HOW TO SETTLE LOUISIANA WORKERS' COMPENSATION CLAIMS

Before you can learn how to settle a compensation claim in Louisiana, you first must understand the nature of settlements in Louisiana. For the purposes of settling a claim fully and finally in Louisiana, there are two types of settlements of which you need to be aware. While we may occasionally mention settling of the 1008 Disputed Claim for Compensation, as you will be represented at that time by an attorney, we will be able to advise you how to achieve that goal. While nothing prevents you from negotiating a full and final settlement on your own, it will require us to prepare the necessary documents to have the court finalize the settlement. However, you are free to negotiate full and final settlements to your heart's content.

For the purposes of this discussion, a "full and final settlement" is a settlement which brings a **complete** conclusion to an employee's workers' compensation claim. After the settlement documents are executed by the court, and after all outstanding bills or expenses have been paid, and/or the Medicare Set Aside funded, this claim comes to an end and can be closed. There are many fellow adjusters in other states who will never experience the joy of settling a compensation claim that has driven you crazy for months or even years.

The two types of full and final settlements in Louisiana are as follows.

- A "compromise settlement" is a full and final settlement in which the parties compromise a claim for a specific amount in settlement that is less that the full value of the claim and that is paid in a lump sum. This is the **most common** and **preferred** form of full and final settlements in Louisiana.

- A "lump sum settlement" is a full and final settlement in which you pay the actual value of the claim in a lump payment rather than paying it out over time. These settlements are for those rare claims in which the amount is one over which there is no dispute. If handled incorrectly, this settlement can subject you to a **very serious** penalty. Despite "lump sum" title of this settlement, both settlements involve a lump sum payment. However, a true "lump sum settlement" should never be undertaken by you without the approval of your team leader and after consultation with us.

A COMPROMISE SETTLEMENT

A compromise settlement is one where the parties negotiate and ultimately decide upon an amount that the claimant will accept in resolution of their claim. For example, the claimant wants "X", you want to pay "Y" and you settle for "Z." These settlements contemplate some level of disagreement, but the parties have agreed to compromise and resolve the matter fully and finally. This is your **target** form of settlement.

A LUMP SUM SETTLEMENT

This form of full and final settlement arises when there are no issues in dispute, and financially it makes sense to pay the undisputed amount in a lump payment rather than paying the claim out over time. This form of settlement requires payment of an amount over which there is absolutely **no** dispute. For example, if you are settling a Permanent Partial Disability (PPD)/scheduled loss claim, where the amount of remaining indemnity for that scheduled loss is not disputed, that is a "lump sum settlement."

I can take an automatic 8% PPV automatically, right?

Wrong. There is no automatic 8% PPV in Louisiana. The penalty provision concerning taking more than an 8% PPV discount has led many to believe that a discount up to 8% is automatic. That is incorrect. The only limitation in the Act is that a PPV with a lump sum can never be more than 8%. In a compromise settlement, you can use whatever discount works to get the other side to agree.

The risk associated with this form of settlement is that if the settlement is discounted by greater than an 8% present value discount, there is a penalty of one-and-a-half times the amount of the underpayment. This penalty can be sought by the claimant for up to two years after the settlement, and even if the settlement has been approved by the court. The moral of this story is to find something over which you can disagree and simply compromise the claim. *Editor's Note: I have been settling compensation claims for 15 years and have easily settled hundreds and may be approaching a thousand. I have yet to perform a true "lump sum settlement."*

Before we cover how to evaluate a case for settlement, there are some things with which you should be aware first, as it will affect how you evaluate the case.

PREPARING FOR SETTLEMENT

While it may be easier for us to negotiate the settlement for you, nothing prevents you from resolving the matter on your own. Regardless of who negotiates the settlement, there are a few things that **must** be considered.

- ❑ During the life of a compensation claim, there is **no** point at which you cannot settle. Some

states require certain conditions to be met before you can settle a claim fully and finally. In Louisiana, you can settle a compensation claim fully and finally **at any point** during the life of the claim. Honestly, you can settle with a claimant during the initial recorded interview!

- ❑ Employer approval is an **absolute** requirement. This is required even if the settlement is within your desktop authority or if the employer's retention has been exhausted. If the employer's approval of the settlement is not documented in the "Affidavit of Employer's Concurrence" as part of the settlement package, the court will **not** execute the settlement. The only exception, which still requires some extra work, is a situation in which the employer no longer exists. Further, under Louisiana does ethics role, our client always remains the insured, and we cannot take a position to encourage the employer to settle, if they are not in agreement with settlement. The best way to achieve a smooth settlement with your employer is by keeping them constantly advised of the potential for settlement as you approach the final request for their approval.
- ❑ You **must** consider and protect Medicare. This includes satisfaction of any conditional payments. You should run a "conditional payments" (payments made by Medicare that should have been paid by you) search before settlement and satisfy those obligations. *If you believe the penalties in Louisiana workers' compensation are stiff, they pale in comparison to those that can be imposed by the Center for Medicaid and Medicare Services (CMS).*
- ❑ Determine the employee's Social Security Disability Insurance (SSDI) status, as a claimant on SSDI will become eligible for Medicare after 24 months, and this may trigger your need to obtain a Workers' Compensation Medicare Set-Aside.
- ❑ You **must** satisfy all statutory liens. These include liens that you cannot ignore such as Medicaid, the Veterans Administration, state-funded hospitals, etc., as these liens arise by operation of law. You will need to contact the relevant agencies and obtain the amount owed to satisfy the lien. *Make sure that you scrutinize these liens, as it is not uncommon for the agency to mistakenly include treatments not related to the compensation claim. If you identify charges not related to the claim, it is easy to dispute, as the inclusion of these charges is usually an oversight on their part.*
- ❑ You **must** satisfy all asserted liens where you have been placed on notice. These include healthcare provider liens or the liens of a prior attorney, where the lienholder has put you on notice **in writing**. These liens can be ignored if they have not put you on formal notice.
- ❑ You **must** satisfy any outstanding child support liens for which the claimant's payment in arrears. The Department of Children and Family Services (DCFS) will rarely negotiate, and they have first claim on the indemnity portion of the settlement. *Start working on these liens first, as they may take the longest to grant approval. On rare occasions, the outstanding child support obligation may exceed the value of the settlement amount. This will usually require our involvement to reach out to the agency and see if there is an ability to negotiate. No offense, but these agencies often find it easier to simply refuse to negotiate with an insurance adjuster.*

- ❑ If you are receiving Second Injury Fund reimbursement, you **must** obtain approval of the settlement **before** the settlement is approved by the court. If you judge signs the settlement documents before you have received Second Injury Fund's approval of the settlement, the Second Injury Fund is no longer obligated to continue the reimbursement.
- ❑ Unless you have reached a written agreement with the claimant to the contrary, you will need to continue indemnity payments until the judge signs the settlement documents and be prepared to pay any pre-approved and related medical expenses that may arrive after the execution of the settlement documents. You should also approach the claimant or their counsel about an automatic two-week termination of indemnity benefits to discourage the delay in executing and presenting these settlement documents for settlement. You should get this agreement **in writing**.
- ❑ **Never** be afraid to walk away from settlement negotiations.
- ❑ **Accept** that some claims will simply never settle.

TIMELINE FOR A FULL AND FINAL SETTLEMENT

No full and final settlement is effective until signed by the court. Once the settlement documents are executed by us and the claimant's attorney, they will either be mailed, or emailed, to the court for execution. A settlement, where both parties are represented, does not need an in-person appearance. While a full and final settlement can be put "on the record" before the court and is just as effective, these are always risky, as we may not be able to ensure that all the above considerations have been satisfied. Further, the settlement funds must be provided **within 30 days** of the judge signing the settlement documents. As a precaution, we will not send the settlement documents to the claimant's counsel for execution, until we have received the settlement check from you.

On average, and assuming no issues arise, from the date of assignment to execution by the court, it should take no more than two to three weeks. Please inform us if reasons exist requiring a faster turnaround.

UNREPRESENTED/PRO SE SETTLEMENTS

While an unpresented/pro se settlement – or a settlement where the claimant does not have an attorney – has the same effect as one negotiated with any attorney, there are some differences. First, an unrepresented/pro se settlement **must** be executed before the judge. Once we have prepared the documents and have received the settlement funds, we will work with the court and the claimant to identify a date, where the matter can be put "on the record" before the judge. Whereas a regular settlement with attorneys must be performed in the court where venue is proper, a settlement with an unrepresented/pro se claimant can be performed at whatever compensation court is most convenient for them. While rare, it does occasionally happen, that a judge finds that the settlement is not in the claimant's best interest. The most common reason

is that the claimant may not mentally grasp the legal effect of their settlement.

PROBLEMS WITH MEDICARE

Never ignore Medicare. You are obligated by law to consider and protect the interests of Medicare in every single workers' compensation settlement, since Medicare exists for the common good of all Americans. However, this obligation does not require you to obtain a Workers' Compensation Medicare Set-Aside (WCMSA) in every case. There is no difference between a Medicare Set-Aside (MSA) and a WCMSA. A WCMSA is CMS' preferred terminology. Medicare reserves to itself the right to examine **every** workers' compensation settlement. To manage that right, they have provided guidelines that you can use to manage your risk. **Understand, while these rules are advisory, most insurers have guidelines that dictate how you comply these rules.**

- ❑ If the **entire** value of the settlement (both medicals and indemnity) is less than $25,000.00, and the claimant is receiving, or is expected to receive, Medicare within the next 30 months of the settlement, CMS has stated that it is unlikely that they will review the settlement. In this situation, a WCMSA is not necessary.
- ❑ If the **entire** value of the settlement (both medicals and indemnity) is more than $25,001.00, and the claimant is receiving, or is expected to receive Medicare within the next 30 months of the settlement, you should obtain a WCMSA, as these are the types of settlements that CMS will likely review.
- ❑ If the **entire** value of the settlement (both medicals and indemnity) is less than $250,000.00 and the claimant is not receiving, nor is expected to receive Medicare within the next 30 months of the settlement, you may want to consider obtaining a WCMSA. These settlements, where the risk that the burden will be shifted to Medicare is low, are not normally identified for review by CMS, but they retain the right to review.
- ❑ If the **entire** value of the settlement (both medicals and indemnity) is more than $250,001.00, and the employee is not receiving, nor is expected to received Medicare within the next 30 months, you should obtain a WCMSA, as these are the types of settlements that CMS may review, as the amount of money, paid for more serious injuries, increases the risk that the burden for payment of medicals may shift to Medicare in the future.

What about an Evidenced Based MSA (EBMSA)?

While these had been seen as a method by which you could reduce the value of a WCMSA, a recent ruling by CMS now holds that use of an EBMSA will be considered as an overt attempt to shift the burden of future medical care to Medicare. EBMSA's should be considered a very high-risk solution and avoided.

Technically, the Medicare Secondary Payor Act (MSP) does require that you obtain an WCMSA

even if one is recommended if you provide your calculations and reasoning in the settlement documents that the amount is sufficient to protect Medicare. While this is an option, the risk is too great, and most insurers will not allow this process.

By CMS' own guidelines, **no** WCMSA is ever required to be submitted to CMS for review, but the risk of a later review by CMS is removed if you receive pre-approval by CMS that the amount for future medicals is sufficient to protect their interests.

Can you exclude a disputed body part from an WCMSA or settle on a disputed basis?

According to the MSP, a disputed body part must be included unless a court of competent jurisdiction has determined that it is not related.

Can you exclude a specific treatment from a WCMSA?

Yes, but only if the doctor recommending the treatment opines in a medical report that the treatment is no longer medically necessary. The claimant stating in writing that they will never have that treatment is not effective under the MSP.

Always remember, CMS wrote these rules, and CMS gets to interpret them.

THE ISSUE OF RESIGNATION

Regarding a resignation requested in conjunction with a workers' compensation settlement, you **cannot** demand a voluntarily resignation as part of a settlement. But nothing prevents you from negotiating a separate agreement between the employer and the claimant concerning the claimant's voluntary resignation at the same time that the full and final settlement is completed. While money need not change hands between the employer and the claimant, is it highly recommended that a small monetary consideration be exchanged at the time of the settlement – $100.00 paid **by the employer** has become standard – to make the voluntary resignation contractually binding.

HOW TO EVALUATE A CLAIM FOR SETTLEMENT IN LOUISIANA

When you are evaluating a case for settlement, you are going to evaluate two items, and two items **only**. You are going to evaluate (1) indemnity, primarily future plus any owed past indemnity which may remain unpaid, and (2) medical benefits, primarily future benefits but this may also include unpaid medical expenses which were previously under dispute if that is part of the settlement agreement. A full and final settlement does **not** include payment of penalties and attorney's fees. In Louisiana, you do not owe penalties or attorney's fees until the court orders that you owe them. If an attorney or a claimant demands a separate payment for penalties and attorney's fees apart from the indemnity and medical benefits portion of the settlement, tell them to take you to court. Also, when settling directly with an employee, they may ask about an amount for their "pain and suffering." In a compensation claim, there is **no** such award for "pain and suffering." You are settling their indemnity and medical benefits only.

INDEMNITY

A claimant receiving Temporary Total Disability (TTD) and/or Supplemental Earnings Benefits (SEB's)

In the vast majority of claims you will encounter; the claimant will be out of work for a time requiring you to pay them Temporary Total Disability (TTD) benefits. With the necessary treatment, they will likely reach a point at which the doctor releases them to some level of work ability. Once they have an ability to work, regardless of whether they are then working, benefits will be converted to Supplemental Earnings Benefits (SEB's). *Although not precisely analogous, these benefits are somewhat like Temporary Partial Disability benefits in other states.* Although this will be discussed in more detail in our other training materials, there is no limit on how long you may be obligated to pay TTD benefits. An employee's ability to recover SEB's is limited to 520 weeks in total, and you are allowed to take a credit based upon the number of weeks of indemnity you have paid in the past. When dealing with a claim in which you are paying TTD or SEB's, you will always value future indemnity through the remainder of the 520 weeks available to the claimant. This is not a rule, but it is simply how things are done. Also, settlement is exposure is what you think it may take the resolve a case, and your goal is to negotiate to a lower amount.
In this situation, we will begin by examining a claimant with an Average Weekly Wage (AWW) of $800.00 providing a corresponding compensation rate of $533.36.

(1) Take the total weeks of indemnity that have been paid in the past. You simply count the number of weeks paid and not the amounts paid, and you subtract this from the maximum obligation of 520 weeks for SEB's. This will give you the maximum amount of exposure which you need to consider when trying to resolve indemnity.

    You have paid 210 weeks of indemnity – type does not matter – and you want to evaluate the case for settlement. You subtract those 210 weeks from the 520 weeks, and you now know that there are 310 weeks of remaining potential exposure for SEB's.

(2) If the employee is currently being paid TTD, then you will likely want to include a reasonable amount based upon anticipated future medical treatment for which you need to measure future TTD exposure. If the claimant is paying SEB's at the time you want to consider settlement, the calculation is somewhat different, and you simply move to the calculation of remaining SEB's.

    You anticipate based upon remaining treatment/medical records that the claimant will be released to some work capacity in 10 weeks, at which point they will be converted to SEB's. Based upon our compensation rate, your exposure calculation begins with a possible

exposure of $5,333.60, or the value of those 10 weeks paid as TTD benefits. Assuming you have included a reasonable amount of time for further TTD benefits, before a point at which the claimant will be entitled to SEB's, an amount of time over which the claimant's counsel will absolutely disagree, your remaining calculations are for SEB's.

Some claimant's attorneys will simply allow you to work from SEB's from the date you begin negotiations, as they will often do so themselves, as it is simply easier to calculate.

(3) Once an employee is released with some work ability, you will need to establish a "post-accident wage earning capacity." While this will be discussed in our separate training materials, calculating SEB's owed is technically performed monthly, but as you are working with a reduced 520-week exposure calculation, it is best to evaluate a case for settlement keeping these calculations weekly. Once an employee has a work ability, either the employer will take them back to work or vocational rehabilitation will establish a wage-earning capacity. Always remember, the measure is wage earning capacity, and not wages owed.

If you have not established a wage-earning capacity, then you should estimate a spread of potential earning capabilities. Depending upon the employee's work restrictions, age, education, and work experience, you may want to perform multiple calculations based upon different hourly wages. The minimum wage in Louisiana is presently $7.25 per hour, but the current economic situation rarely sees anyone paid that amount, but claimant's counsels will always start with that number for their calculations to increase their argued exposure. Normally, you would run the calculations based upon nothing less than $8.00 per hour and work up from there. So, you may run calculations based upon $10.00, $12.00, and $15.00. You may go higher if the claimant has easier restrictions.

For example, if the employer offers the claimant a full-time job earning $10.00 per hour, and the claimant refuses that job, you have established a wage-earning capacity of $400 ($10.00 x 40 hours). If that exact same wage-earning capacity is established by vocational rehabilitation, you have established a wage-earning capacity, regardless of whether the claimant seeks to take that job. If that claimant does accept the job offered, or they find a job on their own, then you work with the same concept of wage-earning capacity. In calculating settlement exposure, treat it as a perfect world, where the claimant is working their maximum number of hours.

(4) You then must determine whether you even owe SEB's. If the wage-earning capacity that has been established exceeds 90% of their pre-accident AWW (technically a monthly calculation, but it is easier to maintain it weekly here), then no SEB's are owed. If the wage-earning capacity does not exceed 90% of their pre-accident AWW, then you will owe SEB's. This 90% calculation is only used to determine whether you owe SEB's are not.

It serves no other purpose in the remaining calculations.

With the employee with a pre-accident AWW of $800.00 above and a $400.00 wage-earning capacity established, SEB's would be owed, as the 90% threshold would not be exceeded unless the job you identified pays the claimant $720.01 a week.

(5) Assuming that you owe SEB's, you subtract the post-accident wage earning capacity from the pre-accident AWW and you would the claimant two-thirds of that amount as their weekly SEB rate.

With a $400.00 a week wage-earning capacity shortfall, their SEB rate, expressed weekly, comes to $266.68 a week.

(6) You then need to calculate future exposure for SEB's. If you go back to step (1) and (2), you know the maximum SEB payout will be 300 weeks. You have paid 210 in benefits already that serves as your credit, plus the 10 weeks you anticipated for the remaining TTD payout. You then multiply the weekly SEB rate by the remaining SEB weekly exposure.

Without a present value discount, 300 weeks at $266.68 comes to $80,004.00 in potential SEB exposure. While that number may work well for reserve calculations, we can reduce the settlement exposure by taking a present value discount.

The 8% discount – not really a thing

There is **no** rule in Louisiana that allows or guarantees you the right to take an 8% discount, while it is commonly believed to be law. With a compromise settlement, you are allowed to use any discount that will led to a number that will get the claim settled. Claimant's attorneys will usually provide arguments for why a 2% or 4% is reasonable, but claimant's counsel is likely not going to accept any discount above 8%.

(7) You then take the future exposure and apply a present value discount. As seen to the right, you should begin at 8% but also value the future exposure at 4% to give you a better idea of what the claimant may seek. But your number for your exposure evaluation should be performed at 8%.

Using an 8% PPV discount, the $80,004.00 above is reduced to $64,049.49. At 4%, the amount would become $71,419.30. As you will keep the $64,049.49 discounted number, and add the TTD exposure of $5,333.60, a reasonable future settlement exposure is $69,383.09 for this claim. While I recognize we did not include a PPV for the TTD, that level of precision is never necessary in negotiations.

(8) Once you have your exposure for indemnity and have conferred with your team leader,

you need to discuss this number and your calculations with your insured. Make sure that you conveyed to your insured that this number is not **your target** number. This number is just the **maximum** you would be willing to pay for indemnity in settlement.

A few things to keep in mind when dealing with a claimant's attorneys:

- A claimant is not **entitled** to the remainder of their 520 weeks of SEB's. That 520 week is merely the maximum time period for which you are obligated to pay SEB's. Some attorneys will speak of the 520 weeks as an obligation owed to their client. Nothing prevents you from negotiating based upon a lower amount, as there is nothing to say that the claimant may not get a raise at the job established, or that they may not find a higher paying job in time.
- **Always** remember that you take a week-for-week credit off the 520-week exposure based upon any other form of indemnity paid, save for the $50,000 payment for a catastrophic injury, for which you can take no credit. Some attorneys will base future indemnity exposures off their client having the full 520-week entitlement even though they have already received two years' worth of indemnity benefits.
- **Always** remember is that a claimant's right to SEB's ends at 520 weeks. They are not automatically entitled to Permanent Total Disability benefits after the passage of those 520 weeks. Some claimant's attorneys will argue that their client's work restrictions are so severe that they will never be able to return to work. As they approached the 520-week cut off, and no wage-earning capacity has been established, they will claim that their client is entitled to PTD benefits because no wage-earning capacity has been established despite their client having a medical work ability. They are **wrong**. A claimant receiving SEB's will receive a check for week 520. They will not receive any benefits at week 521. If opposing counsel believes their client is entitled to Permanent Total Disability (PTD) benefits, their needs to file a claim with the court to obtain that determination.
- When settling this type of claim, there is **no** minimum value. If you can get the claimant and/or their attorney to accept a certain amount, that amount is perfectly legal.
- Always watch for an attorney who has allowed the claim to run too long, where they have put their attorneys' fee at risk. This is common with new claimant's attorneys. An attorney in Louisiana is allowed to take a 20% attorney's fee off the total value of the settlement. That fee can be taken from any portion of the settlement other than that amount that has been apportioned for a WCMSA. While the amount of the WCMSA can be used to calculate the amount upon which the 20% fee is calculated, the attorney cannot take any money out of the WCMSA. As each week that passes, the future SEB exposure is reduced by one week. If the attorney waits too long to settle the claim, they could find themselves seeking to take their fee and taking most of the employees remaining SEB's. That will make settlement difficult. For example, if the total value of the anticipated value of the settlement is $200,000.00 and the WCMSA is $150,000.00, the attorney can take a $40,000.00 fee, but the claimant only has $50,000.00 as the indemnity portion of the

settlement. As the claimant is unlikely to accept only $10,000.00 as his indemnity portion of the settlement, unless the attorney is willing to reduce their fee, then the opposing counsel may try to push the claim in a direction to allow his client to be declared permanently and totally disabled by his physician. This would then allow the attorney to petition the court to have his client be declared to be entitled to Permanent Total Disability (PTD) benefits. This increases the indemnity portion of the settlement allowing the attorney to take their entire fee, plus 20% of the new indemnity gained through their client being awarded PTD benefits. We would advise you to begin to prepare a case for settlement at least after Year Five of the payment of indemnity benefits, especially if you anticipate a high WCMSA depending upon treatment. After Year Five, the likelihood that the attorney and the claimant may be at odds over the remaining indemnity will increase the likelihood that opposing counsel will try to get his client awarded Permanent and Total Disability benefits to allow them to recover their full, and now increased, attorneys' fee.

A claimant judicially entitled to Permanent Total Disability benefits (PTD) or a Permanent Partial Disability (PPD) case for which exposure remains for the scheduled loss

Let me make one thing clear, a claimant being declared "permanently and totally disabled" is not the same as a claimant being entitled to receive Permanent Total Disability (PTD) benefits. If a claimant is out of work as per their physician, they are entitled to TTD benefits. If their doctor says that they will never be able to work again under any circumstances, they are still entitled to TTD benefits. It is only when the court determines that the employee is entitled to PTD benefits that you base your calculation future PTD benefits. If the claimant's counsel wants you to pay PTD benefits, then tell him to go to the court and get a ruling that their client is entitled to PTD benefits. Otherwise, I, personally, would run the TTD to SEB benefits analysis above. There is no time limit for how long a claimant can receive TTD benefits, but their only owed TTD benefits until the next doctor's visit, when the doctor says that they cannot work. The following visit may see them receive work restrictions entitling you to convert benefits to SEB's. Once the court says the employee is entitled to PTD benefits, you will continue to owe PTD benefits, unless you can convince the court that the employee later improved enough to allow them to return to some work ability. As this is extremely rare, once an employee is awarded PTD benefits, resign yourself to the fact that you will be obligated to pay PTD benefits until the claimant's death. Only in situations where the claimant's medical condition is so catastrophically disabling that you know that the court awarding them PTD benefits is a foregone conclusion, do you run your indemnity calculations out through their life expectancy without a formal court order.

With a Permanent Partial Disability (PPD) case, you are paying a claimant a monetary amount calculated based upon a percentage of loss/disability rating applied to the number of weeks for that body part under the statute. That number is an amount that can be determined precisely, and any settlement of the remaining PPD value will be a "lump sum settlement."

Assuming that the claimant has been declared entitled to PTD benefits or whose eventual entitlement to PTD benefits is beyond question, the calculations are easier.

(1) Determine the claimant's current life expectancy. Where you have such information, use the claimant's rated age.

For this example, the claimant has a life expectancy of 37 years, and the claimant is the same from the above example with a compensation rate of $266.68.

(2) Calculate the value of the future PTD benefits based upon the life expectancy. Remember, you do not want it argued later that your settlement was a "lump-sum settlement." In addition to finding one or more items over which the parties disagree upon which you can later argue that the settlement was a compromise settlement, you never want to discount future indemnity by more than 8%. When there is the potential that it can be argued later that the settlement was a "lump-sum settlement," **never** discount by more than 7%. If you are dealing with a remaining PPD value, then the same recommendation of using a discount of no more than 7% applies.

For the PTD claimant, depending upon what present value discount calculator you use, some work in years, and some work in weeks. A 37-year life expectancy comes to 1,924 weeks. Taking the safe 7% present value discount, the settlement value of indemnity in this case comes to $183,217.38. Given the stiff penalty for settling for an amount greater than 8% with a "lump sum settlement,", we advise that the 7% present value discount be the minimum settlement value for indemnity if you cannot argue that the settlement is a "compromise settlement."

With a PPD claimant, with the same $266.58 compensation rate, and who has 93 weeks left to satisfy the value of their PPD, then the remainder of that PPD rating in settlement could not be settled for less than $23,296.87, as that is the PPD amount remaining with a 7% present value discount applied.

Weighing the risk

Once you have the mathematical calculations, and you are only dealing with an "compromise settlement," then you also must take into account the risk based upon your estimation of a successful outcome as to the claim as a whole, a disputed body part being found compensable, etc. If you estimate that your defenses to the claim being held compensable is 50%, then you might want to consider applying that 50% discount to the settlement exposure. If you have a very solid fraud defense, you may be willing to only paying up to 20% of the actual monetary value of the claim. Unfortunately, measuring risk is one of those things that is more of an art than a science and is based upon so many different and varied factors that only experience can provide

a reasonable estimation of the value of the risk. While you may have to rely upon us or your team leader initially, in time, you will begin to recognize those courts which are more employee friendly from those that are more middle-of-the-road. You will begin to know the strengths and weaknesses of the claimant's attorneys and the relative values of the opinions of the doctors involved. You will begin to learn the nuances of the law, and you will begin to understand how certain defenses are more, or less, likely to lead to a favorable result.

At risk is a consideration in a PTD claim, we will likely highlight the differences between the two party's positions when drafting our settlement documents to make it less likely to be called a "lump sum settlement." However, when valuing a "lump sum settlement" claim, risk is not considered.

A few parting thoughts

Here are a few tips to keep in mind:

- ❑ It is always better to have the claimant or the claimant's attorney present a settlement demand first. They will likely offer support for their position, and that may help you determine the strengths and weaknesses of their claim. Understand, you will receive a hyper-detailed demand by opposing counsel, but this is inflated and serves only to intimidate you and to support their initial demand number. As with any negotiation, you want to start from a high, or low in our situation, number with sufficient distance between that number and your ultimate target number to allow you to engage in negotiations. This demand should be presented to the insured, but you must inform them that this is simply uninflated demand serving as their initial number, rather than the actual number they believe the claim is worth. For example, opposing counsel may begin his initial demand by only applying a 2% present value discount to their indemnity demand. Obviously, counsel knows that we are going to pay less, and so his initial number is nothing more than uninflated demand to allow him sufficient room to negotiate.
- ❑ No matter where opposing counsel starts in their initial demand, your counter needs to always be almost absurdly low. It is not uncommon for me to have $100,000 in settlement authority with a $250,000 starting demand from opposing counsel and beginning negotiations with the $5,000 to open.
- ❑ Again, **never** be afraid to shut settlement negotiations down. But once you shut it down, you personally can never restart negotiations. If negotiations need to be restarted, further negotiations should be conducted by another adjuster or even your team leader. If you are the one who shut negotiations down, and you try to restart them, opposing counsel will assume they have all the leverage.
- ❑ **Always** remember, you never owe a single penny in settlement. Nothing prevents you from simply continuing to pay the claim until all your obligations have been satisfied. If opposing counsel wants to settle, they need to make those negotiations attractive.

Remind them that 20% of a weekly indemnity check is a lot less than 20% of a full and final settlement.

MEDICAL BENEFITS

In many ways, settlement of medicals is much simpler. While there are more factors involved in settlement of indemnity, settlement of medicals is simply reaching an amount that should be sufficient to cover the claimant's future medical needs are paying whatever you are told to pay under the WCMSA.

Settlement of medicals without the need for a WCMSA

When getting ready to settle the medicals of the claim, you do not have to wait until the claimant has been declared to be at Maximum Medical Improvement (MMI). Having a claimant at MMI just makes the estimation of future medicals easier. In Louisiana, MMI essentially means that the employee is now as good as medical science can make them. It does not mean that no more treatment is owed, but it is usually sufficient to exclude any major medical procedures from your evaluation.

To value future medicals, you will have to rely upon your experience of the cost – reduced by the Fee Schedule – and what other treatments would be necessary to put, and maintain, the claimant at MMI. It is at this point that you should likely contact us or your team leader to give you a reasonable number based upon the treatment options outlined by the majority of the doctors involved. You simply provide us or your team leader the injuries, the doctors involved, and the type of treatment recommended, and we can usually give you a very reasonable number by which you can estimate future medicals for the purposes of your settlement evaluation.

It may be tempting to authorize a surgical procedure assuming that it will make the claimant to better and the future medical treatment will be considerably less. This is a "rookie mistake." When attorneys are involved, and you are dealing with doctors who take a majority of their referrals from those same attorneys, major surgical procedures almost never achieve the promised results (anything spinal for example), and situations such as a revision surgery, lengthy and expensive pain management, and/or the dreaded Spinal Cord Stimulator are likely going to follow. **Where it is an option, you always settle before any spinal surgery is performed.** That way you only need to consider the value of the surgery and perhaps some nominal amount for pain management plus any minor follow-on care such as additional visits with the physicians. If you pay

Can I take an PPV discount on future medicals?

Technically, the answer is no. As medicals are priced under the Fee Schedule, the price remains constant. However, you are simply free to negotiate future medicals down to a number which is ultimately accepted save for a settlement of medicals not valued by a WCMSA.

for the surgery in hopes that the claimant will make a full recovery, you are going to pay for the value of the surgery, and the orthopedic surgeon, for example, may decide that a revision surgery is necessary, or they may refer the claimant out to a pain management physician who can treat the claimant for years and likely prescribe a Spinal Cord Stimulator. The moral of this story is that you should always settle medicals before any spinal surgical procedure is performed. Procedures such as rotator cuff surgeries, MCL/ACL repairs, labrum repairs, carpal tunnel/ulnar release procedures, etc. usually have sufficiently good results that those surgeries should be authorized. Since CMS always retains the right to review **any** settlement that includes an amount for future medicals, you should always provide the calculations, amounts, and treatments considered in your estimation of future medicals to us, as we are going to include these in the settlement documents to support to CMS that we are not shifting the burden of future medical care on to Medicare simply to settle the compensation claim. This is done even when it is a claim where CMS is unlikely to review the settlement. It is always better to be safe than sorry.

Settlement of medicals when there is the need for a WCMSA

This method of valuing medicals is exceedingly simple. Provide all the necessary medical records to whatever vendor you use to calculate your WCMSA, and then pay that amount in settlement. You are **not** allowed to discount this amount under **any** circumstances.

You may attempt to save on the cost of the WCMSA by having it an annuitized, but not all attorneys will agree to having the WCMSA annuitized. I can name you two attorneys right now who will, under no circumstances, ever allow a WCMSA to be annuitized. You should also offer to have the WCMSA professionally administered, as it prevents the claimant from spending their WCMSA on things other than their future medical needs before deciding to have Medicare pay for their future medical care. *I would recommend that you offer professional administration with any WCMSA. If the claimant refuses professional administration, and then spends the WCMSA unwisely, that we offered professional administration that was refused will increase our chances of success, if the claimant spends all their WCMSA on a new boat, and CMS wants to punish someone. In that case, let CMS punish the claimant and their attorney.*

CONCLUSION

Understand, your exposure calculation is needed to obtain the necessary authority, but these calculations have little real use once negotiations have started. With most settlements, counsel for the claimant, or the claimant alone, has an absolute bottom-line number in mind. They will craft their arguments and/or legal support to allow them to negotiate to that number, if not one higher. You will usually wind up doing the same, but in the opposite direction. Hopefully, their bottom-line number is under your maximum authority. While discussing your ability to take a certain present value discount with opposing counsel may be perfectly sound, if it does not allow the claimant their bottom-line number, your efforts are pointless. Admittedly, you may begin by

supporting your opening number by arguing that their surgery will put them back to full duty, so you are only willing to pay six months' worth of TTD and three more months of SEB's, until the claimant goes back to full duty, after three or four more counter offers/counter demands, you are simply negotiating by adding a monetary amount – smaller as you get towards the number you want them to believe is your authority rather than your actual authority – to move negotiations along. Then, more often than not, you will land upon a number that works for both sides, where you will usually believe that you have paid too much while the other side believes that they accepted too little. And if you do not find a number that works, shut the settlement down and thank the claimant and their attorney for their time. Odds are they will be back. And, as with everything else, you can always call us for tips and tricks. With most attorneys, you can give us their starting number and two or three facts, and we can likely predict their target number. But it is a skill you will have to develop on your own, but we will always be there to help.

Evaluating and negotiating a settlement successfully is like riding a bike. When you start, you are going to fall a lot, and often painfully, but after a while, you will learn to stay on that bike and wonder why you ever thought it was hard to learn in the first place.

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