



THE CITY OF KEY WEST

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October 20, 2010

Mayor and Commissioners
The City of Key West

RE: Settlement of worker's compensation case Charles Winters vs. The City of Key West

Dear Mayor and Commissioners:

On February 3, 2010 the City Commission passed Resolution 10-031 which approved the worker's compensation settlement regarding Charles Winters. I have attached the settlement summary of our outside counsel from that settlement for your review.

Since that time, the Medicare Set Aside came back that was substantially higher than what was projected for this claim. Basically, in a settlement of this magnitude, Medicare has an interest in how much the projected care is going to cost after a settlement of this magnitude is effectuated. The reason for this is because in all likelihood Medicare will be picking up the tab on most of the future health care from a particular worker's compensation injury that settles because the medical care provided by the employer will cease at the time of settlement. Therefore, a study is conducted to reasonably predict what that amount will be called a Medicare Set Aside. Out of the settlement proceeds, that amount is set aside to pay for all of the continued related medical care. When those funds are exhausted, then Medicare kicks in and takes the care from there. All of this takes place after the settlement, but the Judge of Compensation Claims will not approve this settlement unless Medicare gives its blessing.

In this case, the MSA came back \$42,128.00 over what was predicted. Therefore, since there was a contingency built into the February agreement subjecting the settlement to

Medicare approval and the numbers are not in line, we have a case that is essentially not settled. In the meantime, the Claimant's attorney has filed for PTD (permanent total disability) which if he wins, will substantially increase the value of the case; as outlined in Mr. Hayden's summary below. Mr. Hayden has spent months trying to negotiate this discrepancy with the Claimant to have him absorb a portion of the deficiency and they are not willing to do so at all.

Therefore, in order to bring this case to a conclusion and to avoid a substantially higher exposure with a permanent total disability claim as summarized in Mr. Hayden's letter below, I concur that this settlement should be revised to increase the amount by the \$42,128.00 that is in question.

I have included Mr. Hayden's last analysis on the issue below for your review. Lisa Cothron is the city's adjuster for worker's compensation claims with E.M.I.:

Lisa,

Pursuant to your request, I have outlined the cost estimate along with some additional comments regarding each of the options outlined in my previous email of 8/13/10.

1. The employer can instruct PMSI to contact CMS in an effort to negotiate a lesser MSA. The drawback is of course that there is no guarantee this would be successful or that we would receive a favorable response before trial. To my knowledge, there has been no change in authorized medical expenses since the original submission. The MSA takes into account the potential cost of lumbar fusion, orthopedic visits, physical therapy, lumbar corset, lumbar MRI, electrical studies, x-rays, lab tests and Oxycodone. It appears that Oxycodone is the only medication that is considered work related. The claimant's personal physician, Dr. Covington, is prescribing Percocet (narcotic analgesic), Caduet (hypertension), Lasix (hypertension) and Nexium (GERD). The revised MSA projects the cost of Nexium over life expectancy totaling \$33,797.40 although it is unclear if this medication is needed in conjunction with Oxycodone or for reasons unrelated to

the accident. It would be helpful we could conference with PMSI Settlement Solutions to discuss this issue.

2. The employer can increase its settlement authority by \$42,128.00 to cover the excess MSA. I believe the claimant is still prepared to go forward with the settlement. Cost projection: \$135,000.00 plus \$42,128.00 plus roughly \$3,000.00 legal and administrative expenses associated with finalizing the settlement documents.
3. The employer can negotiate a partial washout closing indemnity yet leaving medical open indefinitely. By leaving medical benefits open, an MSA would no longer be required. In that case, the employer would have an opportunity to explore washout of medical benefits at a later date, perhaps when surgery is no longer an issue: Cost Projection: \$92,872.00 to \$100,000.00 plus future anticipated "Medicare covered" medical expenses projected in the amount of \$86,767.00 (assuming surgery) plus non-covered medical expenses such as transportation back and forth to Miami as need, durable medical equipment and attendant care. The employer must also take into consideration the potential for further litigation over medical issues such as the claimant's recent hospitalization for episode of back pain, plus attorney's fees. The employer may never incur the expense of surgery although it is anticipated that it may incur expenses associated with additional medications, injections and ER visits. This option may cost less than option 2 in the short run but may be much greater over time depending on the circumstances.
4. The employer can negotiate a compromise on the exposure for past benefit and attorney's fees in return for accepting the claimant as PTD. The advantage of this option is that the employer can avoid a potential large lump sum award for past benefits, penalties, interest, fees and costs and apply begin applying an SSD offset. Given the claimant's young age, I believe Mr. Rosen would give a significant discount on past benefit exposure and fees to ensure that his client has future financial security. The drawback to this option is that it the employer would most likely have to seek modification of the stipulation if it ever wanted to suspend those benefits. Modification requires a higher burden of proof and involves litigation and

fee exposure. Exposure for PTD from 1/18/06 to 9/1/09 is \$95,958.78 inclusive of penalties and interest, plus roughly \$35,000.00 exposure for attorney's fees. There is no retroactive offset for Social Security disability benefits. I suspect the claimant may accept somewhere in the neighborhood of \$50,000.00 (perhaps less) inclusive of fees and costs provided the carrier administratively accept the claimant as PTD. Using 8% discount factor, the present value of PTD, less SSD offset, plus PTS, is roughly \$271,725.88. In addition, there is of course the exposure for future medical expenses as well estimated in the range of \$100,000.00.

5. The employer can administratively accept the claimant as PTD (permanently totally disable) retroactive to 7/21/06, pay past benefit with penalties, interest, costs and attorney's fees. This is clearly the most expensive option. Estimate of past benefits - \$95,958.78, estimate of fees- \$35,000.00 , estimate of costs - \$3,500.00, estimate of present value future indemnity - \$271,725.88. Estimate value future medical - \$100,000.00.
6. The employer can consider offering the claimant a suitable modified job within the restrictions imposed by his physicians or create a position for him. By offering the claimant a job, the employer, through its vocational expert, can argue that the claimant is physically capable of engaging in a least sedentary employment within a 50-mile radius of the employee's residence within the meaning of Section 440.15(1)(b), Florida Statutes (2006). Job placement would be the best method for defending the claim for PTD. However, it is unclear if the claimant would be willing to accept an offer of suitable light duty employment. If he returns to work, the issue of past benefits, fees and costs may continue to be litigated. In that case, I suspect past issues could probably be compromised somewhere in the range of \$25,000.00 to \$50,000.00.
7. The employer can proceed to trial on the issue of PTD retroactive to 7/21/06, penalties, interest, costs and attorney's fees. Since the case was tentatively settled, it is my understanding that the hearing was never reset. Estimate of past benefits: 0 - \$95,958.78, estimate of fees: 0 - \$40,000.00, estimate of costs – 0 - \$4,000.00, estimate of present value future indemnity: 0 - \$271,725.88. Estimate value future

medical - \$100,000.00. Estimate litigation expenses through trial: \$7,500.00 to \$10,000.

Jerry Hayden

If you have any questions regarding the recommendations above, please do not hesitate to contact me at 809-3775.

Sincerely,

A handwritten signature in black ink, appearing to read 'RR', is written over a horizontal line.

Ron Ramsingh
Assistant City Attorney