F.R. §702.243(f). Jurisdiction under the

Act is undisputed. The form and substance of the application conform to the requirements of 20 C.F.R. §702.242.

The stipulated facts giving rise to this claim are as follows: Claimant, who was born on June 21, 1962, began working for PAE as an electrician performing generator maintenance in Afghanistan on or around February 1, 2005. In August 2005, after arriving in Afghanistan following leave in the United States from his position with PAE, Claimant began to experience pain in his left leg. On September 30, 2005, Claimant boarded an approximately twenty-six hour long flight from Afghanistan to the United States because his contract was ending and he was leaving his employment with PAE to pursue other opportunities. Upon arriving in the United States, Claimant was immediately taken to the emergency room due to severe pain in his left leg. He was diagnosed with a severe arterial blockage of the left leg. On October 5, 2005, after several failed surgeries to remove the blood clots, Claimant's left leg was amputated above the knee. In October 2006, it was discovered that Claimant suffers from Factor V Leiden gene mutation, a condition which puts him at an elevated risk for venous thrombosis.

The parties stipulate that Claimant's injury comes within the coverage of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, through the Defense Base Act, 42 U.S.C. §§ 1651 *et seq.* They further stipulate that Employer's liability under the Act was insured at all relevant times by Fidelity & Casualty Company of New York and administered by CNA International.

Claimant returned to work with a different employer (Lockheed Martin which purchased Claimant's previous employer PAE) in November 2006. His income from such employment during 2007 was \$158,737.28, and his income during 2008 was \$158,614.56. Claimant's attorney notes that the only medical care Claimant presently requires as a result of his left leg amputation is periodic replacement of his prosthesis which, "now that he has returned from working in Afghanistan where the prostheses took somewhat of a beating, . . . will be a far less frequent occurrence." Counsel further notes that Claimant has medical insurance through both his employer and his wife's employer.

Claimant stipulates that he did not file a claim with respect to his left leg injury until June 20, 2007 and that PAE was not notified of an occupational injury until December 2007. Carrier controverted liability on March 27, 2008, on the basis that the statute of limitations had expired on the claim, that Claimant did not timely notify his employer of the industrial injury, and the medical report did not support a work-related injury.

The parties dispute the amount of Claimant's average weekly wage at the time of his injury. While Claimant contends that his average weekly wage during his employment with PAE was \$1,500.00, Employer contends that his earnings in Afghanistan should be combined with his past earnings which would result in a blended average weekly wage of \$1,284.30. Employer further alleges that if per diem payments are excluded from consideration, Claimant's average weekly wage would be further reduced to \$1,153.84.

With respect to the adequacy of the terms and conditions of the Agreement, the parties note that there are significant issues in dispute with respect to causation of Claimant's injury, his

notice to Employer of the injury, the timeliness of his claim, Claimant's average weekly wage and his entitlement to future medical care. However, they wish to avoid the hazards, delays and costs of further litigation and have agreed to finally and completely settle this matter under the above-described terms.

The parties note that the lump-sum payment agreed to considers the fact that Claimant has sustained a 100% loss of his left leg due to the above-the-knee amputation, which would normally entitle him to 288 weeks of compensation under the Act. However, they further recognize the possibility that Claimant's disability could be found to be not work related and that Claimant could receive no benefits whatsoever. The agreement further takes into account the fact that Claimant is now working and has a collateral source of medical care through benefits provided by his current employer.

The parties have considered the potential impact of the Medicare as Secondary Payer statute, 42 U.S.C. § 1395y(b), on lump sum settlements that purport to release an employer or carrier from liability for future medical expenses. They acknowledge that if Medicare's interest in the lump sum payment described herein has not been adequately considered, Medicare may: refuse to make medical payments once Claimant becomes entitled to Medicare benefits; seek reimbursement from virtually any entity involved in the claim of conditional payments of medical expenses Medicare makes, plus interest, if the Center for Medicare and Medicaid Services ("CMS") determines those payments should have been paid by a primary payer; and CMS may continue to hold Employer/Carrier responsible for future Medicare payments if medical expenses are compromised without approval of the settlement by CMS. Claimant attests to the fact that he is not now entitled to Medicare benefits on account of either age or disability, and that he has not been entitled to Medicare benefits in the past.

I find, considering all the circumstances of this case, that the amount of the settlement is adequate and reasonable, and that the proposed settlement for compensation has not been procured by duress. Claimant is represented by Mark L. Schaffer, and he and his attorney have read and approved the terms of the settlement. Furthermore, I have reviewed the petition for attorney fees and client expenses filed separately by Claimant's attorney and find that the fees and costs set forth therein are reasonable.

The findings contained herein are based upon the agreed facts and representations contained in the Application and attachments, as well as Claimant's counsel's attorney fee petition, copies of which are attached hereto, incorporated herein, and made part hereof.

### **ORDER**

In accordance with 20 C.F.R. §702.243, it is hereby **ORDERED** that the Application for Approval of Agreed Settlement pursuant to Section 8(i) submitted for approval, which agreement includes a provision for payment of attorney fees and expenses, is **APPROVED**, and the parties are directed to carry out the requirements of the settlement.

**IT IS FURTHER ORDERED** that upon completion of the requirements of the Settlement Agreement, the past and future liability of Pacific Architects & Engineers and

Fidelity & Casualty Company of New York/CNA International for payment of compensation and medical expenses under the Act as a result of Claimant's alleged left leg injury is **TERMINATED** and **DISCHARGED**.

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STEPHEN L. PURCELL  
Associate Chief Judge

Washington, D.C.