Settlement Documents

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WHEN TO SETTLE BY COMPROMISE AND RELEASE:

1. When off risk
2. When wish to settle future medical
3. When claim or right to benes is disputed
Advantages of C&R:

- Resolves all issues (generally)
- No right to reopen
- Issues [such as penalties] resolved without admission of fault or liability

WHEN NOT TO SETTLE BY COMPROMISE AND RELEASE:

1. Still on risk (C&R may duplicate settlement of future claims);
2. When a party is unwilling to settle future medical care (e.g., applicant concerned about ability to pay future medical, or defendant does not wish to fund MSA);
3. Other party objects (co-def; Death without Dependents Unit).
BENEFITS WHICH CAN BE SETTLED BY COMPROMISE AND RELEASE (C&R):

1. TTD;
2. TPD (wage loss);
3. PD;
4. Life pension;
5. Future medical treatment;
6. Out of pocket medical expenses;
7. Penalties;
8. Interest on delayed payments;
9. VR, (under some circumstances; not applicable any more);
10. Supplemental job displacement benefits (voucher) for injuries prior to 1/1/13.

WHAT CAN’T BE SETTLED BY C&R?

1. Claims over which WCAB has no jurisdiction:
   • Civil claims
   • FEHA
   • ADA
   • Retirement issues
   (Third party C&R settles WC claim in connection with civil third party settlement.)
2. “Unknown” claims;
3. VR/SJDB (voucher)
   • Settlement of VR prohibited, unless “good faith” issue could defeat applicant’s claim. *Thomas v. Sports Chalet* (1977) 42 CCC 625
   • Statutory prohibition against settlement of voucher for injuries on or after 1/1/13. LC 4658.7(g)
“Thomas” for voucher in 1/1/13 case?

“Work-around” for statutory prohibition against settlement of voucher post 1/1/13?

WHEN SHOULD YOU FIRST THINK ABOUT SETTLEMENT OF A CLAIM?

When injured worker is P&S or MMI? For all body parts?

Not necessarily...
When claim is denied? ("Nuisance value?")

1. Consider SETTLEMENT AT EVERY STAGE IN CLAIMS HANDLING. If you don’t, you may miss settlement opportunities.

2. HURDLES to SETTLEMENT:
   - Injured worker/applicant’s attorney;
   - WCAB (judge, I&A officer)
“A Compromise and Release is less about the numbers, and more about who wants it more.”

Fletcher’s Rule

Can’t be forced to settle by C&R. Always by agreement of parties.

Valuing cases and negotiation of are an art, outside the scope of this seminar. Each party must determine if settlement is cost-effective in light of risk of proceeding to trial.

Identify areas of agreement, and areas of dispute. Weigh arguments of each party in areas of dispute to determine appropriate compromise of issues in dispute.

ALL SETTLEMENT MUST BE APPROVED BY A WORKERS’ COMPENSATION ADMINISTRATIVE LAW JUDGE. LC 5001

• Board Rule 10882 directs the Appeals Board to “inquire into adequacy” of C&R.
Q: Does this mean the injured worker gets every benefit possible under the record developed by the parties?

A: NO! The settlement must only be within the range of potential outcomes.

See Board Rule 10870:
“agreements which provide for the payment of less than the full amount of compensation due or to become due, and which undertake to release the employer from all future liability will be approved only where it appears that a reasonable doubt exists as to the rights of the parties, or that approval is in the best interests of the parties.”

TOOLS USED BY WORKERS’ COMPENSATION ADMINISTRATIVE LAW JUDGE TO ASSESS ADEQUACY:

1. DEU (Disability Evaluation Unit);
2. I&A (Information and Assistance Officer)
CLAIMS EXAMINER’S BEST TOOLS TO ESTABLISH ADEQUACY OF SETTLEMENT:

• Superior skill in drafting C&R;
• Providing supporting documents;
• Explaining basis of settlement.

UPON SUBMISSION OF SETTLEMENT JUDGE CAN:

1. Approve it;
2. Suspend and make inquiries re basis of settlement or missing documents;
3. Set hearing on adequacy; or
4. Disapprove settlement

THE FORM:

DWC – CA FORM 10214(c) (The regulation which provides the form to the public). Required contents are provided in LC 5003-5004.

2 other forms not discussed in this seminar:
   a. Death & Dependency Claim
   b. Third Party Compromise and Release.

PAGE ONE-

• Include all case #’s
• Applicant’s SS #
• VENUE – usually based on AA’s office or applicant’s residence
• Let applicant or attorney fill in applicant’s address (so no future argument that check was sent to wrong address)
• Provide ER name and address: be accurate insurance info. You can be sanctioned for mistakenly identifying ER as “self-insured.”

Caldiron v. Compuware (2002) 67 CCC 289
Include all cases settled

Case Number 1

Case Number 2

Case Number 3

Case Number 4

Case Number 5

Applicant’s SS# Wages (Numbers Only)

Venue Choice is based upon. (Completion of this section is required)

☐ County of residence of employee (Labor Code section 5901.5(b)(1) or (5))

☐ County where injury occurred (Labor Code section 5901.5(b)(2) or (6))

☐ County of principal place of business of employee’s attorney (Labor Code section 5901.5(a)(2) or (6))

VENUE

Select 3 Letter Office Code For Place/County of Hearing (From Document Cover Sheet)

Employed/Compliance of this section is required:

First Name

Middle Initial

Last Name

Leave Address Blank For Applicant to Fill Out

Address/PO Box (Please leave blank spaces between numbers, names or words)

City

State

Zip Code

Employer Information (Completion of this section is required)

☐ Insured

☐ Self-Insured

☐ Legally Uninsured

☐ Uninsured

BE ACCURATE REGARDING ER’S INSURANCE SITUATION

Employer Name (Please leave blank spaces between numbers, names or words)

OR RISK SANCTIONS

Employer State Address/PO Box (Please leave blank spaces between numbers, names or words)

City

State

Zip Code

THE FORM - PAGE 2

• AA and DA info. If no AA or DA, leave blank

• Insurance Company – Note next page is Claims Administrator. If intention is to identify TPA, put it on next page.
THE FORM – PAGE 3

• Distinguish between TPA and Ins. Co. (I usually use the same PO Box for Ins. Co. that I have for TPA. Have never had a problem with this.)

CLAIM INFORMATION:

• DOB – Check EAMS to be sure the info in your C&R is consistent. Sometimes EAMS info needs to be corrected.

• OCCUPATION – OK to put “in dispute” but need to explain. Better to put in most accurate occupation. (Try to support assertion that C&R is “award” of specific PD rating for purposes of future apportionment.)
TPA

IN DISPUTE: OCC FROM YOUR RATING, OR BY AGMT

ADJXXXXX1
Specific Injury
04/01/2014

100 HEAD
Corneal Injury

318 ARM
Other Body Part

Body Part 3:

842 NERVOUS SYSTEM - PSYCHIATRIC/PSYCH

The injury occurred at:
Job Site – If Known

City
State
Zip Code

ADJXXXXX2
Specific Injury
04/02/2013 04/02/2014

145 TEETH
Corneal Injury

320 WRIST
Other Body Part

Body Part 3:

840 NERVOUS SYSTEM - STRESS

The injury occurred at:
Job Site – If Known

City
State
Zip Code

Body parts, conditions and systems may not be incorporated by reference to medical reports.

111 NORMAL STREET
ANYTOWN CA 90000
THE FORM – PAGE 3 cont’d

- **CLAIM INFORMATION:** Applies to all claims with ADJ#'s.
- **SPECIFIC INJURY:** Use “state date”
- **CUMULATIVE TRAUMA:** Start and end dates.

**Q:** Stick to 1 year CT period?

**A:** Customary, but not necessary. What were allegations? If only end date alleged, generally provide start date 1 year earlier.

THE FORM – PAGE 3 cont’d

**BODY PARTS:** Use EAMS codes. Include every injured body part alleged, or you may not have settled that part of the claim!

**ISSUE:** EAMS does not specify right or left extremity, only “arm”, “leg”, or “wrist.” Clarify in comment section if any ambiguity.

The electronic form does not provide enough characters to provide the entire description in the EAMS body codes. Clarify in comment section if needed.
THE FORM – PAGE 5 – PAYMENTS MADE

• Provide AWW for “earnings”. If in dispute, so indicate and describe resolution of dispute in comments section. If dispute resolved via compromise AWW, list that as the AWW.

• Provide payments of TTD, PD and medical expenses in lines provided. Should conform to the printout of benefits. If multiple periods, 3 options:
  1. List all periods in comments section;
  2. List first period in spaces allotted on form and additional period(s) in comments section;
  3. Put first and last date of payment on form and indicate in comments section that payments were made during “broken periods” or “various periods.”

EXAMPLES:
• “TTD paid 01/01/2012 through 04/01/2012 at a rate of $400 per week; 01/01/2013 through 06/01/2013 at rate of $400 per week.”
• “TTD paid in broken periods.”
• “PD paid in lump sum in amount of $5,000.00 04/01/2013.”
• “TD paid as wage loss at varying rates 01/01/2012 through 06/01/2012.”

MEDICAL PAYMENTS: Provide total payments for medical treatment. Not include medical-legal costs or medical management costs (nurse case manager; bill review). This item rarely questioned.
UNPAID MEDICAL EXPENSES:

- If claim denied, or in nuisance settlement, indicate medical bills to be paid by "applicant." Judge may question this!

- In most cases, put "per paragraph 8 [liens] below." EAMS will only allow a few characters, so it is compressed to: "per p 8."

- Explanation can be included on page 6, para 8.

- Note resolution of all liens. Generally EDD rep signs C&R noting settlement agreement.

- Resolutions of liens can be in separate Stip and Orders, typically approved by WCJ. Informal agreements can be noted in C&R. Confirmation letters can be retained to show judge.
Ok TO AGREE TO PAY, ADJUST OR LITIGATE ANY LIENS. But AVOID holding applicant harmless.

EDD: Best practice resolve lien prior to negotiating C&R. Reason: some reimbursement to EDD might need to be deducted from settlement.

MEDICAL TREATMENT: If applicant held harmless, def can only assert defenses available to applicant. For example, def can no longer argue treatment was outside the MPN.

*Barajas v. F&H Cold Storage (2010) ADJ6559495 (WCAB Panel Decision)*
C&R FORM – PAGE 6, PARAGRAPH 7

• Start with GROSS AMOUNT of settlement, then work through deductions.
• PDAs: use most current printout and provide total. Include PD paid out on all claims being settled. Provide date of calculation of PDAs (typically date of printout).
• Form provides credit for any PD paid after the date given in paragraph 7.

IF AMOUNT OF PDAs ON FORM IS INCORRECT DEFENDANT WILL PROBABLY LOSE CREDIT FOR AMOUNT NOT INCLUDED!

County of San Joaquin v. WCAB (Oaks), 76 CCC 169 (Writ Denied – 2011)

Q: “Subject to proof”? Will this protect defendant?

C&R FORM – PAGE 6, PARAGRAPH 7, cont’d

• TD OVERPAYMENTS – Form provides for deduction for TD overpayments, but DON’T BE FOOLED! This does not automatically mean the judge will allow it. Be sure injured worker or attorney is aware of the claimed overpayment and agrees to credit. EXPLAIN basis for credit in COMMENTS section of C&R.
• If credit is due to an error by claims examiner, WCAB may not allow credit even if agreed upon by parties.
• J.C. Penney case: overpayment was due to retroactive P&S date by AME. Payment based on PTP. Credit NOT allowed for overpayment because no objection per LC 4062 to issue of TTD status!

J.C. Penney v. WCAB (2009) 74 CCC 826
• Other deductions may include liens for child support or liens for living expenses. These are typically settled by applicant, but deducted from settlement. Be sure judge is provided sufficient documentation of agreement with lien claimant to be satisfied lien is resolved.

• If settlement of EDD lien includes payment by applicant, this is the place to note the deduction from the settlement.

• ATTORNEY FEE – Leave blank for applicant’s attorney to fill out. Or if applicant unrepresented, leave blank, but fill in balance owed to applicant.

Q: Include deduction for MSA?

A: Depends on how MSA is being handled in settlement. If actual trust is being created, probably deduct amount going into trust.

If applicant is self-administering MSA, probably best to rely solely on language in COMMENTS or separate MSA addendum.
THIS SETTLEMENT IS BASED ON THE PANEL QME REPORT OF DR. PHIBES, RATED BY THE DEU AT 10% PD ($8,772.50).

C&R FORM – PAGE 7

BOTH PARTIES MUST INITIAL ALL ISSUES BEING SETTLED. IF YOU DON’T IDENTIFY AN ISSUE AS SETTLED, YOU HAVEN’T SETTLED IT!

Tobar Industries v WCAB (Phan), 77 CCC 300 (Writ Denied – 2012)

C&R had ADDENDUM indicating LC 132a Petition was being settled, but the “discrimination (Labor Code §132a)” issue was not initialed. WCAB held 132a Petition was NOT settled by C&R!
Q: Initial every box? This is common practice, but some judges will then inquire regarding the nature of the dispute and want to know that the C&R contains consideration for resolving the dispute.

Best Practice: Only initial issues actually being resolved.

BE SURE TO HAVE APPLICANT OR ATTORNEY INITIAL ISSUES!

C&R FORM – PAGE 7 cont’d

COMMENTS:
Your opportunity to explain basis for settlement and clarify any points not clear in rest of settlement documents.

Don’t worry if explanation doesn’t fit the box. Put the extra comment in Addendum. Note “Addendum A is incorporated into this agreement.” Judges don’t like boiler-plate addenda that attempt to over-reach. They do appreciate simple explanations of what is being settled and WHY IT IS ADEQUATE.

Recite basis for settlement of PD. Consider providing rating string. Whenever possible give % of PD being settled. Give dollar value. (Make it EASY for judge to evaluate settlement).
Q: Will % of PD be sufficient for LC 4664 apportionment in future claims?
A: Unknown. We only know that an Order Approving C&R without more is not an “Award” for purposes of LC 4664 apportionment.


Why not try? If it becomes common practice we may see a trend of cases allowing apportionment to earlier C&R. (But watch for whether PD is really for same body parts.)

Q: What about a denied claim?

Can still use “Thomas” language identifying issue which could defeat applicant’s claim. Make “offer of proof” identifying evidence and witnesses and what defense evidence would show.

Thomas v. Sport Chalet (1977) 42 CCC 625
For Example:

“The WCAB could find of no injury based on testimony of employer witnesses Pat Sajak and Vanna White, who will testify applicant said injured himself at home jumping up and down in front of television.”

*Thomas* was about settling voc rehab which no longer exists, so no need to ask for a “*Thomas*” finding.

But explanation can justify settlements at “nuisance” value, and can be used to negotiate with lien claimants.

Q: What if applicant is not yet permanent and stationary (P&S) or at Maximum Medical Improvement (MMI)?

A: Use language that justifies the settlement;

- Estimate level of PD (difficult);
- “*Thomas*” type language (if facts justify it);
- or “Applicant does not wish to participate in discovery” (deposition or med-legal eval).
SAMPLE

Case Name ______ ADJ_________

Addendum "A" to C&R
Applicant was terminated from employment with EMPLOYER for cause January 24, 2013.

She had bilateral carpal tunnel surgeries through private insurance and was temporarily totally disabled 05/14/2013 through 07/31/2013, and testified in her deposition that she was returned to work by her treating doctor on 08/31/2013.

No TTD was paid. Employer was not provided notice of surgeries or applicant’s work status.

SAMPLE (cont’d)

EDD paid applicant SDI benefits 05/14/2013 through 07/31/2013 at the rate of $269 per week. EDD’s lien is resolved herein.

TTD rate would have been $369.76 per week. This settlement includes payment to applicant for the balance owed after credit for EDD’s payments for TD 05/14/2013 through 07/31/2013 in amount of $1,238.72.

There is a dispute regarding whether LC 4658(d)(2) applies, as applicant was terminated for cause and def asserts employer should not be obligated to make an offer of work under such circumstances.

However, as part of this agreement defendants are providing a $6,000.00 Supplemental Job Displacement Benefit (Voucher) to applicant.
Additional Attachments:

When to include “ADDENDUM”?

• Lengthy, boilerplate addenda are disfavored. When C&R form was revised and expanded, one reason given was to eliminate need for addenda.
• This does NOT mean that addenda are prohibited. But ask whether it is necessary. Many boilerplate addenda contain provisions which will not be allowed.

Examples:

• “This agreement resolves all injuries, known or unknown.”
• Settlement of civil, employment, FEHA or ADA claims.
• “This agreement settles all injuries to body parts mentioned in the medical record.”

STRUCTURED SETTLEMENT

• When using structured settlement, provide addendum outlining terms of structure. Be sure that comment section indicates payment will be made in accordance with terms of the structure.
MSA (Medicare Set-Aside) Addendum:

Some clients require addenda setting forth requirements of applicant to self-administer MSA. For example, keeping receipts, depositing payments into MSA account, regular reporting to CMS.

Probably OK, but WCALJ will probably not approve language requiring applicant to hold def harmless if CMS increases MSA amount.

Ask if anything more is required than standard language:
“This settlement contemplates funding of a Medicare Set-Aside in the amount of ______ out of the proceeds of the settlement. Applicant agrees to administer the Medicare Set-Aside trust.”

MSA Addendum cont’d

If settling by C&R without Medicare Set-Aside:

“Applicant represents he/she is not presently eligible for Medicare and not anticipated to become eligible for Medicare within the next 30 months. Medicare’s interests are protected in this settlement.”

If settling under CMS review threshold, simply indicate that “Medicare’s interests are protected in this settlement.” Technically, if applicant is eligible for Medicare, MSA required but submission of MSA to CMS is not required.
BE SURE TO GET APPLICANT’S SIGNATURE with either:

- 2 witnesses (not family members) must be “disinterested”, or
- in front of Notary Public

<table>
<thead>
<tr>
<th>Witness 1:</th>
<th>(Name)</th>
<th>Witness 2:</th>
<th>(Name)</th>
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<tbody>
<tr>
<td>N/A</td>
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</tbody>
</table>

By signing this agreement, applicant (employee) acknowledges that he/she has read and understands this agreement and has had any questions fully answered to his/her satisfaction.

Witness the signature here:

Date:

[Signature]

Attorney for Applicant:

Date:

Attorney for Defendant:

Date:

Attorney for Defendant:

Date:

Attorney for Defendant:

Date:

Attorney for Defendant:

Date:
CHARACTERISTICS OF STIP WITH REQUEST FOR AWARD

1. Admitting injury;

2. Medical care typically left open;

3. All payment periods and rates specified;

4. Can be reopened w/in 5 yrs from the date of injury for “new and further disability.”
STIP WITH REQUEST FOR AWARD: THE FORM

- OCR form is similar to C&R form.

DIFFERENCES:
Page one requests venue information, (important when Stipulations act as Application)

Party info (injured worker, employer, carrier and TPA) is essentially the same.

Case info is also similar.

PAY SPECIAL ATTENTION TO DESCRIPTION OF INJURED BODY PARTS!
REMEMBER:

IN STIPULATED AWARDS MEDICAL CARE REMAINS OPEN FOR ALL INJURED BODY PARTS.

Stipulations will be construed against defense. Be as narrow in your description as possible.

Example: “foot” instead of “lower extremity”, “low back” instead of “back” or “spine.”

REAL EXAMPLE:

• Stipulation to “internal injuries” was construed to include fibromyalgia.

• Language in box at bottom of page 5 will control, not body part codes listed in case info.
NOTE: 2 DIFFERENT FORMS FOR INJURIES BEFORE & AFTER JAN 1, 2013

• Reason: 15% increase or decrease in PD rate for failure to offer mod work no longer applies to DOI o/a 1/1/13.

Pre – 1/1/13:
1. Determine if employer has 50 or more employees;
2. Check for offer of modified work w/in 60 days of P&S;
3. Increase remaining PD payment by 15%

NOTE: WATCH FOR PDA’s! Most money charts assume no PDA’s prior to P&S date.

NOTE:

• Stipulations form provides for 2 periods of TD payments (more flexible than C&R form).

NOTE:

• Provision for LIFE PENSION in PD section of Stipulations form.

Q: Is there need for medical treatment (paragraph 4)?

• In 99.999999% of cases the answer will be yes, and box should be checked indicating there is need for medical care.
• Even if QME finds no need for medical care, WCAB will not approve Stips indicating no need for medical care if treatment records contain any possibility of future treatment.
Question...
Can you limit Future Medical Care to treatment recommended by AME or QME? No, in Northern California. Maybe, in Southern California.

BUT

BE CAREFUL WHAT YOU WISH FOR:

_Bertrand v. City of Orange_ (2014), ADJ3135829, Board Panel Decision held that 2004 Stipulations with Request for Award in which medical treatment “disputes” were to be decided by AME as a WAIVER of the IMR process.

LIENS:

- Form distinguishes between Medical-Legal liens and liens against compensation.

MED-LEGAL:
“All paid or will be paid per the medical-legal fee schedule.”

LIENS AGAINST COMPENSATION:
- Medical treatment: use same “pay, adjust or litigate language” as C&R.

True liens against compensation:
- Living expenses
- Child support
- (possibly EDD)
OTHER STIPULATIONS

• Use to explain basis of settlement. Focus on PD: medical report(s); provide rating and dollar value.

INTEREST:
• Include the following in ALL Stipulations requiring payment:
  • “Interest is waived if payment is made within 30 days of the service of the Award pursuant to these Stipulations.”

SIGNATURES:
• No need for applicant to sign in front of witnesses or notary public.
Labor Code Section 5814(c)

“Upon the approval of a compromise and release, findings and award, or stipulations and orders by the appeals board, it shall be conclusively presumed that any accrued claims for penalty have been resolved, regardless of whether a petition for penalty has been filed, unless the claim for penalty is expressly excluded by the terms of the order or award.”

If the potential claim for penalty for unreasonable delay in any benefits being settled, the penalty issue must be expressly deferred or it will be deemed resolved.

“All other issues are deferred” will probably not be good enough to preserve claim of penalty!

WHAT TO INCLUDE WITH C&R WHEN SUBMITTED (PRO-PER SETTLEMENT):

1. All benefits notices as required by Rule 9812;
2. Copy of PTP P&S report;
3. Info about who objected to PTP, if anyone, and why;
4. Notice of right to QME, as req’d by Rule 9812;
5. Copies of all AME/QME reports;
6. All wage documentation and calculations to determine TD and PD;
7. Info that the injured worker was given a choice and explanation of Stip vs. C&R;
8. Copies of all available DEU ratings;
9. Proofs of Service that all proposed settlement and medical records have been served on all lien claimants;
10. All letters providing notice of potential eligibility for supplemental job displacement benefits per Labor Code §4658; and
11. Fully completed settlement documents.
WHAT TO INCLUDE WITH C&R WHEN SUBMITTED (PRO-PER) cont’d

NOT NECESSARILY REQUIRED IN EVERY CASE.
All that is required are:
• executed (signed & initialed) settlement doc
• supporting med report
• proof of service on lien claimants
• other supporting documents, i.e., if less than max earner, provide wage statement

CONSIDER COVER LETTER WITH C&R PACKAGE OUTLINING BASIS FOR SETTLEMENT

What to do when you get an Order Suspending Action on C&R?

DON’T PANIC!!

It is not disapproving the C&R

Read it carefully and RESPOND:
• Answer Judge’s questions;
• Provide requested documents