



**Issue Date: 10 September 2012**

CASE NO.: 2012-LHC-00793  
OWCP NO.: 06-206063

*In the Matter of:*

**RALPH HALL,**  
**Claimant,**

v.

**FLORIDA STEVEDORING COMPANY and**  
**SIGNAL MUTUAL INDEMNITY ASSOCIATION.,**  
**Employer/Carrier.**

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

This claim was brought under the Longshore and Harbor Workers' Compensation Act (the "Act"). On September 5, 2012, the parties submitted an "Application for Approval of Agreed Settlement—Section 8(I)" (hereinafter "Settlement Agreement") for my approval. The Settlement Agreement has been signed by the Claimant, Claimant's counsel, and the Employer/Carrier's counsel. The parties have agreed to compromise their differences and settle this claim, as outlined in the attached Settlement Agreement, which is incorporated herein by reference.

The Director is not a signatory to the Settlement Agreement; section 8(f) relief. Moreover, section 8(i)(4) of the Act provides that when the parties to a claim for compensation agree to a settlement, "[t]he special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under such settlement."

In the Settlement Agreement, the parties have agreed to attorney's fees and costs in the amount of \$30,000.00.<sup>1</sup> As long as the parties have engaged in arm's length negotiations the fee agreement should be approved if not clearly excessive, absent evidence of collusion. *Eifler v. Peabody Coal Co.*, 27 BRBS 168 (CRT) (7<sup>th</sup> Cir. 1993). I find the attorney's fees to which the parties have agreed are appropriate, taking into consideration the qualifications of Claimant's counsel, the complexity of the issues, the skill with which the case was handled, and the amount

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<sup>1</sup> Claimant's counsel has provided an Application for Attorney's Fee, including an itemization of his time spent representing the Claimant in this matter.

recovered. Thus, the agreed upon attorney's fees and costs in the total amount of \$30,000.00 are hereby approved.

Having reviewed the Settlement Agreement, along with other matters of record, and finding the terms of the settlement incorporated therein to be fair, as set forth below, I hereby approve the Settlement Agreement and have signed the Order attached to the Settlement Agreement. Service will be made by the District Director pursuant to 20 C.F.R. §702.349.

### **FINDINGS OF FACT**

1. The facts are as set forth in the attached Settlement Agreement. The Claimant was born on September 21, 1950. He graduated from high school in 1968, and attended an auto mechanic and electronics trade school. He has worked at the Port of Miami since 1994 as a forklift operator, top loader, lasher, porter, and mule driver. Previously, he worked loading and unloading trucks for two years; he was employed as a residential construction worker and laborer including backhoe operator, and as a Federal corrections officer for seven and a half years. The Claimant also served in the Marine Corps for two years, and in the Reserves for twelve years.
2. The Claimant was working as a forklift operator for the Employer on the Cruise Ship Breemer on March 19, 2009, when he alleged that he picked up a pallet with the forklift and backed up, and the right rear tire hit a piece of broken pallet, causing the forklift to jump or shake, causing an injury to his back.
3. The Claimant was seen on March 20, 2009 by Dr. Irwin Potash. At that time, the Claimant advised Dr. Potash that he did not feel any pain or discomfort. He told Dr. Potash that he had been in an automobile accident years before; he was a pedestrian struck by a car. The Claimant was badly injured, and received treatment over the years. Dr. Potash diagnosed a lumbar strain, related to the Claimant's March 19, 2009 injury, and returned the Claimant to work. When the Claimant saw Dr. Potash on March 24, 2009, he complained of pain in his lower back that radiated down his right leg. In April 2009, Dr. Potash diagnosed the Claimant with low back strain and degenerative changes, and found that he could work, but could not lift more than 25 pounds.
4. The Claimant saw Dr. Christopher Brown, who is Board certified in Orthopaedic Surgery, on April 7, 2009, for lumbar pain. At that time, the Claimant denied that he had radiating pain to his lower extremities, and told Dr. Brown that he was not working. X-rays showed significant spondylitic changes. Dr. Brown's diagnoses included lumbar spondylosis and lumbar strain. He reported that the Claimant definitely had a significant pre-existing condition, with significant spondylosis on x-ray, and might have exacerbation from the jolt in the forklift. On April 28, 2009, Dr. Brown concluded that the Claimant could return to activities, if he only occasionally lifted 25 pounds from floor to waist. He noted that the MRIs showed degenerative discs at L3-L4 and L4-L5, with some compression on the left at L4-L5. On May 18, 2009, Dr. Brown concluded that the Claimant had reached MMI, and had a total body impairment rating of 0%. He stated that the Claimant could return to work without restrictions.

5. The Claimant had an MRI and CT scan of his lumbar spine on May 7, 2009, as a result of the March 19, 2009 incident, and an MRI on November 29, 2011 for complaints of lower extremity pain with tingling and numbness. The reports had similar findings, with diffuse disc bulges throughout the lumbar spine, worse at L3-L4, L4-L5, and the worst at L5-S-1. The left L5 nerve root was compressed, and there was stenosis at all levels.
6. The Claimant also received treatment from Dr. Steven Gelbard, Neurosurgeon and Pain Management, starting on August 10, 2009. The Complainant complained of immediate back pain, and later neck and headache pain, as a result of the March 19, 2009 accident. He denied injuring his head, neck, or back in the past. The back pain was constant, and radiated to both lower extremities, right greater than left, with numbness and tingling radiating to his back and both lower extremities. The neck pain was intermittent, and radiated to both upper extremities, left worse than right. The Claimant also reported dizzy spells, constipation, weakness, weight loss, and difficulty with balance walking. Dr. Gelbard diagnosed cephalgia; strain/sprain, cervical spine with radiculitis, and strain/sprain, lumbar with radiculitis. On a September 14, 2009 visit, the Claimant reported that his pain was worse, and he was stiffer. Dr. Gelbard reviewed options, including conservative treatment, epidural blocks, and surgery. After a November 2, 2009 visit, Dr. Gelbard diagnosed herniations at L3-L4 and L4-L5, with slight slippage at L4-L5 and foraminal narrowing at both levels and facet change.
7. The Claimant was seen by Dr. Neil Schechter, Board certified in Orthopedic Surgery, for an independent medical evaluation on November 11, 2009. Dr. Schechter diagnosed chronic lumbar spondylosis, stenosis, and herniation. After reviewing medical records and MRI before and after the incident, he concluded that the Claimant's condition was related to a pre-existing process, as opposed to a specific work incident on March 19, 2009. He noted that there was not much difference between his report, and the 2008 IME performed by the VA. Dr. Schechter determined that no further treatment was indicated, and that the Claimant did not have any work restrictions from the March 19, 2009 incident. The Claimant had reached MMI with no permanent impairment.
8. The Claimant had a neurosurgery consultation on July 26, 2011 with Dr. Luis Zavala, who noted that the Claimant had a longstanding history of low back related difficulties, dating back at least to 2001. He agreed with Dr. Gelbard that the Claimant needed to be considered for at least a two-level, L4-L5 and L5-S1, decompressive laminectomy. He stated that the Claimant had not returned to his previous baseline.
9. The Employer/Carrier has paid the Claimant temporary total disability benefits from March 24, 2009 through June 9, 2009, at a rate of \$626.67 for 11.143 weeks, for a total of \$6,982.98. The Employer/Carrier has also paid for all reasonable and necessary medical care, pursuant to the Fee Schedule.
10. The parties disagree on the nature and extent of the Claimant's injuries and entitlement to benefits. The Employer/Carrier argues that the Claimant was treated for his injuries as a result of the March 19, 2009 accident, and has returned to baseline after a temporary

aggravation of multiple pre-existing conditions. The Employer/Carrier notes that the Claimant has been treated for chronic low back pain since at least 2001, as a result of his motor vehicle accident. The Employer/Carrier also notes that as recently as October 2008, Mr. Hall sought treatment at the VA for low back pain. The Employer/Carrier argues that the claimant has not been forthright about his previous back injuries and pain, and that his request for additional medical care and treatment are either unnecessary, or totally related to his March 19, 2009 accident. The Employer/Carrier also argues that the Claimant has reached maximum medical improvement, and needs no further medical care or treatment. Further, the Employer/Carrier argues that the Claimant is not entitled to any compensation benefits.

11. The Employer/Carrier retained Ms. Rena Marvin to perform a vocational assessment. She concluded that the Claimant has the transferable skills to work in the area of surveillance system monitoring, or as an unarmed guard, such as gate guard, lobby guard, or patrol guard.
12. The parties have agreed to compromise their disagreements on these issues. The parties have agreed that under the terms of the Settlement Agreement, the Employer/Carrier will pay to the Claimant the sum of \$130,000.00, with the Claimant to pay his attorneys, Gillis, Mermell & Pacheco, the sum of \$30,000 for fees and costs for all work up through the Order approving the settlement. The Settlement Agreement represents any and all potential or actual temporary total or temporary partial disability compensation, permanent partial or permanent total disability compensation, wage loss benefits, past medical benefits, transportation reimbursement, rehabilitation benefits, and attendant care benefits, attorney fees and costs arising from the March 19, 2009 accident under the Act, to which the Claimant might be entitled, either now or in the future, from the Employer/Carrier.
13. In the Settlement Agreement, the Claimant expressly represents that his alleged injuries prevent him from being able to perform the essential duties of his job as a longshoreman/harborworker for the Employer either now or in the future, even with reasonable accommodations. The Employer/Carrier has relied on these representations in agreement to pay the settlement amounts. Thus, as an integral part of the Settlement Agreement, the Claimant has agreed not to apply to, work for, accept referral to, or seek employment with the Employer now or in the future. The Claimant has authorized and agreed that the terms and conditions of the Settlement Agreement may be published to and shared with the Southeast Employers Port Association and the Claimant's local union to insure compliance with the Settlement Agreement.
14. The parties have considered the potential impact of the Medicare as Secondary Payer statute. The parties are currently attempting to determine if the Claimant is a Medicare beneficiary, or will be expected to become one within thirty months after the Settlement Agreement. The parties are not presently settling the issue of future medical care, which will be left open in accordance with the Act. The Claimant will be limited to palliative care only. The Employer/Carrier will obtain and submit an updated MSA to the CMS, and once the CMS decides on the amount owed to fund the MSA, the Employer/Carrier

has the right to either settle future medical care by paying the amount of funds toward an MSA as required by the CMS, or to keep them open. If the Employer/Carrier opts not to settle future medical care by funding the MSA, and the issue of future medical care is left open, either party may advance or protect their rights in accordance with the Act, and neither party waives any right with respect to the issue of entitlement to attorney fees related to any litigation regarding future medical care.

15. I find that the agreed settlement is adequate and has not been procured by duress or fraud. The Settlement Agreement adequately complies with the requirements of 20 C.F.R. §§702.242 and 702.243.

### **ORDER**

IT IS HEREBY ORDERED that the attached Settlement Agreement should be, and hereby is, APPROVED, and the parties are directed to carry out the requirements of the Settlement Agreement; and

It is further ORDERED that the Employer/Carrier shall forthwith pay all amounts due in accord with the provisions of the Settlement Agreement; and

It is further ORDERED that the liability of the Employer/Carrier for all payments of compensation or attorney fees under the Act as a result of the Claimant's alleged accident and injury of March 19, 2009 shall be discharged on payment of the agreed upon sums.

It is further ORDERED that the liability of the Employer/Carrier for all past medical treatment causally related to the Claimant's incidents and injuries described in the Settlement Agreement will be discharged on payment of the outstanding medical expenses in accordance with the Fee Schedule, with future medicals to be left open as set forth in the Settlement Agreement.

**SO ORDERED.**

LINDA S. CHAPMAN  
Administrative Law Judge