

Stipulated Settlements – Topics to Consider

David Kay
Settlement Division Director, State Board of Worker's Compensation
Atlanta, Georgia

Topics to Consider when Drafting a Stipulated Settlement

Stipulated Settlements “101” – Pursuant to O.C.G.A. §34-9-15, the State Board of Workers’ Compensation is authorized to approve Stipulated Settlements. In fact, §34-9-15(a) encourages settlements, so long as the amount of compensation and the time and manner of payment are in accordance with law. All settlements of Workers’ Compensation claims in Georgia must be approved by the State Board to be valid and binding. Caldwell v. Perry, 179 Ga. App. 682, 347 S.E.2d 286 (1986). Board Rule 15 details the general procedures to be followed when submitting Stipulated Settlements to the Board.

Captions, copies and associating multiple files

The caption on the first page of the Stipulated Settlement must include the name, address and telephone number of each party to the agreement. The employee’s attorney must also provide his or her Federal Tax I.D. number. Rule 15(a)(2). Leave the top five inches blank above the caption for the approval stamp. Rule 15(a)(7).

If filing electronically, submit one copy of the Stipulation and one copy of the Supporting Documents to the Board. Separate the Stipulation from the Supporting Documents. The supporting documents should be filed as Stip Supplemental. Rule 15(a)(1). If filing electronically, please do not send duplicative documents in paper to the Board. The electronic filing is sufficient.

If the Stipulation covers multiple Board claim files, file the Stipulation in one claim file with the other claim files “associated.” Please call the Settlement Division for information on how to associate files, if needed. **Do not file a duplicate Stipulation in each of several files separately**, as each one will be processed separately, resulting in delay and possible confusion. Similarly, if you file a Stipulation electronically and receive email notice that the document has been filed, but do not immediately see the Stipulation in the ICMS claim file, please do not file the Stipulation again. Sometimes the computer system takes a while to catch up.

Bona fide dispute

Stipulated Settlements must state with specificity the legal and/or factual matters about which the parties cannot agree. Issues such as length of disability, degree of disability, ability of employee to return to regular duty work, need for further medical expenses, liability, permanent partial disability, and dependency may be considered. Rule 15(b)(1).

Past and future medical expenses

Liability Stipulations must state that all incurred medical expenses, which were reasonable and necessary, have been or will be paid by the employer/insurer. Rule 15(b)(2). You may choose to discuss the claimant’s medical treatment, but it is not mandatory to include the entire medical history of the claim or the total amount spent on past medical expenses.

The need for future medical treatment must be addressed. If future medical treatment will not be made available, a rationale for closing medical treatment must be provided.

Attorney fees & expenses

All fees must conform to O.C.G.A. §34-9-108 and Board Rule 108, in addition to Rule 15(e). In structured settlements, attorney fees are based on present value. The cost of the structure/annuity is required.

Expenses must be itemized, and this itemization must be provided to the Board in the Stipulated Settlement or as a Stip Supplemental document. The Board will reject a Stipulation which contains expenses that violate Georgia law, Board Rules, or Georgia State Bar Rules of Professional Conduct. For example, Rule 15(k) prohibits any party, or party's attorney, from entering into a loan with a third party creditor which requires repayment from the proceeds of a workers' compensation claim. Thus, the Board will reject any Stipulation which lists repayment of such a loan as an expense.

No attorney fee can be calculated on money designated for medical expenses. If no money is designated for medical expenses in the Stipulation, the Board may make confidential inquiry as to why, depending on the amount of the settlement, the medical condition of the claimant, and the totality of the circumstances.

Because the attorney fee cannot be taken on money designated for medical, the settlement of medical benefits alone is not subject to attorney fees. This may come up in claims where indemnity benefits are settled at one time, leaving medical open, and the parties later decide to settle medical benefits.

Attorney Fee Liens

All attorney fee liens on record at the Board must be resolved before the Stipulated Settlement will be approved. Liens based on prior representation are to be negotiated to agreement prior to the Stipulated Settlement being submitted to the Board for approval, or, in the alternative, the amount of the lien (**including all expenses**) should be held in escrow pending resolution. A mediation may, of course, be requested at the same time.

Parties negotiating a Stipulated Settlement cannot unilaterally extinguish an award of assessed fees payable to claimant's previous attorney. In the case of assessed fees, the original attorney has a "vested interest" in those fees, and he or she should be made a party-at-interest.

Child Support Liens

All child support liens must be resolved before the Stipulated Settlement will be approved, **including out-of-state liens or liens that have not been filed with the Board**. The parties must provide documentation, from the Support Enforcement Agency or Assistant District Attorney in charge of Support Enforcement, indicating that the lien is withdrawn, satisfied in full, or reduced by a specified amount. If the lien is being satisfied out of the settlement proceeds, make certain it is clear in the Stipulation (or in the Throw Away Sheet for a No-

Liability Stipulated Settlement) which party is going to write the check to satisfy the child support lien. The child support lien check should **not** go to the claimant before going to the appropriate agency. A promise by the claimant that he or she will pay the child support lien out of the settlement proceeds after receiving said proceeds is not sufficient.

If no child support liens exist, the Stipulation must state that there are no outstanding child support liens that would prohibit full disbursement of the settlement funds. Rule 15(l).

General releases and other jurisdictions

The Stipulated Settlement must refer to a specific incident or alleged incident. The Board will not approve a Stipulated Settlement containing a general release from any and all claims, or purporting to settle matters other than workers' compensation benefits. Please do not include language in a Stipulated Settlement waiving "any and all future claims, including but not limited to . . ." because we cannot approve this language. Rule 15(g).

Just as the Board cannot approve settlements of matters outside of workers' compensation, the Board cannot approve a settlement of matters outside the state of Georgia. If the parties wish to settle a Georgia claim at the same time as an out-of-state claim, and wish the Board to be aware of the out-of-state settlement (for example, if knowing about the out-of-state settlement would help the Board understand why a particular claim is settling for a particular amount of money), a statement explaining that an out-of-state settlement is occurring may be filed as a Stip Supplemental.

Social Security disability benefits

Federal law contains an offset for workers' compensation income benefits against Social Security disability benefits. Briefly, the offset rule provides that no combination of workers' compensation and Social Security disability benefits can exceed 80% of pre-injury earnings. Therefore, it is often useful to prorate the portion of settlement proceeds that represent income benefits over the employee's remaining life expectancy. Most Stipulated Settlements should include this "Hartman" language if the settlement amount is \$5,000 or more (for No-Liability Stipulations, this language would be a Stip Supplemental document). Rule 15(m). Please refer to our other information on "Hartman" language for more details.

Structured Settlements

If a settlement includes a structure/annuity that is to be paid by a party other than the employer or the insurer, then the Stipulated Settlement must contain a provision that the employer and insurer will be liable for the agreement in the event of default or failure of that third party to pay. Additionally, the cost of the structure/annuity must be provided.

Medicare Set Asides

If a settlement includes an MSA, you must provide the actual or projected cost of the MSA. Rule 15(d). Make certain the Stipulation is clear as to which party will fund the MSA, when the MSA will be funded, and whether the MSA **is in addition to or included in** the consideration mentioned elsewhere in the Stipulation.

If the MSA has been approved by CMS, best practice is to state so in the Stipulation.

If the parties are waiting on approval by CMS before funding the MSA, but wish to file the Stipulation with the Board and close medical before hearing back from CMS, the Stipulation must specify how medical treatment will be paid in the interim. This may be done by paying all or a portion of the MSA seed money to the claimant at the time of Stip approval. The Stipulation should clarify what will happen in the event CMS issues a “counter higher” or “counter lower.”

The Board may approve a Stipulation that closes indemnity and leaves medical open pending CMS approval of an MSA. In that circumstance, the parties may specify the exact terms of open medical, such as agreeing on an authorized treating physician. Because medical remains open, the Board retains jurisdiction to resolve any disputes over medical treatment. The Stipulation should provide that the parties will petition the Board for a change of physician in the event that a specifically named physician is unable to render services or if the parties cannot agree on a change of physician. Rule 15(b)(2).

Subsequent Injury Trust Fund (SITF)

Determine whether the SITF has an interest in the claim. If so, be certain to make the SITF a party-at-interest to the settlement and have a SITF representative sign the Stipulated Settlement before submitting it to the Board for approval.

Other Parties at Interest (WC-206/244)

Group insurance companies, health care providers or disability benefits providers may give notice to the Board that they should be a party at interest pursuant to O.C.G.A. §34-9-206 or O.C.G.A. §34-9-244, Rule 206 and 244, and Form WC-206 or WC-244.

Settlements in compensable claims will not be approved unless all WC-206/WC-244 party at interest issues are resolved. Rule 15(n). These issues should be resolved prior to filing a Stipulation. Documentation of resolution may be filed as a Stip Supplemental document, if applicable.

In all No-Liability settlements, the parties must submit a statement specifying the party responsible for outstanding medical expenses. Rule 15(o). Best practice is to include this statement in the “throw-away sheet” filed as a Stip Supplemental at the same time as the No-Liability Stipulation. The party identified as responsible for outstanding medical expenses may be liable for any payments owed to Parties at Interest which have filed WC-206/244 forms, but the issue of that party’s liability is separate from the approval of the Stipulation.

The Board may, in its discretion, approve a valid No-Liability Stipulation despite the existence of a WC-206/244 in the claim file. See O.C.G.A. §34-9-206(b).

Conservator/Guardianship Issues (34-9-226 and Rule 226)

If the claimant (or dependent child of a deceased employee) is a minor or mentally incompetent adult, conservator issues must be considered before settlement. Form WC-226(a) or (b) must be filed with the appropriate Administrative Law Judge, and an order on that application issued by the judge, before the parties file a Stipulated Settlement with the Board. See O.C.G.A. §34-9-226 and Rule 226.

If the natural parent is the guardian of a minor and the net settlement amount is under \$15,000, no Board appointed conservator is necessary for settlement approval. If the net settlement amount is \$100,000 or greater, however, the Board does not have jurisdiction to appoint a conservator; the conservator must be appointed by probate court or another court of competent jurisdiction.

Note that in 2012, §34-9-226 was amended to delete the 52 week cap on the time period that a Board-appointed conservator was valid. Now, a Board-appointed conservator may be valid for as long as the Order appointing that conservator states, or until otherwise allowed by law. This means that once a conservator is appointed, it is not normally necessary to file a new WC-226 every year.

Employer notification

The supporting documents, or the Stipulated Settlement itself, must contain certification that a copy of the agreement has been sent to the employer prior to any party having signed it. Rule 15(c).

Signatures

Verify that the Stipulated Settlement is signed by all parties before submitting the agreement to the Board. It is not acceptable for anyone other than the claimant to sign on behalf of the claimant, even “by express permission,” other than a duly appointed guardian or conservator for the claimant.

If the names of the signatories on the Stipulation do not match the Board’s file, make certain there is a clear explanation (for example, if two attorneys are co-counsel for one party, or an employer has changed names).

Rejected agreements or requests for additional documents

The Board may request additional information or documentation on any Stipulated Settlement or may send a rejection notice if the Stipulated Settlement does not comply with Board Rule 15. A rejection notice applies only to the Stipulation in question and does not affect other Stipulations that may be in the file.

The Board may make confidential informal inquiry regarding any settlement. Rule 15(h).

Withdrawing consent to settle

If one of the parties to a Stipulated Settlement wishes to withdraw consent to settle prior to Board approval of the Stipulation, they should contact the Settlement Division immediately. The Board will not approve a Stipulation if we have notice of withdrawn consent prior to Board approval, even if the Stipulation has been signed and filed. Stipulations are not binding until approved by the Board. Caldwell v. Perry, 179 Ga. App. 682, 347 S.E.2d 286 (1986).

Disbursements

Upon approval, the Stipulated Settlement becomes an Order/Award of the Board, therefore, all aspects of the agreement must be met. Checks must be disbursed/mailed in the specified manner, and payment made within the 20-day period specified in O.C.G.A. §34-9-221(f), or a 20 percent penalty will be added to the amount due.

Supporting Documents for Liability Stipulated Settlements

The following documents/information must be submitted at the same time that the Liability Stipulated Settlement is submitted, but should not be attached to the Liability Stipulated Settlement. They should be filed as one or more Stip Supplemental Documents.

- Attorney fee contract, if not already in the claim file.
- Most recent medical report, including the medical condition of the claimant and surgical history, if any. The entire medical history should not be included.
- Itemization of attorney expenses, if the itemization is not included in the Stipulation.
- Documentation confirming resolution of any attorney fee liens, child support liens, WC-206/244 issues, etc.
- A copy of the MSA may be filed as a Stip Supplemental.

Supporting Documents for No-Liability Stipulated Settlements

The following documents/information must be submitted at the same time that the No-Liability Stipulated Settlement is submitted, but should not be attached to the Liability Stipulated Settlement. They should be filed as one or more Stip Supplemental Documents.

- For each date of injury, there should be either (a) a WC-1 (with section (c) or (d) completed), (2) a WC-3 controverting the entire claim filed within 81 days of the date of injury, or (3) a WC-4 showing no indemnity has been paid.

- Board Form WC-15, signed by claimant's counsel, certifying that fees and expenses will not exceed those allowed by Board Rule 108.
- Memorandum or "throw-away" sheet to show the consideration paid to the employee and which party will be responsible for any incurred medical expenses. If attorney expenses are listed, they should be itemized, and if the settlement is \$5,000 or more, the Hartman language should be included with the memorandum.
- Documentation confirming resolution of child support or attorney fee liens, if applicable.

Social Security (a.k.a. "Hartman") Language

Because Federal law contains an "offset" for workers' compensation income benefits against social security disability benefits, it is beneficial to the employee to prorate the portion of settlement proceeds that represent income benefits over his or her remaining life expectancy. The offset rule provides that no combination of workers' compensation and social security disability benefits can exceed 80% of pre-injury earnings. While there is no specific wording required by the Social Security Administration for offset (Hartman) language, the following example is one that may be used:

- Of the \$90,000.00 settlement, \$22,500 shall be paid as attorney's fees to (insert attorney name), as attorney for the employee/claimant. The \$67,000.00 to be paid to the employee/claimant shall be calculated without commutation of interest, but shall represent the negotiated compromise agreement that the claimant's life expectancy is 20.68 years forward from this date, pursuant to the Annuity Mortality Table for 1949 Ultimate, as established by O.C.G.A. §24-4-45, Appendix, Title 24, and that the settlement herein reached represents the payment of \$62.77 per week to the claimant over the balance of the 1,075.36 week life expectancy of the claimant into the future.

Caveats

- Only social security disability benefits are subject to offset. Retirement and social security survivors' benefits are not subject to offset because they are not based on disability. Therefore, you do not need to include Hartman language in a death case.
- Hartman language in No-Liability Stips: The Social Security Administration *may* consider any amount paid in a settlement as income for offset purposes, even in a no-liability stipulation. Therefore, even though the Stip Supplemental filed concurrently with a no-liability stipulation is not sanctioned by the Board, the Hartman language should appear in the Stip Supplemental as part of an agreement between employee and employer. Munsinger v. Schweiker, 709 F.2d 1212 (8th Cir. 1983).
- Permanent Partial Disability (PPD) payments are considered income and as such are not excluded from offset by Social Security; do not exclude any estimated PPD rating from a

settlement when calculating the Hartman language. Davidson v. Sullivan, 942 F.2d 90 (1st Cir. 1991).

- Medical benefits to be paid as a part of the settlement are excluded from offset calculation.
- Attorney fees and litigation costs are excluded from offset calculations.
- Generally, use of prorated lifetime apportionment should be sufficient to lessen the impact of the lump sum settlement on the employee's entitlement to Social Security Disability Income Benefits. In complicated cases, or those with high dollar settlement values, the Board urges thoughtful planning to coordinate benefit entitlement.

Templates for Stipulated Settlement Agreements

STANDARD CAPTION

(First five inches left blank for State Board approval mark)

**STATE BOARD OF WORKERS' COMPENSATION
270 PEACHTREE STREET NW
ATLANTA, GEORGIA 30303-1299**

Claim No.: (the State Board ICMS claim number)

Date of Injury: _____

Social Security No. : (OPTIONAL and should only be listed if known to be accurate)

Name of Employee

Address

City, State, Zip Code

Phone No.

Employer

Address

City, State, Zip Code

Phone No.

Insurance/Service Agent Insurer

Address

City, State, Zip Code

Phone No.

Counsel for employee

Address
City, State, Zip Code
Phone No.
Federal Tax I.D. No.

Counsel for employer/insurer
Address
City, State, Zip Code
Phone No.

Stipulated Settlement and Agreement

Suggested content by paragraph (liability stip):

1.

The exact nature of employee's injury, name of employer, date of injury.

If an additional date of injury is being covered by the settlement, but does not have a Board claim file, list the date of injury in the body of the Stipulated Settlement. Do not list it in the caption.

2.

Total amount of indemnity benefits paid to the employee, and the total amount of medical expenses paid to date. This is optional.

3.

If the employer or insurer may be known by different names or titles, state whether this Stipulation applies to those alternative names or titles.

4.

Detail issues of the bone fide dispute between employee and employer/insurer. Provide employee and employer/insurer contentions.

5.

Specify issues to be settled by this Stipulation (usually, this means all issues and disputes). If any issues are not being settled by the Stipulation (such as subrogation, medical, or other issues), make certain this is clear in the document.

6.

Consideration paid as a compromise settlement between the parties.

7.

Provide amount of attorney fees to be paid employee's attorney. If expenses are to be paid, state the amount of expenses and provide an itemization for those expenses (this itemization may be filed separately as a "stip supplemental" or included in the stip).

8.

Include the Hartman social security language on all stipulated settlements over \$5,000.00.

9.

If any advances have been made to the claimant and will be deducted from the consideration to be paid, state so.

10.

State that all reasonable and necessary medical has or will be paid by the employer/insurer.

11.

Assess the need for further medical treatment in the future. State whether the claimant or the employer/insurer will be responsible for further medical bills.

12.

If a Medicare Set Aside (MSA) account is part of the settlement, state who will fund the MSA, the actual or projected cost of the MSA, and when the MSA will be funded.

13.

If the parties are waiting on an MSA approval decision from CMS but wish to settle indemnity now, state how medical will be paid in the interim. Usually, this means leaving medical open or paying a portion of the MSA seed money upon Board stip approval.

14.

In addition, if the parties are waiting on an MSA approval decision from CMS but wish to settle indemnity now, the Stipulation must state that the State Board retains jurisdiction of those medical issues covered by the MSA until such time as the medical portion of the claim is resolved.

15.

Information concerning participation in or need for vocational rehabilitation.

16.

Detail resolution of child support and/or attorney fee liens, if applicable. If there are no child support liens, the Stipulation must state that there are no outstanding child support liens that would prohibit the full disbursement of the settlement funds.

17.

Certify that the employer received a copy of the settlement before any party signed it.

The standard format for execution of stipulated settlements follows:

Claimant _____
(Type/print employee's name)

Allow 2" between claimant's signature and remaining signatures.

Claimant's Attorney _____
(Type/print name)

Employer _____
(Type/print name)

Insurer _____
(Type/print Company name)

By _____
(Type/print name of attorney for insurer)

If employee is illiterate, or does not understand English, certification must be attached to indicate that the agreement has been read to the employee and that he or she understands its contents.

No-Liability Stipulated Settlement and Agreement

Caption

(See Standard Caption page one)

Suggested content by paragraph (no-liability stip):

1. Exact nature of employee's alleged injury, name of employer, and date of alleged injury.
2. Employee's contentions as to rights to compensation.
3. Employer/insurer's contentions as to why benefits should be denied.
4. Agreement as to non-compensability of claim and request for award denying liability.

DO NOT specify the consideration to be paid in the No-Liability Stipulation.

The standard format for execution of stipulated settlements follows:

Claimant _____
(Type/print employee's name)

Allow 2" between claimant's signature and remaining signatures.

Claimant's Attorney _____
(Type/print name)

Employer _____
(Type/print name)

Insurer _____
(Type/print Company name)

By _____
(Type/print name of attorney for insurer)

If employee is illiterate, or does not understand English, certification must be attached to indicate that the agreement has been read to the employee and that he or she understands its contents.

In compliance with Board Rule 15(f) a Board Form WC-15 must be submitted with each no-liability stipulation if the claimant is represented by counsel.