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November 5, 2009

Ron Ramsingh, Esq.  
Assistant City Attorney  
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P. O. Box 1409  
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**RE: CHARLES WINTERS v. THE CITY OF KEY WEST/GALLAGHER  
BASSETT SERVICES, INC.**

SSN: 592-07-5827

D/A: 1/18/2006

Carrier File No.: 010359-003422-WC-01

Our File No.: 0377-60866

## **MATTER: EXECUTIVE SUMMARY**

Dear Mr. Ramsingh:

This will serve as an executive summary with respect to the above referenced workers' compensation claim including a detailed exposure analysis in relationship to the proposed lump sum settlement.

## **BACKGROUND**

The claimant, Charles Winters, Jr., DOB: 7/31/67, male, 6'3", 202 pounds, is a 42-year-old male who was employed as Maintenance Worker I in the Landscaping of City of Key West (DOH: 11/24/03), when on January 18, 2006 he sustained a back injury while pulling heavy longs onto a truck.

There was no significant evidence of any prior similar injuries or complaints, and past medical history was remarkable for hypertension and a left ankle injury.

Subsequent to the accident, claimant was initially seen at Key West Urgent Care where he gave a history consistent with the above description of accident and was treated for severe lower back pain. Despite a course of therapy and medication, his symptoms persisted and an MRI was

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ordered. A lumbar MRI performed on 1/31/06 at Key West Diagnostics revealed evidence of a broad based left paracentral and foraminal L4-5 disc protrusion and end plate spondylosis with moderate mass effect of the descending roots resulting in canal stenosis, broad based circumferential bulge extending into the neural foramina resulting in mild non-compressive foraminal narrowing at L3-4; and mild left paracentral bulge without root compression. Based on the MRI results, a referral was given for orthopedic consultation and pain management.

On 2/6/06, claimant was initially seen by Dr. Paul Murphy who noted complaints of severe low back pain radiating to both buttocks. His impression was acute lower back pain, L4-5 disc herniation mostly to the left with some foraminal stenosis and bilateral hip pain. He treated the claimant with more therapy and mediation, and after no significant improvement, referred him to an orthopedic spinal specialist.

On 3/17/06, the claimant was evaluated by orthopedic spine specialist, Dr. Dan Cohen, M.D. who found evidence of acute L4-L5 herniated disc with segmental instability. There was soft tissue injury to the supporting structures at L4-5 segment, which included both ligaments and discs. As a consequence, there was instability and a ruptured disc. At that time, claimant was considered a candidate for surgery but preferred to continue with non-surgical options. Therefore, recommendations included a selective epidural at L4-5 pending carrier approval, soft corset and medication (Dapro, Ranitidine, Tizanidine and Tramadol). Patient was restricted to no work status.

On 5/15/06, claimant was administered a bilateral L4-5 transforaminal epidural, and he remained on no work status.

On 6/13/06, Dr. Cohen noted some improvement from the injection, and the claimant was taking medications as prescribed. He walked with a grossly antalgic gait and was bending over to the right side. Since more than six months elapsed since the previous MRI, update testing was ordered.

On 6/21/06, the claimant underwent lumbar CT and MRI without contrast. These films were interpreted by Dr. Cohen as showing an L4-L5 moderate-severe stenosis secondary to a ruptured disc and retrolisthesis of L4 on L5. There was splaying of the facet joint. Again, surgery was recommended involving a one-level minimally invasive decompression and stabilization procedure. It was noted that attendant care would be necessary post surgery for 8hrs/day, 3 weeks. The claimant was given time to consider, but he decided against having surgery. He remained on no work status and was instructed to follow up in one month. If at that time he still declined surgery, he would be MMI and released to sedentary employment.

On 7/21/06, the claimant was placed at maximum medical improvement (MMI) by Dr. Cohen with a 7% whole body impairment, and was released to sedentary employment.

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In response to a request for change of providers, the claimant next came under the care of orthopedic spinal specialist Dr. Neil Schechter who examined him for the first time on 2/9/07. He concurred with Dr. Cohen in virtually all respects. His impression was chronic lumbar syndrome with discogenic pain and herniation at L4-5. He too recommended decompression and stabilization procedure, and said that absent surgery the claimant was considered to have reached MMI per Dr. Cohen.

As of 11/18/08, Dr. Schechter noted that the claimant's condition remained stable. He was still complaining of low back pain with radiation into the right lower extremity, and was walking with an altered gait. No medication was prescribed since the claimant was already receiving pain medication from his personal physician, Dr. Covington. However, Dr. Schechter felt that narcotic and anti-inflammatory medication was reasonable under the circumstances. Should he ever decide to proceed with surgery, the claimant will need a new MRI and work up. Otherwise, he was instructed to follow up on an as needed basis.

With respect to work status, he maintained modified duty with no lifting, pushing or pulling greater than 10 pounds, alternate sitting and standing as needed. He said the claimant can certainly work if there is a job within his physical limitations.

The claimant has not worked since the date of accident, a period of almost four years, and has separated from employment.

### LEGAL

Venue is Monroe County, Florida before the Honorable Geraldo Castiello. The claimant is represented by Ronald Rosen, Esquire, who has a reputation as a highly skilled workers' compensation and general liability practitioner.

The sole issue in this case involves a claim for permanent total disability (PTD) from 7/21/06, corresponding to the date of MMI, through the present date and continuing. It is the claimant's burden to prove that he meets the criteria for PTD, or that he is unable to perform even sedentary work within a 50 mile radius of his place of residence.

In this case, the claimant was released to return to work with sedentary employment with no lifting, pushing or pulling greater than 10 pounds, alternate sitting and standing as needed. However, despite the claimant's young age, there are obstacles that make the ability for re-employment very difficult including the nature of his restrictions, the limited job opportunities within his immediate geographic area, his limited education and that fact that he has virtually no transferable work skills. He has less than a high school education and his past work experience is limited to work as a landscaper and general laborer.

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The employer arranged for a vocational evaluation with its own expert, David Patten, Ph.D, who reviewed extensive records and did a battery of testing. Although Dr. Patten has not yet generated a report of his findings, he believes it is unlikely that the claimant is capable of finding even sedentary employment in the competitive job market. According to Dr. Patten, the main problem appears to be the claimant's physical restrictions combined with his low intelligence documented by quantitative testing and previous testing performed since childhood. The claimant is functionally illiterate and has an IQ that is equivalent to a person with a third grade education. Furthermore, this does not appear to be a case of exaggeration or malingering.

Although the standard for disability under this claim is not the same standard used by Social Security disability, the fact that an administrative law judge already adjudicated the claimant as disabled retroactive to 1/18/06 under s. 216(I) and 223(d) of the Social Security Act is persuasive and would be considered by the JCC as to the weight of the evidence. This decision was based primarily on medical records and statements from the claimant's personal physicians, Jerome Covington, a primary care physician, Dr. Carlos Martinez, M.D, internist, and an impartial medical expert of record, Dr. Pepi Granat.

EXPOSURE ANALYSIS

There has been \$51,209.58 benefits incurred on this claim to date.

The carrier is using an AWW of \$515.15, thus making the CR \$343.45/wk pursuant to a wage statement dated 2/12/06. Fringe benefits were provided at cost to the employer of \$631.50/mo (\$146.86/wk) for health, dental, vision and life. However, to my knowledge, the AWW was never adjusted to account for termination of fringe benefits. The estimates of indemnity exposure was calculated using the base wage only.

The past exposure on this claim through 9/17/09 is outlined below:

\$56,386.91	PTD from 9/21/06 to 9/17/09
(\$3,127.64)	Credit for Impairment benefits
\$ 9,860.91	Interest through 9/17/09
\$11,117.05	Penalties through 9/17/09
\$ 0.00	Outstanding medical bills
<u>\$ 8,173.72</u>	Attorney's Fees (subject to upward deviation)
<b>\$82,410.95</b>	<b>TOTAL</b>

The future exposure on this claim is outlined below:

\$213,391.98	NPV of PTD benefits (8% discount) less SSD offset \$138.4/wk
\$ 58,333.88	Present value PTS using 8% discount factor
\$ 44,639.00	Future anticipated medical expenses

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\$ 27,922.49 Guideline attorney fees on future anticipated PTD/PTS  
\$ 44,639.00 Future anticipated medical expenses (MSA)  
\$388,926.37 TOTAL

Taking the above factors into consideration, the estimated exposure on this claim, past and future, total \$471,337.32 excluding the cost of litigation.

### PROPOSED SETTLEMENT

Subject to approval by the City of Key West City Commission, the parties reached a proposed settlement in the amount of \$135,000.00 inclusive of attorney's fees, costs and applicable liens.

The settlement is also inclusive of an Medicare Set Aside Allocation (MSA) in the amount of \$44,639.00 that is contingent on CMS/Medicare approval. Therefore, even if the settlement is approved by the Commission, the settlement is not enforceable until the MSA is accepted by CMS/Medicare.

It was agreed that \$100.00 from the proceeds would be allocated as consideration towards a separate resignation and general release in favor of the employer.

Under the terms of the proposed agreement, the employer has six months from the date of the mediation agreement to obtain approval from the City of Key West City Commission, and from CMS/Medicare, meaning the contingencies must be satisfied before March, 2010 for the agreement to be enforceable.

### RECOMMENDATION

In my opinion, the proposed settlement in the amount of \$135,000.00 is in the best interests of the City of Key West particularly given the claimant's obstacles to re-employment and the likelihood that he would be determined to be permanently totally disabled. The proposed settlement corresponds to roughly 25% to 30% of the exposure on this claim without taking into consideration the cost of litigation.

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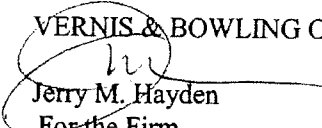
CONCLUSION

Should you have any questions or comments, please do not hesitate to contact me.

Thank you for your attention to this matter.

Very truly yours,

VERNIS & BOWLING OF MIAMI, P.A.

  
Jerry M. Hayden  
For the Firm

Encl: Signed Mediation Agreement

cc: Candice Goldberg, EMI  
Sandra Barroso, City of Key West

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