



Issue Date: 25 September 2012

Case No.: 2012-LHC-01754
OWCP No.: 06-211213

In the Matter of:

DERRICK ODOMES,
Claimant,

v.

FLORIDA INTERNATIONAL TERMINAL/
COMMERCE & INDUSTRY INS. COMPANY C/O CHARTIS,
Employer/Carrier.

**DECISION AND ORDER
APPROVING SETTLEMENT**

That above-captioned matter, which arises under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.* was assigned to the undersigned administrative law judge for disposition. No hearing will be scheduled, however, as a settlement has been submitted for approval. In that regard, a settlement agreement was originally submitted on August 1, 2012. However, as the initial settlement did not comply with the regulatory requirements, Associate Chief Judge Paul C. Johnson, Jr. issued a Notice of Deficiency on August 15, 2012, which is incorporated by reference herein. Issuance of Judge Johnson's Notice tolled the period for approval of the settlement.

On September 11, 2012, counsel for Employer, on behalf of both parties, submitted a revised Joint Petition and Application for Approval of Settlement Pursuant to Section 8(i) of the Longshore and Harbor Workers' Compensation Act, signed by the Claimant, his counsel, and counsel for Employer/Carrier ("Settlement Agreement"), with attachments including a roster of medical expenses, a fee petition with attached itemized entries, a medical report, and other documentation. The parties have done the bare minimum in responding to the concerns raised. Nevertheless, as the Settlement Agreement adequately addresses the deficiencies identified by Judge Johnson and now complies with the regulatory requirements, it is being approved.

First, technical deficiencies in the prior settlement agreement have been corrected and it now provides information that is required to be provided under 20 C.F.R. §702.242. As amended, the Settlement Agreement lists the total amounts paid and when the payments were terminated. Unfortunately, the supporting documentation is not consistent with the Settlement

Agreement.¹ With respect to collateral sources for the payment of medical expenses, the Claimant indicates that he currently holds health insurance through the International Longshoreman's Association. *See* 20 C.F.R. §702.242(a). Language in the Settlement Agreement that could be construed as barring claims not currently in existence (including a Waiver clause) has been deleted. *See* 20 C.F.R. §702.241(g). Also, an indemnification (Hold Harmless) clause relating to Medicare has been deleted.

Second, the issues of past and future medical expenses have been adequately addressed. Under 20 C.F.R. §702.242(b), a section 8(i) settlement is required to provide specified information, including a statement as to medical expenses paid during the past three years and an estimate of future medical expenses. However, the adjudicator may waive these requirements for good cause. *See generally Bomback v. Marine Terminals Corporation*, BRB No. 10-0129, -- BRBS – (Ben. Rev. Bd. Oct. 19, 2010) (pub) (invalidating approval of section 8(i) settlement when need for and estimated costs of future medical treatment was not addressed). The initial agreement was not entirely clear on the issue of medical expenses. As amended, the Settlement Agreement specifies medical expenses paid during the past two years (since the time of the accident) and includes a roster itemizing medical bills; it is therefore compliant on the past medical expenses issue. With respect to future medical expenses, the Settlement Agreement states at page 3, numbered paragraph 2:

The parties agree and stipulate that the Claimant has reached a level of MMI regarding his head injury and cervical spine injury. With the Claimant being placed at MMI, the need for continued medical treatment has subsided substantially, in as much, it is not expected that the Claimant will require additional palliative medical care. The parties agree and stipulate that good cause has been presented to alleviate the need to obtain an estimate of future medical care.

As I must conduct my own independent analysis of the settlement provisions, a stipulation by the parties is not controlling. Nevertheless, I find that the Settlement Agreement adequately addresses the issue of past medical expenses and, with respect to future medical expenses, a waiver is appropriate because, as the Settlement Agreement provides, notwithstanding the articulated lessened need for medical care in the future, it is impossible to accurately predict the need for future treatment, the parties have made a good faith effort to allocate sufficient amounts for future medical expenses, and counsel have conducted arms length negotiations on behalf of the parties.

Attorney Fees and Costs. There is a general requirement that applications for attorney's fees be considered and approved by administrative law judges (for work performed before them) even where settlements are involved. *See, e.g., Ballard v. General Dynamics Corp.*, 12 BRBS 966 (1980); *see also* 20 C.F.R. § 702.132. As long as the parties have engaged in arm's length

¹ An average weekly wage of \$883.21 with a corresponding compensation rate of \$588.01 was listed in the Settlement Agreement. The supporting documentation indicates that a weekly wage and compensation rate of \$314.21 was originally used; however, that was apparently corrected, as the Settlement Agreement indicates that \$3,532.86 in Indemnity was paid in 2012 (from the beginning of the year until benefits were terminated on February 6, 2012 based upon Claimant's failure to attend an examination); and \$19,470.34 in Indemnity was paid in 2011, from the date of the injury (although payments apparently began the next day, May 16, 2011) until the end of the year.

negotiations, however, the fee agreement should be approved if not clearly excessive, absent evidence of collusion. *See generally Eifler v. Peabody Coal Co.*, 13 F.3d 236, 27 BRBS 168 (CRT) (7th Cir. 1993). Fees and mileage for necessary witnesses may be assessed against the employer and carrier as costs under section 28(d) of the Act, 33 U.S.C. § 928(d). Expert witness fees are also payable under section 28(d). *Hernandez v. National Steel & Shipbuilding Co.*, 13 BRBS 147, 150 (1980). *See also Bradshaw v. J.A. McCarthy, Inc.*, 3 BRBS 195, 201-02 (1976), *petition for review denied*, 564 F.2d 89 (3d Cir. 1977) (table). Having reviewed the fee petition, and taking into consideration the criteria set forth in 20 C.F.R. §702.132, which require that any fee approved be commensurate with the work performed, the complexity of the issues, the skill with which the case was handled, and the amount recovered, I find that the agreed upon fee of \$25,000.00 (inclusive of costs) is reasonable and appropriate and it is approved.

Medicare Secondary Payer Act. Under the Medicare Secondary Payer Act (“MSP”), 42 U.S.C. §1395y(b), the Center for Medicare and Medicaid Services (“CMS”) may hold employers and carriers responsible for future Medicare payments if medical expenses are compromised without approval of the settlement by CMS. *See* 42 C.F.R. § 411.46. The parties indicate that they have considered Medicare’s interests in the settlement, as set forth in the Settlement Agreement. In approving this Settlement Agreement, I have not determined whether Medicare’s interest (if any) in this matter has been adequately protected under the provisions of the MSP.

Having reviewed the Settlement Agreement, along with other matters of record, and finding its terms to be fair, I hereby approve the terms thereof. I find that the Settlement Agreement, as revised, comports in all material aspects with the requirements of section 8(i) of the Act, 33 U.S.C. § 908(i) and its implementing regulations, 20 C.F.R. §702.241 to §702.243. The terms of the Settlement Agreement are incorporated by reference herein. Service will be made by the District Director, pursuant to 20 C.F.R. § 702.349.

FINDINGS OF FACT

1. The facts are set forth in the Settlement Agreement. Briefly, this action involves Claimant’s claim that he was injured in an accident of May 15, 2011, when several lashing bars (10-foot metal rods) fell on him, striking him on the left side of his head, and he sustained injuries to his head, face and back (cervical spine and lower spine). The parties have reached an agreement on all material issues, as set forth in the Settlement Agreement.
2. I find that the Settlement Agreement provides adequate relief to the Claimant and it has not been procured by fraud or duress.
3. Settlement in the total amount of \$125,000, out of which \$100,000.00 is payable to Claimant (\$50,000 for compensation, \$25,000 for past, present and future non-Medicare medical benefits, and \$25,000 for Medicare covered medical expenses) and \$25,000.00 for attorney fees and costs (to David Pacheco, Esq., and his firm, Gillis, Mermell & Pacheco, P.A.) is hereby approved and the parties are directed to carry out the requirements of the settlement. Employer/Carrier shall receive a credit for the \$5,000 already paid to Claimant

4. I find that the Settlement Agreement provides adequate relief to the Claimant with respect to the matters addressed and it has not been procured by fraud or duress.

ORDER

IT IS HEREBY ORDERED that that the Settlement Agreement should be, and hereby is, **APPROVED** and the Employer/Carrier shall forthwith pay all amounts in accordance with the above Findings of Fact and the provisions of the Settlement Agreement, and

IT IS FURTHER ORDERED that the liability of Employer and Carrier for compensation, past and future medical benefits, and attorney fees and expenses under the Longshore and Harbor Workers' Compensation Act, as a result of Claimant's accident and injuries sustained on or about May 15, 2011, shall be discharged upon the payment of the agreed upon sums.

PAMELA J. LAKES
Administrative Law Judge