



Issue Date: 20 September 2012

CASE NO.: 2012-LHC-00823
OWCP NO.: 06-211856

In the Matter of:

PHILLIP HOLT,
Claimant,

v.

SOUTH FLORIDA CONTAINER TERMINAL and
AMERICAN LONGSHORE MUTUAL ASSN.,
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"). By letter dated February 10, 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'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.

Although the Director is not a signatory to the Settlement Agreement, there is no apparent issue concerning entitlement to 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 \$25,000.00.00.¹ 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) (7th Cir. 1993). I find the attorney's fees to which the parties have agreed are appropriate, taking into consideration the complexity of the issues, the

¹ Claimant's counsel has provided an itemization of his time spent representing the Claimant in this matter.

skill with which the case was handled, and the amount recovered. Thus, the agreed upon attorney's fees and costs in the total amount of \$25,000.00.00 are hereby approved.

FINDINGS OF FACT

1. The facts are as set forth in the attached Settlement Agreement. The Claimant was born on February 14, 1950. He was working as a driver for the Employer on July 29, 2011, when the mule with a flatbed and container that he was driving was lifted into the air about four or five feet, and released by a gantry crane. The Claimant alleges that he was sitting inside the mule, wearing his seatbelt; he tried to remove his seatbelt to jump out, but the container dropped before he was able to do so. The Claimant alleges that he was shaken inside the cab of the mule, and received injuries to his neck, both shoulders, his left leg, and lower back.
2. The Claimant went to the University of Miami Hospital emergency room on July 29, 2011, complaining of neck pain, right shoulder pain, left lower leg pain, and lower back pain. He was treated and released, with a diagnosis of multiple contusions/sprains of the right shoulder/neck and low back.
3. The Claimant was treated by Dr. Phillip Lozman, who diagnosed him on August 8, 2011 with multiple contusions, and prescribed Celebrex, a lumbar corset, Soma, and physical therapy. He found the Claimant fit for modified duty without any pushing, pulling, or lifting over ten pounds, no reaching above shoulder level, no twisting, bending or stopping, and no operating a motor vehicle.
4. The Claimant saw Dr. Michael Dennis for complaints of injuries to his neck, low back, and lower extremities, beginning on September 2, 2011. Dr. Dennis diagnosed low back pain and strain, and prescribed anti-inflammatory medication, Soma, and a topical cream, as well as physical therapy. Based on a functional capacity evaluation done on October 20, 2011, on November 11, 2011, Dr. Dennis concluded that the Claimant was able to return to work as a mule driver on full duty status. However, the Claimant returned, with complaints of pain in his neck and back. Dr. Dennis returned him to a no work status and prescribed medications. He has not concluded that the Claimant has reached maximum medical improvement, or assigned a permanent impairment rating.
5. The Claimant underwent physical therapy at Lumana Therapy, Inc., in August 2011 and November 2011. On December 22, 2011, he underwent a CT scan of the cervical spine, which showed no acute fracture, and diffuse degenerative disease. The Claimant had a lumbar MRI on April 9, 2012, which showed mild degenerative changes and no disc herniation. An MRI of the cervical spine showed mild cervical spondylosis, minor posterior disc bulging at C4-C6, but no disc herniation. The Claimant has requested authorization for MRIs of his shoulder, but it has not been provided, due to the proximity of his shoulders to his pacemaker and defibrillator.
6. The Claimant was seen by Dr. Edward J. Frankoski on March 7, 2012, for pain management. He received lumbar facet injections on March 19, 2012, and April 2, 2012.

On April 16, 2012, Dr. Frankoski concluded that the Claimant had reached maximum medical improvement from a pain management viewpoint, with a zero impairment rating.

7. Dr. Kenneth L. Jarolem, a spine specialist, evaluated the Claimant on February 3, 2012, noting that the Claimant had completed the facet blocks that he had recommended, and was at maximum medical improvement. The Claimant was not in need of any surgical intervention, and based on an MRI scan and x-ray, all of the findings were longstanding and degenerative in nature. He stated that the Claimant had neither an impairment rating nor any permanent restrictions as a result of his July 29, 2011 work injury.
8. The Employer has paid the Claimant temporary total disability benefits from July 30, 2011 through November 13, 2011, based on an average weekly wage of \$1,533.69, for a total of \$15,629.80. All medical bills for reasonable and necessary medical care related to the Claimant's claim have been or will be paid by the Employer/Carrier pursuant to the Fee Schedule.
9. The Claimant graduated from high school in 1969, and took vocational courses, and learned how to weld and use a lathe. The claimant served in the U.S. Navy from 1969 to 1972, and for four more years in the Reserve. In the Navy, the Claimant worked as an engineer, and as a mechanic on diesel engines. He is certified on mules, toploaders, and small and large forklifts. The Employer/Carrier retained Ms. Rena Marvin to prepare a labor market survey and identify suitable alternate employment, and attached a copy of her report.
10. The parties have considered the potential impact of the Medicare as Secondary Payer statute. The Claimant is 62 years old. He is not a current Medicare beneficiary, nor is he expected to become a Medicare beneficiary within thirty months following the settlement. The Claimant has not applied for Social Security Disability benefits, nor is he receiving such benefits, or has applied and been denied for such benefits. The total amount of this settlement is not in excess of \$250,000.00, and there is thus no requirement for the Claimant to seek CMMS approval, or to allocate any funds in a Medicare Set Aside account.
11. The Claimant confirms that there is no claim or right of reimbursement by Medicare or the Medicare Secondary Payer Program for treatment of the injuries in connection with this claim, and acknowledges that all responsibility for Medicare claims or Medicare Secondary Payer Program liens for any and all past treatment for which Medicare or the Medicare Secondary Payer Program has a claim if any, is that of the Claimant, subject to the rules and regulations of Medicare.
12. The Claimant understands that the receipt of the settlement monies may impact any assistance he currently receives, or may receive in the future, from Medicare, Medicaid, Social Security Disability, or other collateral sources, but regardless of any such impact, including a reduction in benefits, a cessation of benefits, or reimbursement of benefits, the Claimant wishes to proceed with the settlement agreement.

13. The parties have submitted an itemization of medical benefits for the preceding three years, and have allotted \$10,000.00 for future medical benefits in the unlikely event that the Claimant needs medical treatment in connection with his July 29, 2011 injury. The Claimant also has insurance through his Union for medical expenses.
14. The parties do not agree on the nature and extent of the Claimant's injuries. The Employer/Carrier contends that the Claimant's alleged injuries were either not related to his work accident, were pre-existing, or were the natural progression of pre-existing problems as reflected in the records from Sage Chiropractic, and were not permanently worsened by the work accident. The Employer/Carrier claims that the Claimant has not been forthright regarding his pre-existing medical conditions with his treating and examining physicians, and that he is not entitled to any compensation benefits. Alternatively, payment of this settlement compensates the Claimant for all periods of temporary total, temporary partial, and/or permanent partial disability benefits. The Claimant contends that he has suffered new injuries, and/or a permanent aggravation of pre-existing injuries, and that he has been forthright with his treating and examining physicians.
15. The parties have agreed to compromise their disagreements, and settle this claim on the following terms. The Claimant and the Employer/Carrier have expressly agreed that all past benefits due and owing to the Claimant for his injuries alleged to have occurred on July 29, 2011 have been paid. The Claimant has agreed to waive his right to any future benefits under the Act as a result of the alleged injuries arising out of or related to the July 29, 2011 injury, in return for the Employer/Carrier's payment of a lump sum of \$80,000.00, from which Claimant's counsel, Gillis, Mermell & Pacheco P.A. will be paid by the Claimant \$25,000.00 for attorney fees and costs, for a net sum of \$55,000.00 to the Claimant. This amount represents \$45,000.00 for past and future indemnity benefits, and \$10,000.00 in future medical benefits.
16. The parties agree that 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, medical benefits, transportation reimbursement, rehabilitation benefits, and attendant care benefits, attorney fees and costs arising from the July 29, 2011 incident under the LHWCA to which the Claimant might presently be entitled, or to which he may be entitled to receive in the future from the Employer/Carrier.
17. 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, attorney fees, and medical benefits under the Act as a result of the Claimant's alleged accident and injury of July 29, 2011 shall be discharged on payment of the agreed upon sums.

SO ORDERED.

LINDA S. CHAPMAN
Administrative Law Judge