Who, What, When, Why, and How for Settlements under Section 8(i)

By Jonathan A. Tweedy
Why Settle?

- Common sense = Employers and Carriers want to close a claim
- Is withdrawal of a claim an option?
- Administrative closure does not equal closure of a claim
- Payment of a claim by the Special Fund does not equal closure of a claim
- A running award just sounds awful
What to Settle

- Compensation benefits (Past and Future)
- Death benefits
- Attorney’s fees and expenses
- Penalties and interest
  - Caveat for all penalties
- Medical
  - Issues with closure of past medical
Where to Settle?

- Consider the referral date for OWCP v. OALJ
- Consider the procedural status of claim – Remand v. Retainer of Jurisdiction
- Consider which office of the U.S. Department of Labor gets to have a discussion about deficiency with you.
When to Settle?

- When “it” hits the fan
- Scheduled awards
- Claimant has reached MMI
- Claimant does not desire any more medical care
- Death Benefits to Minors
- Claims accepted by the Special Fund
- War Hazards considerations
Who can Settle?

- Must have a ripe claim or be a valid beneficiary
- Can only settle what exists at settlement (ex. not expected death claim for a living claimant)
- Special Fund considerations
- Claimant’s attorney considerations
How to Settle?

- Settlement Apportionment
  - Comp., Medical, P&I, Fees for “successful representation”
- Section 8(i) Settlement Agreement
  - Meets proper regulations
- All the “ducks” are in a row
  - How can insured / carrier assist?
- Proper filing office
- Time period for approval
§ 702.242 Information necessary for a complete settlement application.

(a) The settlement application shall be a self-sufficient document which can be evaluated without further reference to the administrative file. The application shall be in the form of a stipulation signed by all parties and shall contain a brief summary of the facts of the case to include: a description of the incident, a description of the nature of the injury to include the degree of impairment and/or disability, a description of the medical care rendered to date of settlement, and a summary of compensation paid and the compensation rate or, where benefits have not been paid, the claimant’s average weekly wage.

(b) The settlement application shall contain the following:

(1) A full description of the terms of the settlement which clearly indicates, where appropriate, the amounts to be paid for compensation, medical benefits, survivor benefits and representative's fees which shall be itemized as required by § 702.132.

(2) The reason for the settlement, and the issues which are in dispute, if any.

(3) The claimant’s date of birth and, in death claims, the names and birth dates of all dependents.

(4) Information on whether or not the claimant is working or is capable of working. This should include, but not be limited to, a description of the claimant’s educational background and work history, as well as other factors which could impact, either favorably or unfavorably, on future employability.

(5) A current medical report which fully describes any injury related impairment as well as any unrelated conditions. This report shall indicate whether maximum medical improvement has been reached and whether further disability or medical treatment is anticipated. If the claimant has already reached maximum medical improvement, a medical report prepared at the time the employee's condition stabilized will satisfy the requirement for a current medical report. A medical report need not be submitted with agreements to settle survivor benefits unless the circumstances warrant it.

(6) A statement explaining how the settlement amount is considered adequate.

(7) If the settlement application covers medical benefits an itemization of the amount paid for medical expenses by year for the three years prior to the date of the application. An estimate of the claimant’s need for future medical treatment as well as an estimate of the cost of such medical treatment shall also be submitted which indicates the inflation factor and/or the discount rate used, if any. The adjudicator may waive these requirements for good cause.

(8) Information on any collateral source available for the payment of medical expenses.
Adequacy

So what is not adequate in the eyes of the DOL?

- Claimant needs money so he wants to settle
- There are numerous issues and the parties desire resolution without further explanation
- Claimant has stopped medical care
- Claimant believes his unscheduled injury falls under the schedule of benefits
- Claimant does not know what he’s doing
Pro Se v. Represented Claimants

• Pick your poison
• Caution is necessary for dealing with pro se litigants
• No deadline for approval if both parties are not represented
• 30 days from receipt if both parties are represented
• Attorney’s Fee Disputes
Foreign National Settlements

• Applicable Beneficiaries
  – Proper documentation
• Commutation Amount v. Non-Commutation Amount
• Average Weekly Wage information
• Funeral Benefits
Ducks in a Row

- Medicare’s interests / Collateral benefits
  - Medicare Set Aside approved
  - Payment of Collateral Benefits Lien
- Structured settlements – Reinsurance v. annuity
- Special Fund’s interests
- Bifurcated settlements
- Test wire transfers for foreign nationals
- Settlement checks in safe before submitting documents
- Fee petitions filed properly
- All regulations met by the settlement document
Notice of Deficiency

• What to do now?
  – Work it out amongst the parties
  – Ask for clarification from the DOL / OALJ
  – Referral to the OALJ
Penalties

- Must make ordered payments within 10 days of “service” by DD
- Service by the ALJ or BRB is not relevant, but provides a warning to watch out for the served order from the DD
- 10 days are CALENDAR DAYS except if 10th day is on a weekend or federal holiday then the period is extended to the next day (probably even in the Fifth Circuit due to new FRCP)
- Payments by check or draft are based on date of receipt of the check or draft by the Claimant IF the bank promptly honors payment
- Very difficult to acquire excuse without stay of award
- No force majeure, but due process considerations
- Potential for avoidance of penalty based on Claimant’s behavior
LS-208 Notice of Final Payment or Suspension of Compensation Payments

- Submitted by Employer/Carrier within 16 days to notify the DOL and the claimant that compensation benefits are being suspended (or ongoing!)
- LS-208 shows the payment periods, the benefit rate and the total benefits paid
- Mandatory $110 penalty for LS-208 filed more than 16 days after Final Payment: 33 USC § 914(g)
Mandatory $110 Penalty: LS-208 Filed > 16 Days
After Final Payment: 33 USC § 914(g)

• Only acceptable excuse: the payment was not a “Final Payment”

• Per the LHWCA Procedure Manual a “Final Payment” is:
  – Any payment of compensation which anticipates no further payments.
  – The last payment of compensation made in accordance with a compensation order awarding disability or death benefits, issued by either a DD or an administrative law judge.
  – The payment of an agreed settlement, approved under Section 8(i).
  – The last payment of compensation made pursuant to an agreement reached by the parties through informal proceedings.
20% Penalty for Failure to Pay Ordered Comp Within 10 Days

- Must make ordered payments within 10 days of “service” by DD
- Service by the ALJ or BRB is not relevant, but provides a warning to watch out for the served order from the DD
- Applies to Settlements per 33 USC § 908(i)
- Applies to awards such as ALJ awards
- The 20% penalty applies to each payment due per running award (ex. ALJ orders TTD) UNTIL modified by order (ex. settlement)
- 10 days are CALENDAR DAYS except if 10th day is on a weekend or federal holiday then the period is extended to the next day (probably even in the Fifth Circuit due to new FRCP)
- Payments by check or draft are based on date of receipt of the check or draft by the Claimant IF the bank promptly honors payment
How can Employer / Carrier Help?

• Return to work, date of hire, wage records, incident reports, initial medical records
• Payment histories
• Deficiency concerns
ANY QUESTIONS?
Texas:
1177 West Loop South, 10th Floor
Houston, TX 77027
713-629-1580

Louisiana:
650 Poydras Street, Suite 2200
New Orleans, LA 70130
504-569-1007

Florida:
9130 S. Dadeland Blvd., Suite 1600
Miami, FL 33156
305-274-5507

Gulfport:
2304 19th Street, Suite 101
Gulfport, MS 39501
228-867-8711