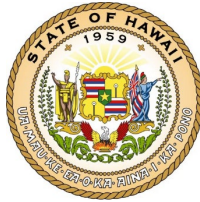


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MEMORANDUM RE: SETTLEMENT AGREEMENTS

To: Workers' Compensation Practitioners
From: LIRAB Date: February 28, 2024

While the following list may not be exhaustive of all matters considered by the Board in its review of a settlement agreement, we hope that the following provides instruction, clarification, and direction to the parties for future settlement agreements. Not all of the following listed considerations will be applicable to all settlement agreements.

A disproportionate and alarming number of settlement agreements submitted for the Board's approval have included substantive errors, as well as typographical, clerical, formatting, writing convention, and grammatical errors. All of these errors should have been identified and corrected before signing and submission to the Board. While the Board overlooks typographical, grammatical, and writing convention errors that do not have any impact on the meaning of the settlement agreement, when the Board declines to approve a document because of substantive errors, the Board will note typographical, grammatical, and writing convention errors that should have been corrected prior to its submission.

Having to review and return settlement agreements for substantive errors and omissions wastes the Board's limited resources and unnecessarily delays the approval process, as well as the Board's other processes in this and other cases, including but not limited to the Board's preparation of other notices, orders, and documents.

It is up to the parties to ensure the accuracy and completeness of any document submitted to the Board.

Thank you for your understanding.

I. **SUBSTANTIVE MATTERS FOR CONSIDERATION**

A. **Conflicting or Inconsistent Settlement Agreement Terms.**

Example of conflicting or inconsistent settlement agreement term:

- 1) The settlement agreement provides for both a withdrawal of appeal (which means the Director's decision stands) and a modification or reversal of the Director's decision.

B. **Incorrect/Inaccurate Statements or References.**

Examples of incorrect/inaccurate statements or references:

- 1) The settlement agreement misstates/miscalculates the temporary disability benefits that were awarded/paid to/will be paid to Claimant.
- 2) The settlement agreement misstates/miscalculates the permanent disability benefits that were awarded/paid to/will be paid to Claimant.
- 3) The settlement agreement misstates or misrepresents the issues on appeal.
- 4) The settlement agreement refers to an incorrect AB Case No.
- 5) The settlement agreement incorrectly identifies a party (e.g., not consistent with the Board caption, misspellings).
- 6) The settlement agreement incorrectly identifies the date of injury.
- 7) The settlement agreement incorrectly identifies a party's appeals status (e.g., identifies a party as the Appellee instead of the Appellant).
- 8) The settlement agreement contains calculation errors.

C. **Statements that Conflict with the Director's Prior Decision(s) (not on appeal).** The settlement agreement should not contain any statements or references that appear to conflict with the Director's prior decisions (not on appeal), if any.

D. **Resolution of All Issues on Appeal.**

The settlement agreement addresses and resolves all issues on appeal and includes a statement that, upon final approval of the settlement agreement by the LIRAB, all proceedings regarding said appeal shall be dismissed with prejudice.

To this extent, it is helpful if the issues on appeal and reference to the Board's most recent pretrial order are recited in the WHEREAS paragraphs.

- E. **Final Approval by the LIRAB.** The settlement agreement should include a term that the agreement is contingent upon final approval and the LIRAB.
- F. **Compromised Case/Adequate Settlement.**
The settlement agreement reflects each party's contention(s) and provides sufficient information and/or documentation to justify the terms, as set forth in the settlement agreement, as adequate.

The settlement agreement also includes a statement or statements to the effect that notwithstanding their respective contentions, the parties now desire to comprise and settle all issues arising from the above-referenced appeal in order to avoid further controversy, litigation, and expenses.
- G. **Recitation of Benefits Paid to and Received by Claimant.**
The settlement agreement includes a recitation of benefits paid to and received by Claimant, an acknowledgment of the receipt and sufficiency of said benefits, and Employer's agreement that Claimant shall keep and retain said benefits.
- H. **To ensure that terms are consistent with Chapter 386, HRS: Explanation of What the New Money Represents.** To ensure that the terms of the settlement agreement comply with and are consistent with Chapter 386, HRS, the settlement agreement should include an explanation or breakdown of what the settlement amount of \$_____ represents. Please attach, as exhibits, any documents (such as rating reports) that are consistent with and support the terms of the settlement agreement.
- I. **To ensure that terms are consistent with Chapter 386, HRS: Deadline by Which Payment Under the Settlement Agreement will be Made.** To ensure that payment of new monies to Claimant, under the terms of the settlement agreement, are made in compliance with Chapter 386, HRS, please state the appropriate deadline by which payments will be made to Claimant.
- J. **To ensure that terms are consistent with Chapter 386, HRS: Responsibility for and Approval of Claimant's Attorney's Fees.**
To ensure that the settlement agreement is consistent with Chapter 386, HRS, the settlement agreement should reflect that Claimant's attorney's fees are subject to approval by the Director and/or the Board. The settlement agreement should clearly state who is responsible for payment of the attorneys' fees for all parties.

- K. **Claimant Waives Her/His Right to a Hearing.** So that there is no ambiguity, please include a statement to the effect that Claimant specifically acknowledges, understands, and agrees that s/he is waiving her/his right to a hearing in this matter and that Claimant is satisfied with the informal handling of the claim and does not need a formal hearing on the terms of this agreement.
- L. **Director's Waiver of Right to Be Heard** (for settlements which modify or change the Director's decision). If the terms of the settlement agreement change an order of the Director, please attach a "Waiver of Right to be Heard" to be signed by the Director.
- M. **Optional: For the Parties' Consideration – Provisions regarding Claimant's Attorney's Fees.** The settlement agreement may include a statement which provides for how Claimant's attorney's fees will be paid in the event that the LIRAB does not concurrently approve Claimant's attorney's fees and the settlement agreement. Sample language for consideration:
- If no order(s) of approval of Claimant's attorney's fees are issued by the Director/and or the LIRAB concurrently with the final approval of this Agreement by the LIRAB, Claimant specifically understands and agrees that Employer and Insurance Carrier shall issue payment for the balance of the settlement amount stated in Paragraph __, less the total amount requested for Claimant's attorney's fees in this case pending approval, within __ calendar days from the date of approval of this Agreement by the LIRAB. Claimant further specifically understands and agrees that Employer and Insurance Carrier shall issue the payment of the approved attorney's fees of Claimant's attorney and, if applicable, the remaining balance of any settlement amount payable to Claimant within ____ calendar days following the latest date of issuance of all orders approving the attorney's fees and costs of Claimant's attorney in Case No. _____.
- N. **Claimant with Limited English Proficiency ("LEP") and Not Represented by an Attorney.** In cases where the claimant is known to have limited English proficiency and requires or has requested, in the past, the assistance of a language interpreter and/or translation and where the claimant is not represented by an attorney, the settlement agreement should reflect that LEP

assistance that was provided to the claimant in the claimant's review of the settlement agreement.

- O. **Claimant's Signature Notarized.** In cases where the claimant is not represented by an attorney, the claimant's signature on a settlement agreement must be notarized.
- P. **Missing Signature(s)/Initial(s).** All required signatures and/or initials should be included in the settlement agreement.
- Q. **Medicare Concerns (No CMS Approved MSA).** In any settlement involving waivers of medical care, services, and supplies, you must always take Medicare's concerns into account.

In the event that Employer will be relieved of its responsibility to pay for medical benefits for Claimant's industrial injury, but CMS (Centers for Medicare and Medicaid Services) has not approved a Medicare Set-Aside ("MSA"), the settlement agreement should confirm that all parties have taken Medicare's interest into account, that Claimant's waiver of medical benefits and consideration for the same are consistent with HRS Chapter 386, and that Claimant acknowledges and understands her/his rights, risks, and/or responsibilities associated with her/his waiver of medical benefits in this case. The settlement agreement should include¹:

- 1) A statement confirming:
 - a. Whether Claimant is a Medicare beneficiary.
 - b. Whether Claimant has applied for, has received, has been denied, is appealing a denial, and/or is in the process of applying or re-filing for Social Security Disability ("SSD") benefits.
 - c. Claimant's age.
 - d. Whether Claimant has end stage renal disease ("ERSD").
- 2) The parties' acknowledgment of Medicare's interests and confirmation that the parties are not intending to shift responsibility to Medicare for payment of work-related conditions, including but not limited to the following statements, or similar statements (if true):
 - a. The parties have paid attention to Claimant's entitlement to Social Security Disability benefits and receipt of Medicare or Medicaid benefits under 42 U.S.C. §1395y.

¹ Similar language/provisions are acceptable.

- b. The parties have paid attention to the entitlement of the Centers for Medicare and Medicaid Services (CMS) to subrogation and intervention, pursuant to 42 U.S.C. §1395y(b)(2), to recover any overpayment by Medicare.
 - c. It is not the intent or purpose of this settlement agreement to shift to Medicare or Medicaid the responsibility for payment of medical expenses for the treatment of work-related conditions.
 - d. There are no conditional payments which have been made pertaining to this claim. Please attach evidence of this (e.g., confirming letter from CMS).
- 3) Claimant's acknowledgement that s/he understands the following:
- a. Medicare is not bound by the settlement agreement. Claimant should acknowledge that any decision regarding entitlement to Social Security Medicare or Medicare/Medicaid benefits including the amount and duration of payments and offset reimbursement for prior payments is exclusively within the jurisdiction of the Social Security Administration, the United States Government, and the United States federal courts and is determined by federal law and regulations. As such, the United States Government is not bound by any contrary terms in this Settlement Agreement.
 - b. Receipt of this workers' compensation settlement may affect Claimant's rights to other governmental benefits, insurance benefits, disability benefits, or pension benefits. Despite this possibility, Claimant desires to enter into the agreement to settle her/his workers' compensation claim as set forth in this settlement document.
 - c. Claimant has the right to seek counsel (or has sought counsel) and advice from the Social Security Administration on the impact of this settlement on governmental benefits.
 - d. Claimant understands and accepts the risk that should Medicare find that its interests with respect to future medical expenses were not taken into account under the settlement agreement, Medicare may require her/him to exhaust the entire settlement on Medicare covered expenses.
 - e. Claimant understands that from and after the date of approval of this settlement agreement by the LIRAB, s/he will be solely and personally responsible to pay for all medical care, services, and supplies which may be claimed to result from the nature of Claimant's injuries from said accident of ____.

- 4) *Where the settlement agreement reflects the existence of a proposed MSA that has not been approved by the CMS:* In the event that the parties are not able to obtain CMS approval an MSA because the settlement agreement and Claimant's circumstance do not meet CMS workload thresholds, please state this and include a statement confirming the current, CMS workload thresholds.
- 5) *Where the settlement agreement reflects an unapproved, unfunded or zero (\$0.00) MSA ("zero sum MSA") in a case where Claimant's injury of ___ was determined to be compensable:* To demonstrate that these terms are consistent with HRS Chapter 386 and ensure that Claimant understands and accepts the risks associated with a zero sum MSA, the settlement agreement should:
 - a. Provide a justification for this zero sum MSA.
 - b. Confirm that there are no reasonably anticipated future, work-related, Medicare-covered and non-Medicare covered expenses.
 - c. Confirm that Claimant understands and accepts the risk that should Medicare find the zero sum MSA to be inadequate, Medicare may require her/him to exhaust the entire settlement on Medicare covered expenses.
- 6) *Where the settlement agreement reflects an informal or unapproved MSA that is funded but self-administered by Claimant:* To demonstrate that these terms are consistent with Chapter 386, HRS and to ensure that Claimant is aware of the risks and responsibilities associated with this self-administered MSA, please:
 - a. Provide a justification for the funded amount of the MSA.
 - b. Confirm that both Medicare-covered and non-Medicare covered expenses were considered and accounted for in the funding of this MSA (and any additional monies allocated to medical waivers, if applicable).
 - c. Confirm that Claimant acknowledges and agrees that all funds deposited into the MSA will be solely used for Medicare-covered expenses associated with Claimant's covered work injury/condition.
 - d. Confirm that Claimant acknowledges and understands that the MSA will be self-administered by Claimant.
 - e. Describe Claimant's responsibilities with regard to maintenance of the self-administered MSA, including but not limited to keeping the MSA funds in a separate, interest-

earning bank account. Please reference and attach to the settlement agreement the most recent version of the “Self-Administration Toolkit for Workers’ Compensation Medicare Set-Aside Arrangements (WCMSAs)” published by CMS.

- f. Confirm that Claimant understands and accepts the risk that should Medicare find the MSA to be inadequate, Medicare may require Claimant to exhaust the entire settlement on Medicare covered expenses.

SUBSTANTIVE FORMATTING ERRORS

- Incorrect/incomplete captions and footers.
- Missing exhibits, incorrect exhibits, or incorrect references to exhibits.
- Blank lines for the agreement date.
- The Board’s signature page is missing a page number.
- Please delete the signature line for Melanie S. Matsui. Ms. Matsui is no longer a Board Member.
- Other:

**TYPOGRAPHICAL, GRAMMATICAL,
AND/OR WRITING CONVENTION ERRORS**

These errors are identified by the Board only if errors and/or omissions were identified, above.