

# The Only Good Claim is a Closed Claim!

## Getting a Claim to the Finish Line



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# Ways to Finish a Claim

1. Claim Disallowed
2. NCLT - Lost Time Paid
3. Scheduled Loss of Use
4. Permanent Partial Disability
5. Permanent Total Disability
6. §32 Settlement



# §32 Settlements

1. Indemnity Only §32
2. Full and Final §32
3. Global Settlement §32



# Indemnity Only §32

- ❖ Resolves Liability for Indemnity Payments
  - Similar to an ATF Deposit for a PPD Case
  
- ❖ Still Liable For Medical Benefits
  - Medical Expenses Usually Drop When the Money Stops
  - No Need for MSA for Medicare Recipients
    - MSA Can be Expensive
    - Inexpensive MSA is costly while waiting for CMS approval
  
- ❖ Can Settle Medical Expenses Later
  - After medical drops, MSA cost can drop dramatically
  - Workers' Compensation Board will approve an attorney fee on the medical only §32
    - *Shea v. Icelandair*, 63 A.D. 3d 30 (2009)
    - Workers' Compensation Law §24(2)
    - If MSA, must be over and above MSA value



# Full and Final §32

- ❖ Resolves Indemnity and Medical Issues
  - Will need to determine if formal MSA is required or if a “Reasonable Amount” can be selected to protect Medicare
- ❖ Resolving medical can add cost to the §32
- ❖ Claimant cannot come back for more indemnity or medical benefits



# Global §32 Settlement

- ❖ Settles the workers' compensation claim simultaneously with third-party action
- ❖ Requires coordination with the Self-Insured Employer/TPA, third party attorney, workers' compensation attorney and the claimant-plaintiff.
  - Workers' compensation attorney must be advised of negotiations as only they can negotiate the §32
- ❖ Will involve an extra lien reduction or lien waiver in return for a \$0.00 §32 settlement
  - Claimant's attorney should work out fee with third-party attorney
    - No fee is payable out of the extra lien reduction, *Pickering v. Car Win Construction, Inc.*, 133 A.D. 3d 1068 (2015)
- ❖ Must take into account future liability under *Kelly, Burns* and *Bissell* to determine how much to reduce the lien by.



# Global §32 Settlement Terms

- ❖ Agreement should indicate that the lien be held in escrow by third-party attorney until the §32 Notice of Approval is filed by the Workers' Compensation Board
  - Have the third-party attorney sign the §32 Agreement
  - Indicate that a late payment penalty cannot be imposed on the Self-Insured Employer since the payment of the lien reduction will be made by the third-party attorney
  
- ❖ Claimant must cooperate to have the §32 approved by the Workers' Compensation Board
  
- ❖ Claimant must live through the 10-day waiting period
  - ❖ *Weishar v. Dan Tait, Inc.*, 193 A.D. 3d 1197 (2021)
  
- ❖ If §32 is not approved by the Workers' Compensation Board, the entire recoverable lien is to be recovered



# Pursuing Settlement

- ❖ Claimant no longer works for employer
- ❖ Claimant is willing to resign
  - Resignation agreement must be part of §32
  - There must be additional consideration for resignation
    - May have to be paid by the employer as the employer and not as a Self-Insured Employer, because of reinsurance issues





# Controverted Claims

- ❖ Preferable to settle instead of risking claim establishment
  - Unreliable employer witnesses
  - He said/she said situations
  - Contemporaneous medical records
    - ER records and/or ambulance report
  - WCB mistakes are always possible
  - More cost efficient to settle
- ❖ Settlements are usually for nominal amount



# Schedule Loss of Use Award v. §32

- ❖ Only established to extremities; or
- ❖ Claimant is working and pursuing schedule awards instead of wage loss benefits *Taher v. Yiota Taxi, Inc.* 162 A.D. 3d 1288 (2018) and *Gamberdella v. New York City Transit Authority*, 204 A.D. 3d 1210 (2022)
- ❖ Cases typically close in SLU award, but SLU award does not close medical
- ❖ §32 may be preferable to SLU award if:
  - Multiple claims
  - Possible future surgery
  - No longer employed
  - Claim may be subject to LWEC



# Classification

- ❖ Established to systemic sites (head, neck, back, psych, CPRS); and
- ❖ Medical evidence of permanent impairment
- ❖ Settlement based on present day value of Loss of Wage Earning Capacity (LWEC)
  - LWEC factors include not only medical but also age, vocational history, English proficiency, and computer proficiency



# Limiting the Value of Claims

- ❖ 15(3)(w) credit reduces LWEC by the number of weeks paid at a partial disability rate after 130 weeks from date of accident
  - Can be compromised by finding of no MMI
  - Benefits paid at total do not account
  - For example:
    - The date of accident is 8/31/2020
    - 130 weeks from the date of accident is 2/27/2023
    - The claimant is paid at a temporary partial rate from 2/27/2023 until the date of classification, which is 10/2/2023, or 31 weeks
    - The claimant is classified on 10/2/2023 at a 50% LWEC
    - Instead of receiving 300 weeks of LWEC benefits from the date of classification, the claimant receives 269 weeks



# Example:

**50% LWEC with average weekly wage of \$1,500, but awards were paid at partial rate for 31 weeks after 130-week mark:**

- ❖ Claimant is entitled to 269 weeks of benefits at \$500 per week, for a total capped period of awards of \$134,500
- ❖ With date of classification of 10/2/2023, benefits payable until 11/27/2028
- ❖ Present value is approximately \$119,000 (**5% discount rate – Special Bulletin 222C Table XIII**)
- ❖ When considering settlement, this is a reasonable value for indemnity portion of claim
- ❖ Additional contribution is necessary to close medical portion of claim



# Limiting the Value of Claims (continued)

- ❖ Labor Market Attachment
  - A claimant who is partially disabled must show attachment to the labor market
    - The carrier must raise this issue
  
- ❖ A claimant who fails to show attachment is no longer entitled to indemnity benefits, which can drastically reduce the value of a claim
  - A claimant who is not attached must reattach to receive indemnity benefits
  - Subsequent surgery or IME giving total is insufficient to reinstate awards *Bacci v. Staten Island University Hospital*, 32 A.D. 3d 582 (2006)
  
- ❖ A claimant who shows attachment at the time of classification no longer has an obligation to look for work due to changes in WCL § 15
  
- ❖ A claimant who fails to show attachment at the time of classification still has an ongoing obligation to produce a job search if they reattach to the labor market. *Digbasanis v. Pelham Bay Donuts, Inc.*, 224 A.D. 3d 1047 (2024)



# Limiting the Value of Claims (continued)

- ❖ Fraud – WCL §114-a
  - An intentional misrepresentation of a material fact for the purpose of affecting compensation
- ❖ Mandatory penalty is equal to amount of awards claimant received as a direct result of fraud
  - Effectively creates an overpayment on the file
- ❖ Severe violation can lead to discretionary penalty, which is often a permanent disqualification from any future indemnity benefits
- ❖ Does not impact medical benefits



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