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Navigating the Murky Waters of Settlement

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Settlement of a workers' compensation claim provides an opportunity for state-fund employers to reduce future premiums by eliminating the reserve on a claim and for self-insured (SI) employers to reduce claim costs and assessments. Several factors should be considered when evaluating a claim for potential settlement, including both economic and legal issues.

Type of Employer

Settlements affect each type of employer differently. When an SI employer settles a claim for $10,000, the cost is $10,000 and the SI employer is relieved from future costs under that claim. For a state-fund employer, however, the cost is not determined as easily. A based-rated employer's premiums are not impacted by settlement. For an experience or group experience-rated employer, the effect of a settlement depends on how many years the claim will remain in the employer's five-year experience period. If the claim is not in the employer's experience, the settlement will have no impact on premiums. (Such a settlement may be beneficial to eliminate potential Disabled Workers' Relief Fund exposure, but may not be advisable with a current employee.) If the claim is still in the employer's experience, a settlement will impact premium calculations for each year the claim remains in the employer's experience. A settlement eliminates any reserve on the claim, but the counterbalance to

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the reserve elimination is the inclusion of the amount of the settlement for each remaining year. Whether the settlement will benefit the state-fund employer depends on the variances between the settlement amount and current and projected future claim reserves and future claim payments. The variances must be considered in the context of current and likely future rating plans, if applicable the maximum claim value, and the projected premium savings or increases. State-fund employers should work closely with their third-party administrator and legal counsel when negotiating settlement of a claim that remains within the employer's experience.

Another difference between state-fund employers and SI employers involves assessments. An SI employer pays several assessments that are a certain percentage of its total compensation paid for workers' compensation claims each year. Money paid pursuant to a settlement agreement, however, is not included in "total compensation paid." This creates an incentive for SI employer settlements.

Information Needed to Evaluate Settlement Potential

Employment Status: If a claimant is an active employee, settlement of the claim may not be advisable. (See "The Impact of the New Aggravation Standard" on page 11 for more information.) Settlement with an active employee can be problematic because of the risk that he or she will suffer re-injury to the same body part and file a new claim. Current employees whose claims have not been settled, however, are still at risk of re-injury. The difference is that a re-injury to a claimant with an open claim may be covered under the open claim, rather than a new claim. If the previous claim has been settled, the claimant has a financial incentive to pursue a new claim. How hearing officers decide new claims where there has been a prior settlement involving the same body part is not well established due to the infrequency of such settlements, although their frequency may increase due to the new aggravation standard. Because of uncertainty concerning the application of the new aggravation standard and the impact the standard may have on the value of a settlement to the employer, an employer considering the settlement of a claim with an active employee should work with legal counsel to structure a settlement agreement that protects the employer from liability for future payments for subsequent treatment or disability related to the body part involved in the settled claim(s).

Employment History and Other Claims: A claimant's employment history impacts settlement in several ways. The claimant's length of employment with the employer may result in vested benefits which the claimant may not be willing to waive as part of the settlement. Also, the claimant may have a contractual right to return to work based on seniority. Likewise, potential or pending non-workers' compensation claims, for example under the Family Medical Leave Act or the Americans with Disabilities Act, should be addressed in a global release drafted by experienced legal counsel.

Claimant's Financial Information: A claimant's financial situation may affect settlement potential. For instance, a lack of income may increase a claimant's incentive to settle, or a claimant's debt, if it has to be satisfied out of the settlement, may drive up the demand to an unreasonable level. Sometimes, a claimant may have another source of income which also may impact settlement potential. The point is, knowledge is important to conduct negotiations.

Medical Benefits Paid: An employer always should examine the total amount paid for medical benefits as well as the last date of service paid under the claim. The most recent medical records often reveal whether the claimant's physician is recommending additional treatment. If the claimant has not been treated for several years under the claim, the future medical costs usually will be nominal, the value of the settlement will be smaller, and the claimant may be more likely to agree to a reasonable settlement. If a physician is recommending surgery, however, the exposure could be quite significant and the claimant may wait for the surgery to be paid under the

claim before agreeing to settle. With significant treatment like surgery on the horizon, employers and claimants have a more difficult task when valuing a claim for settlement. Also, the potential for future treatment often will increase exposure for future temporary and permanent disability compensation.

Total Compensation Paid: A significant amount of compensation paid under a claim may mean that the claimant has nearly exhausted his or her right to temporary total disability (TTD) compensation and the settlement value is low. Or, a high level of compensation paid may mean that the claimant's injuries are significant enough that he or she may receive even more compensation and the settlement value is high. For example, if a claimant has received a great deal of TTD, his or her conditions may be severe enough that he or she will be eligible for permanent total disability compensation, which increases the settlement value significantly. In other cases, the claimant may have received a great deal of TTD, but there is very little exposure for additional TTD because the claimant is no longer interested in working or the claimant's condition has resolved. A claimant's TTD history also impacts the assessment of exposure for wage loss compensation. Employers also should determine whether the claimant has already (or has not yet) received a permanent partial disability award, and if so, whether there are any factors which would make the claimant eligible for an increase in that award.

Possible Additional Conditions: The allowance of additional conditions can affect all of the considerations discussed above and create significant exposure for future claim costs. For example, while a claim may be allowed only for a soft tissue injury, such as a lumbar sprain, the medical evidence may establish that a claimant also has a herniated disc. The costs for compensation and medical benefits under such a claim most likely would increase significantly if the herniated disc were allowed. One of the foremost benefits of settling a claim is preventing the expansion of the claim with additional conditions.

Medicare Set-Aside

The Medicare Secondary Payer Act (MSP) requires that all parties involved in the settlement of a workers' compensation claim take steps to insure that Medicare's interests are protected. Thus, every settlement needs to be evaluated to determine if there is any potential that a claimant will need future medical care for the allowed conditions. If there is such potential, all parties involved in the settlement must take measures to ensure that the claimant will not seek to have such treatment covered by Medicare inappropriately or prematurely.

In response to enactment of the MSP, the Centers for Medicare and Medicaid Services (CMS) established the requirements for a Medicare Set-Aside (MSA) in workers' compensation settlements. Essentially, CMS requires that every workers' compensation settlement agreement designate a certain amount of the settlement money as an MSA. The only time CMS does not require an MSA is if all of the following requirements are met:

1. the facts of the case demonstrate that the injured individual is only being compensated for past medical expenses;
2. there is no evidence that the individual is attempting to maximize the other aspects of the settlement (e.g., the lost wages and disability portions of the settlement) to Medicare's detriment; and
3. the individual's treating physicians conclude (in writing) that to a reasonable degree of medical certainty the individual will no longer require any Medicare-covered treatments related to the allowed conditions.

Unless all three of these criteria are satisfied, an employer should consider insisting that the claimant agree to an MSA in a settlement agreement. Many MSAs need not be submitted to CMS for review and verification. An MSA must be submitted to CMS only if the claimant is currently a Medicare beneficiary and the settlement is for more than $25,000 or if the claimant has a reasonable expectation of becoming a Medicare beneficiary

within 30 months of the settlement date and the settlement is for more than $250,000. These "review thresholds" only establish when CMS will review and verify an MSA. They do not determine when an MSA is necessary.

Approval by the Bureau and the Industrial Commission

When settling a state-fund claim, claimants and employers often execute a standard settlement form provided by the Bureau of Workers' Compensation called a C-240, which must be submitted to the BWC and the Industrial Commission for approval. The form includes a space to "[c]learly set forth the circumstances by reason of which the proposed settlement is deemed desirable." The Ohio Supreme Court recently stated this information must be provided or the settlement may be invalidated. State-fund employers also should consider insisting that the claimant execute a separate global release regarding any other claim (not only workers' compensation claims) arising out of the claimant's employment. Although SI employers do not have to submit a C-240, they should include language in the settlementagreement which provides "information which justifies the reasoning for the settlement as required by ORC 4123.65(A)" or the Commission may reject the settlement.

After the settlement agreement is fully executed by the parties in SI claims or after the C-240 is approved by the BWC in state-fund claims, there is a 30 day "cooling off" period during which any party to the settlement can withdraw consent to the agreement. This does not apply to state-fund settlements in court cases.

Conclusion

Settlement of a workers' compensation claim is very often an effective risk management tool. Employers should constantly evaluate the status of their workers' compensation claims to determine when a claim is ripe for settlement. Because settlement evaluation is a multifaceted and complex task, state-fund employers and self-insured employers should seek guidance regarding effectuating reasonable settlements of workers' compensation claims.

Mr. Johnson is a member of the Firm. While his practice includes all areas of employment law, Mr. Johnson concentrates his practice in workers' compensation defense. Ms. Phelps is an associate whose practice includes representing employers in labor matters as well as against claims of employment discrimination and workers' compensation. They may be reached by calling our Toledo office (419-241-6000).

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