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THE CITY OF KEY WEST

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To: The City Commission for the City of Key West
From: Ron Ramsingh, Assistant City Attorney
Date: April 27, 2015
RE: Settlement of Worker's Compensation case OJCC 14-26483RDM & 14-13472RDM John Newcomer v. City of Key West

EXECUTIVE SUMMARY

*******REDACTED FOR PROTECTED MEDICAL INFORMATION (H.I.P.A.A.)*****
FOR PUBLIC REVIEW**

Background: Mr. Newcomer (Claimant) is a 63-year old former mechanic for the City. His job responsibilities included welding, hydraulic repairs, operating a fork lift, prolonged standing, climbing, and general heavy equipment mechanical responsibilities. The Claimant began working for the city in 2003 where he worked in FMT until getting transferred to the transfer station in 2006 where he was assigned until his position was eliminated effective January 1, 2015 with Waste Management taking over the management of the transfer station.

2008 Industrial Accident and Care (back): On December 2, 2008 that Claimant was lifting a large, 200 pound hydraulic cylinder when he experienced pain in his lower back. He was seen by Urgent Care and treated conservatively and then referred to Dr. Pagan (neurosurgeon), who treated the Claimant conservatively. Dr. Pagan placed the Claimant at maximum medical improvement with a 20-pound weight limitation and a 5% permanent impairment rating. The Claimant then exercised his statutory right to a one-time change in physicians and the city sent

him to Dr. Schecter (ortho) The Claimant was prescribed medications. Dr. VanTuyt transferred care to Dr. Floyd (physiatrist), and to Dr. Fulcher for treatment.

The Claimant was then put on modified work due to the resulting restrictions, which the city at that time could not accommodate, which resulted in the Claimant being at home and receiving Temporary Partial Disability Benefits for a period of time. The Claimant then got his restrictions changed so as to return to work and was assigned to significant restrictions when on 2/24/2011 he claimed to re-injure his back while riding on a lawnmower for the city. The Claimant was given a 25-pound restriction and physical therapy as well as restrictions of no lawnmower riding and he remained at maximum medical improvement.

Because there appeared to be a disagreement between the conservative care of Dr. Schecter and the liberal care by Dr. Floyd, the undersigned decided to have an independent medical evaluation performed by Dr. Tannenbaum in physiatry. Dr. Tannenbaum opined that he agreed with Dr. Floyd's treatment plan. The Claimant's last physical day working for the city was November 10, 2014 after several stints out of work, as well as work restrictions that at times the city could and could not accommodate.

2013 Industrial Accident and Care (Knee): On March 3, 2013 the Claimant was at work at a time when he had relatively less restrictions on his back claim. The Claimant was climbing when he twisted his left knee and immediately experienced pain. The Claimant was treated by Dr. Levitt (ortho) who attributed 75% of the major contributing cause to the 2013 industrial accident. After 2 significant surgical procedures, the Claimant was placed at maximum medical improvement for his left knee and assigned a 10% permanent impairment rating with permanent restrictions of no lifting more than 30-pounds, no bending or twisting more than 1 hr a day, no squatting or climbing, no walking or standing for more than 4 hrs a day, and no pushing or pulling for more than 2-3 hrs a day. The city was honoring those restrictions until November 2014 when Dr. Floyd imposed significantly more restrictions that the city could not satisfy and which ultimately resulted in the Claimant's last actual day of working for the city being 11/10/2014. The Claimant continues to walk with the assistance of a cane regularly, which was verified through surveillance that was ordered by the undersigned.

Exposure/ Risk: Mr. Newcomer is a 63-year old man with a life expectancy to 75 years old (12 years). Newcomer has filed Petitions for Benefits requesting permanent total disability in both of his industrial accidents. The standard for PTD is that the Claimant cannot obtain gainful employment within 50 miles of his residence, given his stated permanent restrictions as issued by his authorized treating physicians. Of course, the City of Key West is geographically limited in the pool of possible work, given that the scope is statutorily limited to Marathon). This fact alone makes the city particularly vulnerable to these types of claims, but to complicate this case further, we cannot accommodate his permanent restrictions. If Mr. Newcomer is successful in his PTD claim, he would receive benefits until he reaches 75 years of age. The Claimant's Compensation Rate is \$786.44. If the city were to administratively accept his PTD claim, the present value has been calculated to be \$549,689.40, over his life expectancy, plus future medicals which can reasonably include a second revisions as these types of knees have a useful life of 12-15 years and is estimated to be an additional \$80,000.00. **Total exposure for the knee claim= \$629,689.40**

On the back claim, the PTD exposure is calculated to be \$504,296.00 for his life expectancy, plus an estimated \$40,000.00 in medications provided that he remains non-surgical. If his surgical posture changes, that number can expected to increase exponentially. **Total exposure for the back claim= \$544,296.00**

Total exposure to the city for both cases= \$1,173,985.40

If we were to go to trial and lose, the prevailing attorney's fee can be projected to significantly add to that number. Any and all of the city's attorney fees have been saved by the undersigned (estimated to be an additional \$30,000.00 thus far and far higher if these matters proceeded to trial), who handled these matters in house from its inception with limited counsel from George Helm for sole purpose of mediation.

Additionally, if these case were to settle for more than \$250,000.00, a Medicare Set Aside would need to be established and funded to address the Claimant's future medical care. This is an

account that would need to fund and pay all of his related medical expenses from until it is exhausted. When it is exhausted, then Medicare will step in and the future medicals can be submitted to Medicare for payment at that time. In this case, the MSA was not required because the proposed settlement is \$249,900.00 for both cases.

It is also critical to note that \$200,000.00 of the total settlement amount is allocated to the more valuable 2013 knee claim. Since that claim falls within the 2012-2013 fiscal year, which is a year in which the city exceeded its stop-loss aggregate, the city will be reimbursed \$200,000.00 of the total \$249,900.00 spent on this settlement; if approved.

Given the Claimant's age, permanent restrictions and limited geography in terms of the labor market (as limited by statute to 50 miles), I think that it is likely that the Claimant will be successful in his claim to obtain PTD benefits. Therefore, by settling these cases for \$249,900.00 I project a minimum savings to the city of \$924,085.40.

Again, it is critical to note that although the potential exposure to the city is over \$1.1 million dollars for these 2 cases, *this entire proposed settlement will cost the city \$49,900.00 in actual dollars* after the \$200,000.00 reimbursement.

Options:

1. Agree to the proposed settlement with John Newcomer in the amount of \$249,900.00 for both referenced cases inclusive of all fees and costs.
2. Decline to settle this matter and the case will continue on in litigation to decide the PTD issue. I believe that the city has less than a 50% chance at success given the aforementioned factors and risks.

Recommendation: Agree to enter into a settlement with John Newcomer for these 2 industrial accidents.