

Mississippi Workers' Compensation Commission

1428 Lakeland Drive / Post Office Box 5300
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(601) 987-4200

<http://www.mwcc.state.ms.us>

Liles Williams, Chairman
John R. Junkin, Commissioner
Debra H. Gibbs, Commissioner

Ray C. Minor, Executive Director
Phyllis Clark, Commission Secretary

MEMORANDUM

DATE: MARCH 12, 2013

TO: PRACTICING W.C. ATTORNEYS AND STAFF

FROM: LILES WILLIAMS FOR THE COMMISSION

In recent months, we have experienced more problems with completeness and accuracy of settlement documents. In order to assist you and your staff in preparing documents and our staff in checking them, we have developed a Settlement Review Checklist that we will use internally. We have also prepared a detailed Settlement Checklist giving details of why we must have this information on all settlement documents (copy attached).

These checklists, if properly used by your staff and MWCC staff should expedite the settlement process and improve the accuracy of our documents.

Please share this with all your attorneys and support staff. We appreciate your cooperation and support.

cc: John R. Junkin, Commissioner
Debra H. Gibbs, Commissioner
Robert Arnold, III, Administrative Law Judge
James Homer Best, Administrative Law Judge
Melba Dixon, Administrative Law Judge
Tammy Harthcock, Administrative Law Judge
Deneise Lott, Administrative Law Judge
Virginia Mounger, Administrative Law Judge
Linda Thompson, Administrative Law Judge
Cindy Wilson, Administrative Law Judge
Scott Clark, Senior Attorney
James Rankin, Senior Attorney
Megan Garrott, Staff Attorney
Ray Minor, Executive Director

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RE: SETTLEMENT CHECKLIST

The Commission has recently implemented some updated measures with our staff to improve our review of proposed settlement documents. As part of that update, we are issuing this checklist as a reminder to attorneys of some of the issues that we are reviewing during the settlement process. **It is the responsibility of all attorneys who sign proposed settlement documents and the attorneys who present them to the Commission to be sure that the documents are in compliance with this checklist BEFORE presenting the settlement documents to the Commission and/or sending the settlement documents to the Commission.** Although this checklist does not address every issue that may arise on a potential settlement, we believe it will offer greater clarity on some of the most common issues that can cause delay or rejection of a settlement. With your cooperation, the settlement approval process should become more efficient for everyone involved.

This document is also available on our website. It is subject to revision, and any future updates will be available on our website as well.

The following questions should be addressed by the parties prior to submission of the settlement documents to the Commission:

1. Is there a final medical report?

In most cases, a final medical report is required. *See* Miss. Code Ann. Section 71-3-15(1); Miss. Work. Comp. Com. Procedural Rule 15. The Commission may in its discretion waive the requirement of a final medical report in limited circumstances, including the following: 1) if the parties agree that the Claimant is permanently and totally disabled; 2) if the claim has been denied and no benefits have been provided; 3) if the claimant has abandoned medical treatment; or 4) if the matter is a request for a facial disfigurement award.

2. Is there a child support lien or spousal support lien?

If the answer is yes, the parties should have a copy of current correspondence from the Mississippi Department of Human Services [DHS] (or in cases where DHS is not involved, the applicable state agency or other lienholder representative) agreeing to the following: (1) the amount proposed as settlement of the lien; and (2) the proposed method of payment of the lien if the lien is to be paid by any method other than direct payment by the Employer/Carrier. (Note: DHS has advised the Commission that they will require direct

payment by the Employer/Carrier in most instances. DHS has also advised that in limited circumstances they may consent to an alternative method of payment. In those circumstances, the Commission must see written confirmation from DHS of such consent prior to approval of the settlement.)

For example, if such an alternative method of payment is consented to by DHS, or whichever other applicable state agency or other lienholder representative, correspondence similar to that which follows will ordinarily be sufficient:

“[Insert DHS, or whichever other applicable state agency or other lienholder representative], agrees to accept [Insert \$ AMOUNT] in satisfaction of our child support lien in this matter. We agree to allow [Insert Claimant’s current attorney] to satisfy the lien by payment from [his/her] trust account.”

Printouts of arrearage and/or affidavits of accounting are not a substitute for the required correspondence because they do not verify that the lienholder has received notice of the settlement as required by recent amendments to Miss. Code Ann. Sections 93-11-101 and 93-11-103, nor do they verify the current extent of the lien that is to be asserted over the settlement proceeds, which can in some instances potentially exceed that of the current arrearage (*See, e.g.*, Miss. Code Ann. Section 93-11-103(6)).

Information regarding the notice requirement and other issues can be found at the following website:

http://www.mdhs.state.ms.us/cse_mesc.html

Parties should also be aware that regardless of whether the Executive Director of the Commission has received notice of a child or spousal support lien pursuant to Miss. Code Ann. Section 71-3-129, other provisions of Mississippi law clearly require the Employer/Carrier and Claimant to comply with an income withholding order and set forth penalties for failure to do so. *See, e.g.*, Miss. Code Ann. Section 93-11-101(h); 93-11-111; 93-25-69; 93-11-117. Therefore, when the Commission is aware of a child or spousal support issue on a case, we will not proceed with approval of the settlement without a resolution of the issue, regardless of any arguments from the parties that the lien was not “perfected” under Miss. Code Ann. Section 71-3-129.

3. Is there an attorney’s fee lien?

If the answer is yes, the parties should have a copy of current correspondence from the former attorney agreeing to the following: 1) the amount proposed as settlement of the lien; and 2) the proposed method of payment of the lien if the lien is to be paid by any method other than direct payment by the Employer/Carrier.

For example, if such an alternative method of payment is consented to by a former attorney who has an attorney’s fee lien, correspondence from that attorney similar to that which follows will ordinarily be sufficient:

“I, [Insert former attorney], agree to accept [Insert \$ AMOUNT] in satisfaction of my attorney’s fee lien. I agree to allow [Insert Claimant’s current attorney] to satisfy my lien by payment from [his/her] trust account.”

With respect to attorney’s fee liens, correspondence from the former attorney is not required if the settlement clearly states that the Employer/Carrier shall pay the entire lien amount asserted by the former attorney in full directly to the former attorney.

Note: Attorney’s fee liens ordinarily arise after an order granting withdrawal of an attorney has been issued by an Administrative Judge. Such orders will customarily give the attorney 30 days (or occasionally some other number of days) to assert the amount of his/her lien, and the order will usually further state that the final determination of the exact amount of the lien will be taken up at a later date. Given that not all such orders are identical, the Commission will first look to the specific terms of the withdrawal order if there is a question as to whether a lien was validly asserted by the attorney. If the Commission file does not reflect that the attorney complied with the order regarding its requirement to submit documentation of his/her fees and expenses, the Commission may in its discretion find that there is no outstanding lien owed to that attorney and allow the settlement to proceed without further notice to the former attorney.

4. Are there any other liens?

If the answer is yes, the parties should have a copy of current correspondence from the lienholder agreeing to the following: 1) the amount proposed as settlement of their lien; and 2) the proposed method of payment of their lien if the lien is to be paid by any method other than direct payment by the Employer/Carrier. Correspondence similar to the examples provided above should ordinarily be sufficient for this purpose.

5. Are the Petition and Order properly signed by all parties?

The Petition should contain the signatures of all attorneys as well as the notarized signature of the claimant. Further, Miss. Work. Comp. Com. Procedural Rule 20 requires that “...where the proposed order is an agreed or joint order, such as an order approving settlement, it must be signed and approved by an attorney or other legal representative for each party.”

6. Was the notarial act performed by a qualified notary?

1 Mississippi Administrative Code Pt. III, R. 14.202 sets forth a number of disqualifications which may prevent a notary from performing a notarial act. Among those disqualifying circumstances are the following: 1) if the notary “is a party to or named in the document that is to be notarized” (emphasis original); 2) if the notary “will receive as a direct or indirect result any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in this Chapter.” Therefore, parties to a settlement should be aware that an attorney who is named in settlement documents or who will receive a fee as a direct or indirect result of the settlement is disqualified from

performing a notarial act with respect to those settlement documents. More information regarding the Secretary of State's regulation of notaries can be found at the following website:

http://www.sos.ms.gov/business_services_notaries.aspx

7. Are all parties (other than a pro se claimant) represented by an attorney?

Only a pro se claimant (or in limited circumstances an uninsured sole proprietor) can proceed before the Commission without an attorney. All other parties must be represented by an attorney. *See* Miss. Code Ann. Section 71-3-63(3) ("Representation of one other than himself or herself before the commission shall be considered the practice of law, and all statutes applying to and regulating the practice in all other courts of law in this state shall likewise apply to practice before the commission, insofar as the qualification of those practicing before the commission are concerned."); *See also Dillard v. Rodriguez and Grieshaber*, 2012 WL 3792047 (Miss. Work. Comp. Com. August 9, 2012).

8. Do the documents include the attorneys' typed or printed names, official Mississippi Bar identification numbers, addresses, telephone numbers, facsimile numbers, and email addresses?

This information is required by Miss. Work. Comp. Com. Procedural Rule 20.

9. Is the claimant and/or death beneficiary under the age of 21?

"Any person, male or female, under twenty-one years of age" is a minor pursuant to Miss. Code Ann. Section 1-3-27. Pursuant to Section 159(d) of the Mississippi Constitution, the Chancery Court has "full jurisdiction" over minor's business. Settlement of a workers' compensation claim requires a determination of the claimant and/or death beneficiary's best interest (*See* Miss. Code Ann. Section 71-3-29 and Miss. Work. Comp. Com. Procedural Rule 15). The best interest of a minor is an issue over which the Chancery Court has full jurisdiction. *See* Miss. Constitution Section 159(d); *See also* Miss. Code Ann. Section 93-13-211(2). Therefore, the Commission will not issue an Order regarding a determination of a minor's best interest without prior action from Chancery Court.

When the claimant and/or death beneficiary is a minor, the Chancery Court of proper jurisdiction, not the Commission, must first authorize the claimant and/or death beneficiary to proceed with the settlement prior to the parties seeking approval by the Commission. When presenting a minor settlement to the Commission, an Order from the Chancery Court of proper jurisdiction should be attached which either grants the claimant and/or death beneficiary the authority to settle the claim or removes the disability of minority for the purpose of allowing the claimant and/or death beneficiary to proceed with the settlement.

The Commission is aware of the authorities often cited by attorneys for the proposition that a minor who has reached the age of 18 should be allowed to settle his/her claim without any action from Chancery Court. *See Garrett v. Gay*, 394 So. 2d 321 (Miss. 1981); Miss. Code

Ann. Section 93-19-13. Neither of these authorities specifically address the settlement of a workers' compensation claim, which, as noted above, requires a determination of the minor's best interest. Therefore, the Commission maintains its current position that Chancery Court action is required regardless of whether the minor has reached the age of 18.

The Commission further notes that such a determination of the minor's best interest must be made by the Chancery Court regardless of whether the settlement does not exceed a certain dollar amount, pursuant to Miss. Code Ann. Section 93-13-211(2):

“...if the sum of money or personal property is not due the ward under a judgment, order or decree of a court, the chancery court before ordering the money or personal property paid over or delivered as provided in this section shall fully investigate the matter and shall satisfy itself by evidence, or otherwise, that the proposed sum of money to be paid, either as liquidated or unliquidated damages because of any claim of the ward whatsoever whether arising ex delicto or ex contractu, is a fair settlement of the claim of the ward, and that it is to the best interest of the ward that the settlement be made, or that the personal property be delivered to the ward.”

Although there are other arguments often offered by attorneys before the Commission in support of their position that Chancery Court action should not be required in various circumstances, for the sake of brevity, we note herein that the Commission does not currently recognize any exceptions to this requirement.

10. Have the parties submitted the required number of copies?

Miss. Work. Comp. Com. Procedural Rule 20 requires an original and three copies.

Additional issues that attorneys must consider:

11. Medicare Set Aside Arrangements and Attorney's Fees

There are many issues that may arise with respect to Medicare Set Aside arrangements and workers' compensation settlements. Our intent is not to address those issues exhaustively here, but rather to mention one which routinely arises as an obstacle to settlement approval at the Commission. Pursuant to a May 7, 2004 memorandum from the Centers for Medicare and Medicaid Services (CMS), attorney's fees cannot be charged to a Medicare Set Aside arrangement. Settlements which seek approval of an attorney's fee that will result in a Medicare Set Aside (MSA) being less than fully funded will not be approved by the Commission. The current Commission policy is to allow the amount of the MSA to be included in the gross total settlement amount for the purpose of calculating the permissible attorney's fee unless doing so will result in the MSA being less than fully funded, in which case the fee cannot be approved.

For example:

Suppose a total settlement of \$100,000 includes a \$50,000 MSA. Claimant's attorney seeks a \$25,000 fee. This can be approved because the MSA can still be fully funded after the Claimant's attorney takes his/her fee. However...

Suppose a total settlement of \$100,000 includes an \$80,000 MSA. Claimant's attorney seeks a \$25,000 fee. This cannot be approved because the MSA would no longer be fully funded after the Claimant's attorney takes his/her fee. There would only be \$75,000 remaining after the attorney's fee, leaving the MSA underfunded by \$5,000.

A copy of the CMS memorandum can be found at the following website:

<http://www.cms.gov/Medicare/Coordination-of-Benefits/WorkersCompAgencyServices/Downloads/5704Memo.pdf>

12. Cases on appeal

The Commission cannot consider a settlement while the case is pending before another court. The parties must obtain an order of dismissal or remand from that court in order to proceed with settlement before the Commission. Miss. Code Ann. Section 71-3-51 states in relevant part the following: "No controversy shall be heard by the commission or an award of compensation made therein while the same matter is pending either before a federal court or in any court in this state."

DISCLAIMER: This document is not an exhaustive list of all issues that may arise on a settlement, and compliance with this document does not guarantee that a settlement will be approved by the Commission. The above simply constitutes the Commission's identification of some of the most common issues that can cause the settlement process to be unnecessarily delayed. This document is subject to revision, update, or withdrawal.