




City of Venice
Administrative Services Department

Interoffice Memorandum

DATE: June 17, 2014

FROM: Alan Bullock, Director of Administrative Services 

THROUGH: Ed Lavallee, City Manager

TO: City Council

SUBJECT: Joe Whitehead - Proposed Workers' Compensation Claim Settlement

Joe Whitehead was employed by the City of Venice as a Police Officer and Sergeant from November 1984 to September 2013. He retired on medical grounds and shortly after retirement filed a Workers' Compensation claim under Florida statute 112.18 (1) (a), which essentially presumes that heart-related conditions in law enforcement personnel are work-related.

Even though Mr. Whitehead no longer works for the city, the city's obligation regarding his Workers' Compensation claim continues. Both Mr. Whitehead and the city are represented by legal counsel in this matter. Following successful completion of a recent mediation conference, we are requesting Council approval of a settlement (Council approval is necessary since the city is self-insured for Workers' Compensation). It is our assessment that it is more cost-effective for the city to settle the claim now rather than keep it open ad infinitum. Without this settlement, this case could develop into one with significant risk exposure.

The proposed settlement amount is as follows:

| | |
|-----------|---|
| \$ 26,250 | to the claimant in exchange for a release of WC claims |
| \$ 3,750 | to the claimant's attorney for fees and costs |
| \$ 100 | to the claimant in exchange for a general release of all claims |
| <hr/> | |
| \$ 30,100 | total |

Our standard request in proposed settlements of this nature is for a written evaluation and recommendation from both the assigned defense counsel and the assigned adjuster. Both are attached for your review. We hereby request City Council approval. More information is available upon request.

City Attorney Review

Covered by recommendation from Mark Hungate June 3, 2014

Risk Management Review

Completed June 17, 2014

Funds Availability

Account number 502-0421-595.23-03 – Workers' Compensation Claims



Memorandum

BANKER LOPEZ GASSLER

TO: Mr. Alan Bullock – City Director of Administrative Services

FROM: Mark E. Hungate, Esq., Workers' Compensation Defense Counsel

DATE: June 3, 2014

RE: Joseph Whitehead Workers' Compensation Claim Settlement Recommendation

Date of Alleged Fire Fighter Heart Presumption Accident: 6/24/2013 and any and all dates of accident

Alan: Please consider this as defense counsel's recommendation of a 5/30/14 mediated settlement of the above workers' compensation claim for \$30,000.00 inclusive of a \$3,750.00 attorney's fee and any costs incurred by Claimant counsel (which amount would be paid through Commercial Risk). This payment would settle any and all work accidents/injuries/conditions or alleged work accidents/injuries/conditions arising out of his entire employment at the City. In addition, the City would pay \$100.00 separate consideration payable by the City for a Separation Agreement/General Release/Covenant Not to Sue in favor of the City which releases any and all causes of action other than workers' compensation for vested benefits like his pension. In other words, neither the workers' compensation Settlement Agreement nor the Separation Agreement/General Release will have any impact Mr. Whitehead's right to continue to receive his pension or any other vested benefits. Settlement was made contingent upon City Council approval.

This case arose out of an alleged 6/24/13 Florida Statute Section 112.18(1)(a) "firefighter/law enforcement presumption" claim. Claimant submitted his initial hospital and medical bills to and they were paid by his health insurance through the City. Claimant retired on a length of service pension effective 10/1/13 after signing up for DROP in 2009. Claimant admitted at his 12/5/13 deposition that he remained capable of full time full duty as a law enforcement officer even as of the date of his voluntary retirement if he did not have to be 'Tascd' as a part of training activities. Claimant did not submit a First Report of Injury under workers' compensation until 10/11/13. The City's workers' compensation third party administrator, Commercial Risk, issued a '120-day pay and investigate letter' dated 10/15/13 and provided a physician's evaluation on 1/15/14. The doctor's report stated an opinion that the 6/24/13 alleged presumption event was NON-occupational in origin. Immediately upon receipt of this report, Commercial Risk filed a Notice of Denial of the case in its entirety on 1/17/14.

Claimant retained counsel and filed a Petition for Benefits (a claim) on 2/13/14 claiming entitlement to a determination of compensability, payment of past medical bills, provision of medical treatment, indemnity (lost wages) from 10/1/13 to date plus penalties, interest, costs and

attorney's fees. The parties engaged in medical discovery then attended a 5/30/14 mandatory state mediation at which time the contingency settlement was agreed upon and a Mediation Agreement was executed by the parties.

Despite our denial of compensability, as you know, 'presumption' cases are difficult and expensive to defend. Claimant passed his pre-employment physical so he's arguably entitled to the 'presumption' that his claim/condition/treatment and disability are work-related. If he relies solely on the presumption, the burden of proof shifts to the City to establish non-occupational cause by competent evidence. If Claimant obtains a medical opinion of occupational causation, the burden of proof on the City to prove non-occupational causation increases to 'clear and convincing' evidence.

On the other hand, Claimant's pre-6/24/13 personal physician medical records are replete with evidence of material non-compliance with medical recommendations and treatment regarding his condition. Our physician opined this material non-compliance caused a significant aggravation of his presumptive condition. If the Judge of Compensation Claims agreed, the City would be entitled to a 'reverse presumption' that his condition is NOT work related. The burden of proof would then shift back to Claimant. Our doctor also opined that the major contributing cause of his presumptive condition is a combination of non-occupational risk factors.

Claimant's attorney could ask for a one-time change of physician and/or get an independent medical examination with a Claimant-friendly cardiologist. If any other doctor reaches an opinion different from the doctor selected by the City, not only does the burden of proof increase as explained above but the City would be required to pay for a tie-breaking doctor's opinion called an 'expert medical advisor.' The opinion of the expert medical advisor is binding on the Judge of Compensation Claims absent rare facts and circumstances. There are only 4 expert medical advisors in Florida that specialize in Claimant's presumptive condition and the parties have no input on which expert medical advisor Judge Beck would appoint. Thus, with an expert medical advisor, the parties lose control over their destiny. An expert medical can cost up to \$2,400.00 plus the costs of taking his/her deposition.

Claimant's presumptive condition requires multiple medications, periodic testing and doctor visits. His condition since 6/24/13 has stabilized but is undoubtedly progressive. He is approximately \$1,500.00 out of pocket on past medical expenses not paid by health insurance. As a pensioner, he has maintained his health insurance coverage through the City and continues to submit the cost of his medical treatment for his condition to that carrier which is still paying the bills. Future medical treatment is speculative by its nature but would likely involve ongoing multiple medications which would annually increase in cost, periodic lab work and diagnostic tests, doctor office visits, eventually surgery, implants, replacements, breathing assistance and possibly transplants which could cost hundreds of thousands of dollars.

Currently, the City faces minimal exposure to temporary indemnity benefits (lost wages) but long term, once 'maximum medical improvement' is reached, the case has potential exposure to permanent total disability benefits as Claimant ages and his condition progresses to the point of impairment of his work capability and the activities of daily living. Permanent total benefits are payable until an injured worker reaches age 75. Claimant's compensation rate is \$816.00/week. In addition, permanent total recipients receive an annual 3% cost of living

adjustment under the law in effect in 2013. If the case is determined by the Judge to be work-related, even if Claimant does not become permanently and totally disabled, once Claimant is medically determined to reach the point of maximum medical improvement, the City would be on the hook to pay permanent impairment benefits. His presumptive condition routinely is accorded a 40-50% permanent impairment rating of the body as a whole per the Florida Guides for Evaluation of Permanent Impairment. For example, under the 2013 workers' compensation law, a 50% rating to the body would entitle Claimant to approximately 235 weeks of impairment benefits which would be paid at 75% of his \$816.00 compensation rate. In other words, we are talking about approximately 235 weeks of impairment benefits x \$612.00 = \$143,820.00. The present value of permanent total disability benefits at the prevailing 4% discount rate exceeds \$500,000.00.

Absent settlement, we are looking at a trial on the merits before Judge Beck in Sarasota. We have both won and lost trials before her. She would be fair and impartial. If the City wins at trial, Claimant's attorney most likely would appeal to the First District Court of Appeal. His lawyers are affiliated with the unions and thrive on making new presumption law. Discovery in presumption cases is expensive because of the need to depose multiple background doctors to establish the 'reverse presumption' and occupational or non-occupational causation. Also, not many doctors practice in the area of Claimant's condition which boosts their expert witness fees. If Claimant prevails, because this area of the law is so specialized, his attorney would likely be awarded a large trial attorney's fee and reimbursement of his litigation expenses. Appellate hourly rates often start at \$300.00/hour and appellate fees alone could exceed \$25,000.00 for both sides if Claimant prevailed. Defense trial fees and costs could be expected in the \$10,000.00 range from this point forward through a final hearing.

In conclusion, absent early settlement intervention, this case could develop into one with significant risk exposure of approximately \$500,000.00 - \$700,000.00 requiring protracted and expensive litigation at a potential combined cost of approximately \$50,000.00 including both parties' trial and appellate fees and costs. I therefore recommend approval of the \$30,000.00 workers' compensation settlement of any and all accidents/injuries arising out of Claimant's employment at the City of Venice plus \$100.00 for a separate General Release which the parties negotiated at a May 30, 2014 state mediation contingent upon City Council approval.

I hope the above explanation has been helpful. I would be happy to provide any additional information or comments that Council requires. I look forward to hearing the results of Council action. Thanks.

Alan Bullock

From: Nichole Summers <NSummers@crm-su.com>
Sent: Tuesday, June 10, 2014 12:53 PM
To: Alan Bullock
Subject: Settlement Recommendation - Joseph Whitehead

Dear Alan:

Please consider this as WC Adjuster's recommendation in the matter of Joseph Whitehead vs. City of Venice. This matter was mediated on 5/30/14 and a settlement agreement was reached in the amount of \$30,000.00 inclusive of a \$3,750.00 statutory attorney's fee and any costs, contingent upon City Council approval. This payment would settle any and all work accidents/injuries/conditions or alleged work accidents/injuries/conditions arising out of his entire employment at the City. In addition, the City would pay \$100.00 separate consideration payable by the City for a Separation Agreement/General Release/Covenant Not to Sue in favor of the City which releases any and all causes of action other than WC except for vested benefits such as his pension.

Mr. Whitehead alleged entitlement to benefits pursuant to FS 112.18(1) firefighter/law enforcement presumption. Claimant retired based on years of service pension effective 10/1/13 after signing up for DROP in 2009. Claimant did not submit a First Report of Injury under WC until 10/11/13. Once the First Report of Injury was submitted I issued a 120-day pay and investigate letter dated 10/15/13 and authorized a physician's evaluation on 1/15/14. The doctor's report stated an opinion that the 6/24/13 alleged presumption event was NON-occupational in origin. Immediately upon receipt of this report, I filed a Notice of Denial of the case in its entirety.

Presumption cases under FS 112.18 are difficult and expensive to defend. Claimant passed his pre-employment physical so he's arguably entitled to the 'presumption' that his claim/condition/treatment and disability are work-related. If the Claimant relies solely on the presumption, the burden of proof shifts to the City of Venice to establish non-occupational cause by competent evidence. If Claimant obtains a medical opinion of occupational causation, the burden of proof on the City of Venice to prove non-occupational causation increases to clear and convincing evidence. Claimant's presumptive condition requires multiple medications, periodic testing and doctor visits. His condition since 6/24/13 has stabilized but is certainly progressive. Future medical treatment is speculative by its nature but would likely involve ongoing multiple medications which would annually increase in cost, periodic lab work and diagnostic tests, doctor office visits, eventually surgery, implants, replacements, breathing assistance and possibly transplants which could cost hundreds of thousands of dollars.

Currently, the City of Venice faces minimal exposure to temporary indemnity benefits (TTD /TPD) but long term, once maximum medical improvement is reached, the case has potential exposure for permanent total disability benefits as Claimant ages and his condition progresses to the point of impairment of his work capability and the activities of daily living. Permanent total benefits are payable until an injured worker reaches age 75. Claimant's compensation rate is \$816.00/week. In addition, permanent total recipients receive a 3% COLA under the law in effect in 2013. If the case is determined to be work-related, even if Claimant does not become permanently and totally disabled, once Claimant is medically determined to reach the point of maximum medical improvement, the City of Venice would be on the hook to pay permanent impairment benefits. His presumptive condition typically is assigned a 40-50% permanent impairment rating of the body as a whole per the 1996 FL Guidelines. The present value of permanent total disability benefits at a 4% discount rate exceeds \$500,000.00.

To end, it is in the City's best interest that settlement approval is granted as this case could easily develop into one with significant exposure of approximately \$500,000.00 - \$700,000.00 due to costly medical expenses and protracted litigation. After reviewing the foregoing, I recommend approval of the \$30,000.00 workers' compensation settlement of

any and all accidents/injuries arising out of Claimant's employment at the City of Venice plus \$100.00 for a separate General Release based on the contingent mediation agreement of May 30, 2014.



Nichole Summers, CWC, CWCL
Commercial Risk Management, Inc.

Senior Claims Adjuster

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