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Workers' Compensation Settlements - - Plaintiff and Defense Perspectives

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Workers' Compensation Settlements - -
Plaintiff and Defense Perspectives

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I. Settlement - - Pros and Cons

A. Claimant's Perspective - - The injured worker may have any number of motives for wanting to pursue settlement negotiations in a workers' compensation case. A small sampling of these reasons might include:

1. Potential third party litigation (i.e., products liability, MVA, etc.) that would make it advantageous to eliminate the subrogation lien and provide a source of funding for third party litigation costs;

2. Claimant is tired of dealing with workers' compensation system (i.e., doctors, lawyers, judges, adjuster) and simply "wants out";

3. Claimant is a strong candidate for re-training due to severity of injury, lack of modified duty and lack of reasonable accommodation that would allow a return to pre-injury job;

4. Claimant seeks to avoid negative result in litigation (i.e., pending termination, modification, suspension, or contested claim or reinstatement petition);

5. Claimant is at MMI and is receiving SSD and workers' compensation concurrently. Claimant wishes to increase SSD payments by taking a lump sum settlement and spreading it out over her life expectancy;

6. Claimant has mounting debts and seeks a "fresh start".

The "negatives" to claimant in settling might include one or more of the following: uncertainty over coverage of future medical bills; loss of employment benefits through resignation; lack of "employability" after settlement; foregoing a potentially large WCJ award, in exchange for a sum certain; inability of lump sum to meet future income needs.

B. Employers' Perspective - - The employer will also have to explore a number of factors, to sort out the pros and cons of settling a particular case.

1. "Settlement philosophy" - - Perhaps the most important issue for employers managing workers' compensation costs today is the balance between avoiding the creation of a "settlement culture" (i.e., creating an expectation in the workforce that workers' compensation is the equivalent of a social welfare program or a pension supplement) and maintaining a fair and objective approach to settlement evaluations. Too often, employers look to legal counsel to decide which cases should settle and at what price. By delegating this important responsibility to a legal advisor, employers are really allowing the legal advisor to dictate or control company policy and make business judgments that are better made by the risk manager or human resources professional. The important point is that there is no "right or wrong" settlement philosophy - - just as there is no "right or wrong" policy on modified duty. What works for company A might be a disaster for company B. Some companies successfully employ a "no settlement" philosophy - - carefully screening, but aggressively defending all claims that result in litigation. Other companies adopt a more moderate approach - - carefully selecting those few cases that should settle and are not likely, if settled, to create a negative "ripple effect" within the workforce. What is your company philosophy on settlement? The fact that the company culture is changing is no excuse for failing to take charge of your claims.

2. Factors for employers to consider in settling workers' compensation cases:

   a. How does settlement of this particular case comport with our settlement philosophy?

   b. What message will settlement of this case send to other, similarly situated employees?

c. What is the likelihood of prevailing in the current litigation? Should we look beyond the immediate litigation, to see whether there may be an opportunity, short of settlement, to get the case back on track?

d. What is our exposure if we lose - - worst case scenario and likely outcome;

e. Are there creative cost-shifting strategies that we can employ, as part of the settlement process, to shift the future costs of the claim to other payment sources?

f. Do we need to start taking steps as a company, to correct the "settlement culture" we have created - - both within the workforce and within the legal community?

II. Legal Considerations

A. Parties affected by settlement - - It is worth keeping in mind, as a case is evaluated for potential resolution, that many parties on each side of the litigation may be affected by settlement in some way:

1. Claimant's side - - Persons affected might include claimant, claimant's spouse, dependent children (i.e., domestic relations liens, fatal claim cases), health care providers, various subrogation interests (i.e., non-occupational medical coverages, STD and LTD providers, Medicare, etc.).

2. Employer's side - - TPA, employer, union, carrier, various parties with subrogation and lien interests, the workforce at large, Medicare.

B. Mechanics of Settlement

Section 449 of the Pennsylvania Workers' Compensation Act (the "Act"), 77 P.S. § 1000.5, sets forth the provisions regarding the Compromise & Release (C&R) of workers' compensation claims, as follows:

Sec 449 (a) Nothing in this act shall impair the right of the parties interested to compromise and release, subject to the provisions herein contained any and all liability which is claimed to exist under this act on account of injury or death.

(b) Upon or after filing a petition, the employer or insurer may submit the proposed compromise and release by stipulation signed by both parties to the workers' compensation judge for approval. The workers' compensation judge shall consider the petition and the proposed agreement in open hearing and shall render a decision. The workers' compensation judge shall not approve any compromise and release agreement unless he first determines that the claimant understands the full legal significance of the agreement. The agreement must explicit with regard to the payment, if any, of reasonable, necessary and related medical expenses. Hearings on the issue of a compromise and release shall be expedited by the department, and the decision shall be issued within thirty days.

(c) Every compromise and release by stipulation shall be in writing and duly executed, and the signature of the employe, widow or widower or dependent shall be attested by two witnesses or acknowledged before a notary public. The document shall specify:

(1) the date of the injury or occupational disease;

(2) the average weekly wage of the employe as calculated under section 309;

(3) the injury, the nature of the injury and the nature of disability, whether total or partial;

(4) the weekly compensation rate paid or payable;

(5) the amount paid or due and unpaid to the employe or dependent up to the date of the stipulation or agreement or death and the amount of the payment of disability benefits then or thereafter to be made;

(6) the length of time such payment of benefits is to continue;

(7) in the event of a lien for subrogation under section 319, the total amount of compensation paid or payable which should be allowed to the employer or insurer;

(8) in the case of death:

(i) the date of death;

(ii) the name of the widow or widower;

(iii) the names and ages of all children;

(iv) the names of all other dependents; and

(v) the amount paid or to be paid under section 307 and to whom payment is to be made;

(9) a listing of all benefits received or available to the claimant;

(10) a disclosure of the issues of the case and the reasons why the parties are agreeing to the agreement; and

(11) the fact that the claimant is represented by an attorney of his or her own choosing or that the claimant has been specifically informed of the right to representation by an attorney of his or her own choosing and has declined such representation.

(d) The department shall prepare a form to be utilized by the parties for a compromise and release of any and all liability under this act in accordance with the stipulation requirements of this section, and it shall issue such rules and regulations necessary for it and the board to enforce the procedure allowed by this section. No compromise and release shall be considered for approval unless a

> vocational evaluation of the claimant is completed and filed with the compromise and release and made a part of the record: Provided, however, That this requirement may be waived by mutual agreement of the parties or by a determination of a workers' compensation judge as inappropriate or unnecessary. The vocational evaluation shall be completed:
>
> (1) by a qualified vocational expert approved by the department; or
>
> (2) by the department on a fee-for-service basis.
>
> Nothing in this clause shall serve to impose an obligation of liability or responsibility regarding vocational rehabilitation on either party or to require the implementation of vocational rehabilitation.

Settlements by C&R were first allowed as part of the 1996 amendments to the Act ("Act 57"). Since that time, settlements have had a significant and beneficial impact on the backlog of cases across the state, and on the general "health" of the workers' compensation system as a whole.

A Workers' Compensation Judge ("WCJ") does not have the authority to approve a C&R Agreement unless the WCJ believes that the claimant understands the full legal significance of the Agreement and its effect on his or her rights under the Act. Contrary to prior practice (pre-Act 57), a WCJ no longer has to determine whether a given settlement is in the "best interests" of the claimant.

Nonetheless, old habits die hard, and at least for a time counsel and WCJs would still ask claimants at the C&R hearing if he or she believed the proposed settlement was in his or her "best interests." It could be argued that such an inquiry is relevant in assessing whether the claimant truly understands the legal significance of the settlement, since presumably the claimant would not desire to go through with it, if such were not the case. A claimant who truly

understands the effect of a proposed settlement may appreciate that settling is the best option available, although he may not necessarily feel that the settlement is truly in his "best interests."

1. C&R v. Commutation - - Since 1996, settlements by Compromise and Release have become the preferred method for resolving workers' compensation cases in litigation. Prior to Act 57, settlements were not sanctioned by law, although lump sum payments were often made via "commutation," based on a supplemental agreement and fictional earning power agreed upon by the parties. Alternatively, the parties could enter into a Stipulation of Facts, if supported by evidence of record, in exchange for a lump sum payment. The flexibility and finality of the C&R process has rendered these old methods obsolete. The C&R approach to settlement offers certain distinct advantages in this regard:

   a. The settlement process is now recognized by law and is no longer a "legal fiction" - - thereby lending more finality and certainty to the process;
   b. Stringent safeguards are in place to protect claimants' interests;
   c. The process is flexible enough to allow creativity and cost-shifting, to resolve cases that might not otherwise be resolvable;
   d. Attempts to re-open or set aside settlements by C&R have been largely unsuccessful (see case law discussion at end of outline);
   e. The legal sanctioning of settlements has led to the growing use of mediation to resolve cases.

2. Lump Sum vs. Structured Settlement - - Section 449 of the Act is flexible enough to allow the use of structured settlements or annuities, using all or a portion of the lump sum proceeds. This may be advantageous for a number of reasons, but particularly where the claimant is concerned about having an income stream to meet future needs.

3. Open or closed medicals - - Prior to Section 449, there was no satisfactory way for the parties to "settle" the issue of ongoing medical expenses - - other than a stipulation of facts, supported by medical evidence and approved by a WCJ, and issuance of a formal binding decision. Indeed, a "commutation" presumed the continuation of claimant's disability and the need for ongoing treatment. In a case decided just a few weeks ago, the WCAB held that a commutation approved in 1996 resulted in an "open medical" claim, and that the claimant could, therefore, petition to modify the NCP to include a psychological injury, despite the passage of time. Butcher v. Budd Baer, Inc., PICS Case No. 05-1250 (decided July 28, 2005). Section 449 offers the flexibility to settle future (and past) medical coverage outright, or to shift the burden of these expenses to an alternate source, such as private health insurance or Medicare. The parties can also establish a set aside trust for payment of medical bills, or limit the payment of medical bills for "reasonable and necessary treatment" to a fixed period of time following settlement approval - - perhaps 2 or 3 years. The finality and binding nature of settlements involving medical coverage issues under Section 449 has been reinforced by the courts. Consider, for instance, Iten v. WCAB, 847 A.2d 814 (Cmwlth. Ct. 2004), in which claimant was precluded from seeking payment of "after discovered" medical bills related to his work injury, where the C&R language extended to past, as well as future bills. Likewise, claimant's unilateral but mistaken belief that her non-occupational group health coverage would continue, was insufficient to set aside an approved C&R agreement in Farner v. WCAB, 869 A.2d 1075 (Cmwlth. Ct. 2005). The Court noted, however, that a showing of fraud or mutual mistake might lead to a different result.

4. Cost-shifting strategies - - The C&R process is even flexible enough to consider cost-shifting strategies, to resolve cases that otherwise might not settle. For example:

(a) Medical evidence may support a "full recovery" from the work injury, with residual problems being related to a non-work-related disease process (i.e., degenerative disc disease). The parties might utilize a stipulation of facts, coupled with the usual C&R agreement, to adopt the opinions of the defense medical expert and shift the burden of future medical costs to another payment source (i.e., private health insurance, spousal coverage, etc.).

(b) Medicare Set Aside Trust - - In cases where the claimant is currently receiving SSD benefits, some portion of the settlement proceeds may be used to fund a trust, from which medical payments for the work injury are made. Once the trust is depleted, Medicare assumes responsibility for future payments. In these situations, prior approval from Medicare must be obtained before attending the C&R approval hearing. The specific entity under Medicare that grants approval is the Center for Medicare/Medicaid Services ("CMS"). CMS requires that all current Medicare beneficiaries who settle their workers' compensation claims obtain CMS approval. The amount of the settlement for current recipients is irrelevant. However, for claimants who only have a **reasonable expectation** of becoming eligible for Medicare benefits within thirty (30) months, approval is only necessary if the settlement exceeds $250,000. Medicare approval can be a somewhat byzantine and lengthy process, and it is advisable for employers to monitor the progress of such approval. This is particularly so where claimant is receiving ongoing temporary total disability payments pending the CMS approval process. The employer might consider negotiating a credit for ongoing weekly indemnity benefits, against the lump sum amount, if the approval process takes longer than 3 to 4 months.

(c) Supersedeas Fund Reimbursement - - As most settlements deprive an employer of the potential to seek supersedeas fund reimbursement, that loss should be viewed as a "cost" of settlement by the employer. However, at least one case has held that an employer

may still apply for supersedeas fund reimbursement, where there is a pending petition for termination and the parties decide to settle only the issue of the employer's future liability, expressly reserving the issue of past liability for the WCJ (i.e., assuming the WCJ decides that portion of the termination petition in favor of the employer) Coyne Textile v. WCAB, No. 3059 C.D. 2002 (filed 10/20/03).

5. Other Legal Considerations - - There are certain other considerations to keep in mind, as the settlement process moves ahead:

a. Resignation - - Although the parties might anticipate and assume that a workers' compensation settlement will also include a severance (or broken seniority in the context of an employee who is a member of a union), the better approach is to require a separate written letter of resignation. The resignation will typically be effective as of the date of the settlement hearing. Most employers also prefer to keep the claimant away from the plant (and out of harm's way), while waiting for the WCJ approval hearing. A small "advance payment" might be made, or salary continuation might be offered, to facilitate settlement. A letter of resignation, however, should be standard procedure in virtually any settlement involving a substantial lump sum payment. Absent a resignation, any new injury or aggravation that occurs at work could result in a totally new claim - - with no credit for any settlement proceeds advanced in connection with the C&R.

b. General Release - - Another standard item in any resolution involving a significant cash payment or structured settlement should be a general employment release. The regulations interpreting the Family and Medical Leave Act ("FMLA"), along with those pertaining to disability discrimination under the Americans with Disabilities Act ("ADA") and the Pennsylvania Human Relations Act ("PHRA") clearly provide that the settlement of a

workers' compensation case is no bar to a companion lawsuit under one of these statutes. If the injured worker is truly interested in finality and closure with the employer, a resignation and release should pose no real obstacles to settlement. Conversely, if the claimant is **unwilling** to execute a resignation and release in addition to the Compromise and Release Agreement, this is a fairly good indication that additional litigation is under consideration, or already in the works.

c. Confidentiality Concerns - - Although employers would like their settlement offers and payments to be confidential (and confidentiality language should be incorporated into the settlement documents), in reality, it is difficult to enforce or police these provisions. Employers should expect and anticipate that there will be a certain amount of "information leakage" along the way. The best practice is to emphasize the importance and expectation of confidentiality with counsel and to ask that these provisions be covered in detail with the claimant at or prior to the approval hearing.

III. Practical Considerations

A. Know the Players

It is important to candidly assess the relative strengths and weaknesses of all those who will be involved in litigating any suspension, termination, or other petition when determining whether settlement is a viable alternative. Who is claimant's counsel and what is his or her reputation? Does the WCJ who will hear the petition tend to be claimant or defense-oriented? Are the defense medical/vocational witnesses' credentials strong, and are their opinions sufficient to support the relief sought? What about claimant's expert's evidence? How long will it take to get a decision from the WCJ? What is the likelihood, in light of all the above, that the outcome of the litigation will be favorable to the employer? If the outcome is favorable to the employer, will the employer be eligible for supersedeas fund reimbursement?

B. Importance of Communication

Once a decision to settle has been made, and a lump sum agreed upon by both sides, it is crucial that every other term of the settlement, not just the lump sum, be thoroughly considered and spelled out in the C&R agreement as appropriate. If these additional matters are not thought through carefully, difficulties can arise years later. In fact, there are a growing number of Commonwealth Court opinions that highlight the problems that can occur when claimants, dissatisfied for whatever reason, attempt to "reopen" a settled case. The dissatisfaction which gave rise to these decisions often has to do with aspects of the agreement other than the actual amount of the lump sum (although he or she may regret that as well), including:

1. releasing the employer from paying medical bills when the claimant still required/desired more treatment for the work injury;
2. loss of fringe benefits the claimant had not taken into consideration;
3. claimant believes that she has been tricked or deceived in some fashion;
4. "Settlement remorse" - - accepting a settlement that everyone would agree, in retrospect was not a good idea.

Most of the issues raised in the cases that follow, could have been avoided with better communication between counsel, between claimant and claimant's counsel, or between counsel and the WCJ assigned to the case. Some of the issues that should be "ironed out" well ahead of the C&R approval hearing, include the following:

- Date of the Injury (or injuries, if more than one claim is being released)
- Description of the Injury (or injuries, if more than one claim is being released)
- The exact nature of what is being settled (*e.g.*, wage loss and/or medical, etc.)
- Subrogation rights of the employer under section 319
- Credit for continuing payments of TTD or PTD made after the date of C&R hearing and before payment of the lump sum
- Satisfaction of child support obligations and proof of acceptance by the appropriate authorities

- Payment of past medical bills that have not been identified during the litigation or pre-C&R process
- Social Security Disability (SSD) language (the so-called "Sciarotta" clause)
- Centers for Medicare/Medicaid Services (CMS) approval, in cases that meet the criteria

The single most important factor in the C&R process is claimant's understanding of the deal. A number of settlements fall apart at the last minute, because paperwork is not exchanged ahead of time and the claimant has no meaningful opportunity to review and ask questions about the settlement. As a courtesy to the WCJ and the interest of "finality," the claimant should be prepared to confidently answer any questions posed by counsel or the WCJ at the approval hearing. It can be an expensive proposition for the employer if claimant does not understand the settlement and backs out at the last minute. Likewise, if unanswered questions arise after the settlement, the employer may be forced into further litigation with the claimant - - a scenario that is costly, even if the employer ultimately prevails.

C. Recent Cases - - The following cases demonstrate the importance of full communication and disclosure, prior to the C&R approval hearing:

1. *North Penn Sanitation v. WCAB (Dillard).*[1] In this case the court held that a C&R should only be set aside upon a clear showing of fraud, deception, duress or mutual mistake of fact. *Dilliard* involved an unrepresented claimant who settled his claim. The defense attorney did not inform the WCJ that claimant was blind, nor that the blindness was a result of the work injury. Indeed, it appears the claimant could not read the C&R Agreement, and no one had taken the time read it to him. The presiding WCJ approved the C&R, and the claimant did not appeal from the order approving the settlement. About two years later, the claimant filed a petition to set aside the C&R based upon a "material" mistake of fact.

[1] *North Penn Sanitation, Inc. v. WCAB (Dillard)*, 850 A.2d 795 (Pa. Commw. 2004).

Both the WCJ and the Board found that the C&R should be set aside. The Commonwealth Court agreed, although it found that a "mutual" not a "material," mistake of fact existed at the time of the settlement. The mistake was that both claimant and the carrier knew of the work-related blindness, but this fact was not disclosed to the WCJ who had presided over the C&R approval hearing. The "mutualness" of the mistake was in the form of the joint failure of the claimant (apparently not his fault, however) and the carrier to make the WCJ aware of the work related blindness, which culminated in the WCJ's mistakenly approving the C&R.

Several other opinions from the Commonwealth Court further reveal how the courts will likely handle attempts to reopen settlements under various facts:

2. ***Stiles v. WCAB (DPW).***[2] Claimant attempted to overturn the approval of her settlement on the basis that the lump sum was too small. She argued that her psychiatric condition, along with her post traumatic stress syndrome, made it impossible for her to understand the value of her claim. She further stated that she was not mentally competent at the time of the settlement generally, thereby rendering her psychologically unable to understand the full legal significance of her actions when she settled. The employer argued that the issue of whether she understood what she was doing at that time was precluded by the doctrine of "collateral estoppel."

In order for collateral estoppel to apply, four specific factors must be found by the reviewing court: (1) the legal or factual issues are identical; (2) they were actually litigated; (3) they were essential to the judgment; and (4) they were material to the adjudication. The Commonwealth Court ruled that the employer had satisfactorily proven that all four factors were

[2] *Stiles v. Workers' Compensation Appeal Board (DPW)*, 853 A.2d 1119 (Pa. Commw. 2004).

satisfied, and ruled that all issues, including the claimant's ability to understand the C&R proceedings and its effect on her rights. Thus, the C&R settlement would not be disturbed.

This opinion emphasized the importance of having the WCJ include a specific finding of fact that the claimant understands the full legal significance of the settlement. This would hopefully tend to limit attempts by claimants to get another bite at the apple simply because the value of the settlement was no longer to their liking after the fact.

3. *Barszczewski v. WCAB (Pathmark Stores).*[3] The claimant settled his claim, but sought to reopen it when it was discovered that the incorrect AWW had been used. The claimant argued that the use of the incorrect AWW amounted to a mutual mistake of fact, justifying a reopening of the settlement. The WCJ disagreed and found that the doctrine of *res judicata* operated as a bar to the subsequent attempt to relitigate the AWW. Moreover, the court specifically noted that the claimant had a meaningful opportunity to present wage information below, but had failed to do so on two separate petitions which had included reference to the AWW.

The court reaffirmed the notion that the test to set aside a C&R based on mutual mistake is even more difficult to establish than the proof necessary for a showing of fraud. The court also pointed out that in a typical civil case which results in a settlement, an underestimation of damages prior to settlement does not constitute a mutual mistake of fact sufficient to overturn the settlement, and therefore there was no good reason to stray from this well-established principle for workers' compensation settlements.

4. *Wallace v. WCAB (Bethlehem Steel).*[4] In this case, the employer sought to have a claim dismissed on the basis that the injury therein was barred by the release the claimant had

[3] *Barsczewski v. WCAB (Pathmark Stores)*, 860 A.2d 224 (Pa. Commw. 2004).

[4] *Wallace v. WCAB (Bethlehem Steel)*, 854 A.2d 613 (Pa. Commw. 2004).

given in *different* case. Claimant had entered into a C&R relating to an inhalation injury, in which he represented that he had sustained no other work injuries, but later filed a claim petition alleging a back injury sustained prior to the settlement relating to the inhalation injury. While the claimant had made the broad statement that he had "no other injuries," the claimant apparently had been advised by counsel that his back injury would not be compromised by settling his inhalation injury. In light of this opinion, it is the better practice to use a separate C&R agreement for each injury which is being settled, instead of simply inserting the catch-all phrase which refers to "any other injuries" in one C&R agreement.

5. ***Farner v. WCAB (Rockwell International).***[5] The Commonwealth Court held that a claimant's mistake over her alleged ongoing eligibility for group medical coverage did not warrant setting aside a C&R.

Claimant in this case had been on total disability for over a decade. Employer sought to modify claimant's benefits. During litigation, the parties ultimately settled on a C&R basis with claimant receiving $45,000 in exchange for a release of both indemnity and medical benefits. At the C&R hearing, the claimant stated that she understood that she would still be covered under the "Employer's plan" for group health benefits, but she also signed a separate release (not the C&R) which provided in part as follows:

> I fully realize that with this resignation, I am no longer entitled to any of the privileges or benefits to which employees [of Employer] may be entitled except those benefits and rights which are vested as the time of my resignation.

Within the year following the settlement, the employer discontinued claimant's health care coverage. The claimant thereafter filed a "review petition alleging Employer breached the

[5] *Farner v. WCAB (Rockwell International)*, 869 A.2d 1075 (Pa. Commw. 2005).

C&R agreement by failing to pay her medical insurance premiums ....“ The WCJ on the petition to set aside the C&R found the following, among other things:

1. that claimant would not have handed over the release had she understood that employer was going to discontinue the employment fringe benefit;

2. that the release paperwork did not expressly state that the Claimant would or would not be entitled to ongoing medical insurance coverage;

3. that claimant had “the understanding ... that her medical insurance coverage ... was going to continue”;

4. that the claimant “had a mistaken understanding as to whether her medical insurance coverage ... was going to continue following the approval of the [C&R]”;

5. that the “silence of Employer’s attorney” contributed to claimant’s misunderstanding;

6. that “there was a clear misunderstanding/mistake pertaining to a material issue at the time the parties executed the [C&R] Agreement …., and at the time they asked for it to be approved. As such, the [C&R] Agreement must be set aside.”

The employer appealed to the WCAB, which reversed. The WCAB reasoned that although the claimant genuinely misunderstood the agreement, her written acknowledgement in the voluntary resignation statement she signed was inconsistent with that understanding. The Commonwealth Court affirmed the WCAB, and ultimately ruled that claimant’s misunderstanding was a <u>unilateral</u> mistake insufficient to set aside the C&R Agreement.

This case was a “close call” for the employer, and Judge Friedman’s lengthy dissent makes it clear that this case could have easily gone the other way. Accordingly, employers must take care to consider all issues, including non-workers’ compensation issues, in connection with a C&R. Along these lines, the Commonwealth Court has consistently held that once the parties invoke the jurisdiction of the WCJ over a non-workers’ compensation issue in order to help settle

a case, the WCJ will retain jurisdiction where either of the parties later alleges a breach of that particular aspect of the agreement.[6]

6. *George v. WCAB (Conway Central Express)*.[7] Claimant had suffered a previous head and neck injury with employer (Conway). He went back to work on a suspension, and thereafter started working for a second employer, JEM. While in the employ of JEM, he had another accident, injuring his left knee. JEM accepted this latter injury without litigation.

While receiving TTD for the knee injury, he filed a reinstatement and review petition against Conway, and apparently alleged further injuries against JEM. The WCJ found that both separate injuries substantially contributed to his disability, and an order apportioning liability was issued.[8]

Claimant then settled with JEM, accepting $100,000.00. Four weeks later, he petitioned to reinstate benefits against Conway on the theory that "because the WCJ found each employer 100% responsible for Claimant's disability and JEM is no longer in the case, Conway is responsible to pay the full amount of Claimant's total disability compensation."[9]

The WCJ, WCAB and Commonwealth Court all rejected claimant's petition. The Commonwealth Court expressed its displeasure with claimant's argument in this case, as the following excerpt reveals: "Claimant cites no authority for these arguments, and we are not surprised, since there is nothing in workers' compensation law or civil law that sanctions the

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[6] *See Department of Public Welfare v. Workers' Compensation Appeal Board (Overton),* 783 A.2d 358 (Pa. Commw. 2001); *See also Department of Corrections v. Workers' Compensation Appeal Board (Clarke)*, 824 A.2d 1241 (Pa. Commw. 2003).

[7] *George v. WCAB (Conway Central Express)*, 871 A.2d 310 (Pa. Commw. 2005).

[8] Apportionment of liability is permitted in limited circumstances under §322 of the Act. *See, e.g., South Abington Township and St. Paul Fire & Marine Insurance Company v. Workers' Compensation Appeal Board (Becker and ITT Specialty Risk Services)*, 831 A.2d 175 (Pa. Commw. 2003).

[9] *George*, 871 A.2d at 312.

windfall Claimant seeks. Therefore, Claimant is not entitled to a reinstatement of total disability payments from Conway solely on the grounds that he voluntarily extinguished his claim against JEM."[10]

[10] *Id*.