

**Chapter 6**

**SETTLEMENT ISSUES**

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**§ 6.01 Form 16.**

A workers' compensation claim may be settled through the use of a Form 16. A Form 16 is used to establish a specific loss and/or disfigurement, either with or without a viewing or informal hearing. See regulations 67-801, 67-802, and 67-804. The main advantage to using a Form 16 to settle a claim is it preserves the claimant's right to seek additional compensation if he/she has a change of condition for the worse within one year of the date of the last payment made pursuant to the terms of the settlement. The main disadvantage of a Form 16 is that it limits the attorney's ability to protect a totally disabled client's entitlement to Social Security Disability benefits from being reduced by the "workers' compensation offset." See Appendix 6.

**§ 6.02 Agreement and Final Release (Clincher Agreement).**

A claim may be settled by executing an Agreement and Final Release, generally known as a clincher agreement. A settlement on this basis is similar to the settlement of an automobile accident or personal injury claim when a release is executed in favor of the insurance carrier. When a claim is settled in this fashion, it is not binding on the parties until it is approved by the commission. Prior to such approval the employee (or the employer) can unilaterally repudiate the offer of settlement that had previously been accepted. Mackey v. Kerr-McGee Chemical Company, 280 S.C. 265, 312 S.E.2d 565 (S.C. App. 1984).

Once approved, the terms of the agreement are binding on the parties, and the claimant loses his right to seek additional benefits based on a change of condition. The agreement becomes as binding as a judicial decree, and the facts contained therein are as definitely settled as factual findings incorporated in a decree. McCreery v. Covenant Presbyterian Church, 303 S.C. 271, 400 S.E.2d 130 (1990). The settlement is final and relieves the carrier of any further responsibility for payment of any form of compensation under the Act, including medical benefits. Regulation 67-801 explains the difference between a settlement on a Form 16 and a settlement concluded by execution of an Agreement and Final Release. Regulation 67-803 sets forth the specific information that must be included in a clincher agreement, and the procedure for concluding a case in this fashion.

Attorneys must read clinchers very carefully. Defense lawyers are notorious for attempting to include things in a clincher that were never negotiated by the parties. The clincher may contain purported releases of wrongful termination claims, ADA claims, and other causes of action over which the commission has no jurisdiction. Some defense attorneys attempt to include a finding that the claimant sustained a permanent partial impairment equal to the amount of the settlement. The *sole* purpose of such language is to attempt to deprive the claimant of fair compensation in the event that he has another injury in the future. If the clincher contains a finding that a claimant has sustained a certain degree of loss of use, in order to receive compensation for loss of use for a future injury, the claimant must prove that his total loss of use exceeds that specified in the prior clincher. Clinchers containing inappropriate, un-negotiated language should be returned to defense counsel for correction.

In deciding whether to recommend that a claimant settle by clincher, the attorney must consider many factors. One of the main considerations is the likelihood of future medical treatment. Some cases involving total disability probably should not be clinched due to the likelihood of substantial future medical expenses. In cases of permanent partial disability the attorney and client should consider the likelihood of a change of condition. If the claimant is likely to end up on Social Security Disability, the impact of the potential settlement, or non-settlement, on such benefits should be carefully considered. See Section 6.03 and Appendix 6.

### **§ 6.03 Social Security Disability Benefits and Offset of Workers' Compensation Benefits.**

The Social Security Act, regulations and Social Security Administration policies (POMS) provide that in certain circumstances Social Security Disability benefits must be offset/reduced due to the receipt of workers' compensation benefits. (See also 42 USCA § 424a.) The Regulations and POMS provisions also set forth the procedures to be followed in determining whether or not an offset is applicable, and if so, the amount of the offset.

POMS section 52001.001 explains the offset provision. When a claimant is entitled to both Social Security Disability benefits and workers' compensation benefits, and the total of those benefits is greater than 80% of the workers' average current earnings (ACE), then the offset and resultant reduction of Social Security Disability benefits will be applied. See Appendix 6. Note that under the POMS provision, the receipt of Social Security Disability benefits and a workers' compensation award need not be based on the same injury in order for the offset to apply.

### **§ 6.04 Example of the Social Security Offset Computation.**

**Facts:**

Monthly WC Benefits--\$600

Monthly SSD Benefit--\$400 (Assume that claimant has no children).

Average Current Earnings (ACE) (Per SSA)--\$1000 /month

80% of Average Current Earnings (ACEH)--\$800 /month

**Calculations:**

Workers' Comp Benefits	\$ 600 /month
SSDIB	+ \$ 400 /month
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Total Monthly Benefits	\$ 1,000 /month
Total Monthly Benefits	\$ 1,000 / month
80% of ACE- -	- \$ 800
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Amount of Offset	\$ 200

SSDIB	\$ 400 /month
Offset	- \$ 200 /month
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Adjusted/Reduced SSDIB Entitlement	\$ 200 /month

The offset of Social Security benefits due to the receipt of workers' compensation benefits terminates at age sixty-five. In determining the amount of workers' compensation benefits that are offset against receipt of Social Security Disability Insurance Benefits, certain exclusions and deductions are allowed to reduce the amount of workers' compensation benefits to be offset. These include the following: (1) legal expenses, (2) medical expenses (past and future), (3) rehabilitation payments or expenses, (4) penalties and (5) money paid to dependents. At one time payment for a specific loss, not paid on account of total or partial disability, was also excludable. However, the POMS have eliminated this exclusion.

**§ 6.05 Minimizing the Offset.**

If a claimant is receiving Social Security Disability benefits and temporary total workers' compensation benefits (running award), and the combined total of these two benefits exceeds the greater of 80% of the ACE, or the total family benefit, there is no way to minimize the offset. So long as the claimant has not reached maximum medical improvement and draws temporary total the offset will continue. Once a clincher settlement has been reached, the

Agreement and Release should include a provision prorating the lump sum payment in order to minimize the social security disability offset. See Appendix 6 for recommended language.

Lump sums may be prorated over the life expectancy of the claimant. POMS § 52001.555(c)(4) specifically allows such prorations. Prorating the settlement proceeds over the claimant's life expectancy produces a hypothetical monthly sum attributable to workers' compensation that is generally low enough to substantially reduce or eliminate the offset. The Social Security Administration recently considered eliminating this method of reducing the offset. 62 FR 4662. Fortunately, the administration has now withdrawn this proposed regulation.

For many years workers' compensation attorneys in South Carolina and other states allocated a portion of a clincher settlement to past and/or future medical benefits in order to minimize or eliminate the offset. This practice is very risky in light of the Medicare regulations that, while confusing, make it apparent that any attempt to unreasonably allocate any portion of a lump sum settlement to payment of medical expenses will result in a loss of Medicare benefits, until the allocation to medical expenses has been offset by incurred medical costs. That is, if the compromise settlement agreement (clincher) allocates a certain sum for specific future medical expenses, Medicare will not pay for those services until medical costs related to the disability equal the amount of the lump sum allocation to future medical expenses. However, where the clincher agreement, by its terms, precludes the possibility of any future payment of workers' compensation benefits, including medical expenses, any medical costs incurred after the date of the settlement will be paid by Medicare, if covered.

**CAVEAT:** Be sure to advise your client clearly and thoroughly that the proration of a lump sum award using the method outlined above and in the appendix is an attempt to reduce or eliminate the workers' compensation/social security disability offset, but it is subject to review and approval by the Social Security Administration. You are not guaranteeing that the Social Security Administration will approve the agreement, and if not approved, his/her workers' compensation settlement may result in a reduction in his/her monthly Social Security Disability benefits. See Appendix 6.

**§ 6.06 Annuities, Structured Settlements and Irrevocable Trusts.**

The use of annuities, structured settlements, and irrevocable trusts to settle workers' compensation claims raise some extremely complicated issues. When an employee has the right to receive payments from an annuity or structured settlement, and does not have the option of a lump sum settlement, the employee's Social Security Disability benefits are subject to reduction/offset at the time the payments are actually received by the employee. POMS § 52001.020B.2 (1992). Similarly, when an irrevocable trust agreement provides that the employee has no option to receive a lump sum payment, only the payments from the principal, when paid, are to be considered in determining the amount of an offset. POMS § 52001.020E.2 (1992).

The problem with all such settlement devices is they make it difficult, if not impossible, to use the fiction of the traditional Utica-Mohawk language. A structured settlement or annuity will specify the manner in which payments are to be made. The Social Security Administration will base its offset calculations on these terms of payment. If, for example, the structure/annuity indicates that the claimant will receive \$1000 per month for 20 years, the Social Security Administration will treat these payments as it would any other monthly workers' compensation payment and reduce the claimant's benefits according. It *might* be possible to draft language which states that although the claim is being settled on a structure/annuity, the present value of this structure/annuity shall be deemed to represent payment over the claimant's remaining life expectancy at the rate of \$ X per month. Getting the Social Security Administration to base its calculation of the offset on these Utica-Mohawk style numbers rather than the actual method of payment specified in the structure/annuity is probably a long shot.

Probably the safest thing to do when considering a structured settlement or annuity offer is to assume that the claimant's Social Security benefits will be affected. The question then becomes whether the proposed settlement is attractive enough to overcome the probable loss of Social Security Disability benefits.

Irrevocable trusts also raise similar questions. On rare occasions, workers' compensation claimants may be eligible for Medicaid. An irrevocable special needs trust may help preserve the claimant's eligibility for Medicaid. See Appendix 6. However, payments made under a trust created or funded as a part of a workers' compensation settlement may also result in reduction or loss of Social Security Disability benefits. Again, it might be possible to put some Utica-Mohawk style language in the clincher stating that the corpus of the trust represents payment over the claimant's remaining life expectancy at the rate of \$ X per month. However, the odds of the Social Security Administration honoring such language are probably slim.

#### **§ 6.07 Lien Issues—Third Party Claims.**

Whenever a workers' compensation carrier pays benefits because of an accident caused by the negligence of a third party, the carrier has a lien on the proceeds of any resulting third party settlement. See section 42-1-560. See also Chapter 10. The attorney should approach settlement negotiations of the workers' compensation claim with an eye toward the future third party claim. Oftentimes the workers' compensation carrier will agree to waive its lien as a part of the workers' compensation settlement. Sometimes it will be to the claimant's advantage to settle the workers' compensation claim for a little less than he normally would in order to permanently dispose of the lien.

#### **§ 6.08 Lien Issues—Health Insurance Carriers, Medicare, and Medicaid.**

It is not uncommon for a private or group health insurance carrier to pay for medical treatment related to an on the job injury. Sometimes this is because the claim is simply filed with the wrong carrier. Other times it is because the workers' compensation carrier has denied the workers' compensation claim and the claimant has no other way to get medical treatment than to file on his health insurance. Health insurance carriers could, in theory at least, assert a lien on the workers' compensation settlement. Fortunately, they seldom do so.

Whenever possible, the attorney should try to negotiate a provision in the clincher that provides that in the event the group carrier should assert a subrogation claim at a later date, the workers' compensation carrier will hold the claimant harmless. This can also be done by

way of a “side agreement” or letter. Workers’ compensation claims are always clinched on a “doubtful and disputed” basis. Should the health insurance carrier assert a lien after the case is settled, the claimant can attempt to use the “doubtful and disputed” language as a shield. However, this argument may not be persuasive to the health insurance carrier. The claimant should be fully advised of the potential for a later subrogation claim by the carrier and allowed to make an informed decision regarding how he/she wants to proceed on this issue. (This section does not attempt to address any ethical duties that the claimant’s attorney might have to the carrier in such a situation. Such issues are beyond the scope of this publication.)

In the event that a carrier should assert a lien at a later date, the claimant could also argue that there is no lien on the settlement because section 42-9-360 exempts the settlement proceeds from the claims of creditors. The claimant may also argue lack of notice of the subrogation right/claim. See also the discussion of this issue in Section 10.11 below.

**§ 6.09 Lien Issues—Medical Providers and Other Creditors.**

Medical providers frequently assert liens against personal injury settlements. Such liens are not valid in workers’ compensation cases under section 42-9-360. However, this section does not exempt the claimant from complying with a family court order to pay child support out of the proceeds of his settlement. 1968-1969 Ops. Atty. Gen., No. 2704, p. 149.

**§ 6.10 Short Term and Long Term Disability Policies.**

Claimants are frequently covered by short term and/or long term disability plans obtained through their employer. Whether to allow credit against temporary total for amounts paid as STD or LTD is in the discretion of the commissioner. See section 42-9-210. Most commissioners allow the credit if the employer paid the cost of the benefits.

Long term disability sometimes becomes an issue when it comes time to settle a claim. Most LTD policies allow the LTD carrier to reduce benefits based on the workers’ compensation settlement. The extent to which they may reduce such benefits is governed by the policy language. At least one large self-insured employer in South Carolina has refused to agree to



the insertion of Utica-Mohawk language in a clincher because such language, as applied to the policy language, would prevent them from reducing LTD benefits.

LTD policies should be reviewed prior to settlement in order to determine what effect the workers' compensation settlement will have on the LTD. In certain cases, it may be advisable to attempt to settle the LTD claim at the same time as the workers' compensation claim.