



Issue Date: 11 October 2012

CASE NO.: 2012-LHC-00857
OWCP NO.: 06-210805

In the Matter of:

HENRY RAGIN,
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"). On September 18, 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 \$25,000.00.¹ 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 qualifications of Claimant's counsel, the complexity of the issues, the skill with which the case was handled, and the amount

¹ 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 \$25,000.00 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. 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 May 8, 1956. He attended high school through the eleventh grade, and has a work history in the construction industry, and as a cook and restaurant manager. He is certified as a mule driver, crane operator, and small forklift operator, and has 34 years of experience with the union. He is currently not working.
2. The Claimant was working operating a gantry crane for the Employer on February 18, 2011, when he alleged that the cab, in which he was sitting, began to violently shake up and down, causing severe pain in his back and left leg. The Claimant reported the incident to his supervisor, and went to the Port of Miami Medical Clinic, where he was given a drug test, but received no treatment. The following day, the Claimant reported to work on a crane, and a cable broke and hit the cabin, causing another incident which injured his back. The Claimant worked for four or five more days, and saw a chiropractor, unauthorized, for two or three visits. The Claimant contends that he did not return to the Port of Miami Clinic because no treatment was provided to him; his attorney referred him to Dr. Moya.
3. Dr. Moya saw the Claimant on March 21, 2011, and diagnosed thoracic spine strain and sprain, rule out herniated disc in the lumbar spine and facetogenic arthropathy. Dr. Moya recommended a lumbar MRI, therapy for three times a week for four weeks, Celebrex, and Amrix. A lumbar MRI was done on March 28, 2011, which showed spinal stenosis at L3-4, bulging annulus and annular tear at L4-5 with moderate canal stenosis, and hypertrophy of the ligamentum flavum. Although therapy was helping, Dr. Moya felt that the claimant was a candidate for facet blocks, which Dr. Moya performed on May 8, 2011. As of June 6, 2011, the Claimant reported just a 10% improvement for two weeks. Dr. Moya recommended a number of surgical options, including discography, endoscopic discectomy and ablation by way of microdiscectomy with TESSYS procedure, classical laminectomy and fusion, and FUSIO at L3-4 and L4-5, combined with discography and endoscopic discectomy rather than ablation. Dr. Moya continues to see the Claimant, and to recommend some type of surgical intervention.
4. Dr. Moya referred the Claimant to Dr. Brown for nerve conduction studies of the bilateral lower extremities, which were unremarkable. Lumbar radiculopathy could not be evaluated.

5. Dr. Donshik saw the Claimant on June 16, 2011, and reported that his examination showed that the Claimant walked without difficulty, had full range of motion of the cervical spine, had some spasm of the thoracolumbar spine, and generally exhibited a normal lower extremity exam, with some subjective left leg pain. He reported that there was no significant pathology on the MRI, or anything that he could interpret as acute, or indicating an injury as a result of the alleged crane episodes. Dr. Donshik suggested that the Claimant might have a lumbar strain superimposed on a pre-existing degenerative condition; the findings were all consistent with pre-existing degenerative conditions. Dr. Donshik suggested epidural injections, and questioned the surgeries recommended by Dr. Moya.
6. Dr. Donshik examined the Claimant on January 23, 2012, and reviewed his medical records. His physical examination showed inconsistent subjective complaints of pain. Dr. Donshik concluded that it was “inconceivable” that all of the pathology was the result of the crane incidents. He noted that the Claimant had three levels of disc dessication, a degenerative condition; there were no specific focal herniations, but rather a generalized disc bulge typical with age. Dr. Donshik felt that the three level fusion recommended by Dr. Moya was absolutely not indicated in any orthopedic spinal literature, and that Dr. Moya’s claim that there was a 95% likelihood that the Claimant would notice a decrease in his pain following facet fusion was inconsistent with any orthopedic procedure that could offer such a high success rate. Dr. Donshik does not believe that the Claimant would improve with any type of surgical procedure. He did not need a discectomy to compress the nerve roots, and he did not need a fusion. The Claimant had completed physical therapy and undergone injection therapy, and Dr. Donshik placed him at maximum medical improvement, employable without restriction.
7. Dr. Alen Gordon examined the Claimant on October 26, 2011, and reviewed his medical records. He did not reach any conclusions regarding care, treatment, maximum medical improvement, or impairment ratings.
8. The Employer/Carrier has paid the Claimant temporary total disability benefits from March 21, 2011 through February 3, 2012, at a rate of \$1,237.21 for 45 3/7 weeks, for a total of \$56,558.17. The Employer/Carrier has also paid for all reasonable and necessary medical care, pursuant to the Fee Schedule.
9. The parties disagree on the nature and extent of the Claimant’s injuries and entitlement to benefits. The Employer/Carrier argues that the Claimant’s injuries were either not related to the work injury, were pre-existing, or were the natural progression of the pre-existing problems, and were not permanently worsened by the work injury. The Employer/Carrier argues that the Claimant’s request for further medical care and treatment is unrelated to the work injury, or not needed for any current condition. The Employer/Carrier argues that the Claimant is not entitled to any compensation benefits, or alternatively, that payment of this settlement compensates the Claimant for all periods of temporary total, temporary partial, and/or permanent partial disability benefits.

10. The Claimant argues that he has suffered new injuries and/or a permanent aggravation of pre-existing injuries, and needs additional medical treatment.
11. The Employer/Carrier retained Mr. James Sullivan to perform a vocational assessment. He prepared a labor market survey identifying suitable alternate employment based on the Claimant's age, background, experience, education, and physical abilities.
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 \$75,000.00, with the Claimant to pay his attorneys, Gillis, Mermell & Pacheco, the sum of \$25,000 for fees and costs, for a net settlement of \$50,000.00 to the Claimant. Of this sum, \$25,000.00 represents past and future indemnity benefits, and \$25,000.00 represents future medical benefits. 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 February 18, 2011 work injury under the Act, to which the Claimant might presently be entitled, or to which he may in the future become entitled to receive from the Employer/Carrier.
13. The Claimant has agreed to waive his right to any future benefits under the Act as a result of the alleged injuries. The Claimant also expressly agrees that for seven months from the signing of the Settlement Agreement, he will not apply for, seek, or accept work as a longshoreman and harborworker for South Florida container Terminal. The Employer/Carrier has relied on these representations in agreeing to pay the sums of money in the Settlement Agreement. The Claimant also acknowledges and agrees that the terms and conditions of the Settlement Agreement may be published to and shared with his union to ensure compliance with the Settlement Agreement.
14. The parties have considered the potential impact of the Medicare as Secondary Payer statute. The claimant is not a current Medicare beneficiary, and is not expected to become one within thirty months after the settlement. The Claimant has not applied for, and is not receiving Social Security Disability benefits, nor has he been denied such benefits. As the total amount of the settlement is not over \$250,000, there is no requirement for the Claimant to seek CMMS approval, or to allocate any funds in a Medicare Set aside account, and Medicare waives any interest in the settlement. party waives any right with respect to the issue of entitlement to attorney fees related to any litigation regarding future medical care.
15. 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.

16. 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.
17. The parties have submitted an itemization of medical benefits for the preceding three years, and have allotted \$25,000.00 for future medical benefits in the unlikely event that the Claimant needs medical treatment in connection with his February 18, 2011 injury. The Claimant also has insurance through his Union for medical expenses.
18. 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 February 18, 2011 shall be discharged on payment of the agreed upon sums.

SO ORDERED.

LINDA S. CHAPMAN
Administrative Law Judge