

**PHILADELPHIA BAR ASSOCIATION  
WORKERS' COMPENSATION SECTION  
LUNCHEON MEETING  
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**WORKERS' COMPENSATION  
COMPROMISE & RELEASE (C&R) AGREEMENTS:  
REOPENING AND OTHER ISSUES\***

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\* This paper was, at an earlier date, and in somewhat different form, presented to the Pennsylvania Claims Association, and also attached as a supplement to the PBA WC Law Section *Newsletter*. Thanks to Andrew B. Klaber, Esquire, The Chartwell Law Offices (Sewickley, PA), for preparing portions of this text.

## I. Introduction

A. ***In General.*** Section 449 of the Pennsylvania Workers' Compensation Act, 77 P.S. § 1000.5, governs the final settlement, or Compromise & Release (C&R) of workers' compensation claims. Settlements by C&R were first allowed as part of the 1996 amendments to the law (Act 57).<sup>1</sup>

The full text of the statute, and a regulation promulgated pursuant to the statute, is included in this paper as an appendix.

In general, the statute provides that the WCJ shall not approve any C&R Agreement unless he or she first determines that the claimant understands its full legal significance.

Notably, the statute does not direct the WCJ to evaluate whether the settlement is in the best interests of the claimant, and court cases have held that, indeed, that kind of assessment is not the responsibility the WCJ, nor within his or her jurisdiction.<sup>2</sup>

A hearing must be held in every case. The statute provides, "The [WCJ] shall consider the petition and the proposed Agreement in open hearing ...."

The statute also provides for a release form for the parties to utilize.

The claimant may tender a release for both disability and medical treatment liability.

In fact, the statute states, "Nothing in this act shall impair the right of the parties interested to compromise and release, subject to the provisions herein contained, any and all liability which is claimed to exist under this act on account of injury or death."

B. ***The statute on reopening a case, or setting aside a C&R.*** The statute is silent on this issue.

C. ***Popularity of settlements.*** Settlements have, since 1996, become very popular under the Pennsylvania practice.

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<sup>1</sup> For further discussions, see D. Torrey & A. Greenberg, PA Workers' Compensation: Law & Practice, § 15:91 et seq. (West 2<sup>nd</sup> ed. 2002 & Pocket-part 2004); D. Torrey, "Lump Sum Settlements of Workers' Compensation Cases: Background and Unanswered Questions Under Section 449 of the Pennsylvania Act," 62 Pa. Bar Ass'n Quarterly 23 (January, 2001); D. Torrey, "Historical Commentary on the Compromise & Release Agreement Under State Workers' Compensation Laws," in PBA WC Law Section *Newsletter*, Vol. VII, No. 83 (January 2005).

<sup>2</sup> While this is the formal standard, experience has shown that in a few cases, some WCJ's have been known to try to talk claimants, particularly self-represented claimants, out of settlements.

In addition, the claimant's willingness to settle his or her claim under particularly draconian or onerous terms might be viewed by the WCJ as a reflection of the claimant's lack of understanding of the full legal significance of the Agreement.

At first, employers and carriers, as well as claimants, were shy to engage in such case resolutions. Now, however, the Pennsylvania C&R is immensely popular and a critical aspect of the system. Hundreds of cases are settled each month, and many millions of dollars are paid in lump sums.

In December, 2004, for example, WCJ Torrey (one of the authors of this paper) approved, after hearing, fourteen settlements. In thirteen of these cases, the worker gave a complete release. In one, the case stayed open for a defined period for further medical treatment. The total cash payout of these settlements was \$570,500.00.

In the second half of 2004, the total cash payout of settlements approved by this writer was \$3,611,092.65.

For this same period, the total cash payout of settlements approved throughout Pennsylvania was \$345,420,169.08. During this period, 6,533 C&R's were approved, twenty-two applications for approval were withdrawn, and six were denied.

**D. Attempts to reopen cases/set aside settlements.** Most observers agree that permitting C&Rs was and is a positive development under the Pennsylvania practice.

It seems apparent, at least in Western Pennsylvania, that allowing settlements has reduced litigation caseloads and backlogs, and has encouraged workers to return to work – or at least discontinue their workers' compensation claims – more promptly.

Permitting the C&R settlement has also promoted the informal mediation of cases. As almost everyone agrees, before 1996 mediation was futile in most cases, as the ability of the parties to compromise was forbidden (though negotiated commutations were common).

With so many claims being settled, it is not surprising, and was entirely predictable, that some workers would try to reopen their claims by petitioning to set aside their settlements.

Also, it is not surprising and was predictable, that some workers would try to assert new claims, arguing that they are *different* from those subject to the settlement.

In many states, C&Rs (or their equivalent) have long been allowed, and even a cursory review of the experiences of those states shows that workers, on occasion, try to set aside their settlements.

Currently, no crisis of setting aside settlements exists. Still, within the last two years a number of cases have reached the appellate courts in which a claimant has settled and then seeks to have the C&R set aside or reviewed; or has pressed a *new claim* arguing that it was not *covered* by the settlement.

Claimants try to set aside settlements for many reasons. A few are as follows:

- some workers accept settlements that virtually everyone agrees are ill-advised, and then encounter trouble later because they have dissipated the funds and still have wage loss and/or medical bills;
- some workers rush to accept settlements, are later regretful that they did so, and simply believe that it is fair to try to reopen their cases, despite having taken a lump sum;
- some workers agree to release medical before they have reached maximum medical improvement, even in accepted cases where employer has no evidence of full recovery; later, they incur medical bills and do not have the money to pay them, and have no other insurance coverage;
- some workers do not believe that they have been provided everything that they were promised as part of the C&R;
- some workers believe that they have been misled or have been victims of outright fraud.

In this presentation to Philadelphia Bar Association, the critical focus is the law and practice surrounding opening or setting aside of C&R's.

First, however, this presentation sets forth a summary of all of the reported cases that have interpreted the C&R provision of the Pennsylvania Act.

## II. Law, in General, Pertinent to Pennsylvania WC Settlements: A Quick Summary

As discussed above, the 1996 amendments to the Pennsylvania Act dramatically altered the traditional view of settlement under the law.

Previously, only the “commutation” of disability benefits was allowed. Now, however, a worker is permitted to tender a release in compromise of both his disability and medical claims, subject to approval after a hearing in open court.

The integrity of a Compromise and Release (C&R) Agreement has been the subject of a series of court decisions – all from the middle-levels appeals court – that can be summarized as follows:

(1) ***Technically, a party can appeal the approval or disapproval of a C&R.*** The scope of appellate review of a WCJ adjudication, approving or disapproving a C&R Agreement, is the same scope of review applied in connection with any WCJ adjudication, as set forth in Section 704 of the Administrative Agency Law<sup>3</sup>;

(2) ***A C&R Agreement is not subject to WCJ approval upon unilateral submission by the claimant.*** To the contrary, the Agreement must be signed by both parties and must be submitted to the WCJ by the insurer or the employer<sup>4</sup>;

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<sup>3</sup> 2 Pa. C.S. § 704. See *Blessing v. Workers' Compensation Appeal Board (Heintz Corp.)*, 737 A.2d 820 (Pa. Commw. 1999).

<sup>4</sup> *Blessing v. Workers' Compensation Appeal Board (Heintz Corp.)*, 737 A.2d 820 (Pa. Commw. 1999).

(3) ***A WCJ “Bench Order” is not an enforceable C&R approval.*** A settlement becomes enforceable only after the circulation of a formal written WCJ adjudication<sup>5</sup>;

(4) ***Mere appeal does not allow a party to escape an approved C&R.*** A claimant (or employer, for that matter) does not possess an absolute right to withdraw from an approved C&R Agreement, entered into voluntarily, because “he or she has changed his or her mind” simply by filing an appeal during the 20-day appellate period following circulation of the WCJ adjudication approving the settlement<sup>6</sup>;

(5) ***Setting-Aside of C&R: the basic test.*** A WCJ has jurisdiction to hear a so-called “Petition to Set Aside Compromise and Release Agreement,” and the common law test applied for assessing the viability of a civil release is the applicable test to which the WCJ is to refer<sup>7,8</sup>; Thus, evidence establishing that the subject Agreement was the product of “fraud, deception, duress, or mutual mistake” constitutes sufficient grounds for setting aside a Compromise & Release Agreement.<sup>9</sup>

(6) ***Claimant cannot try to set-aside a C&R on the grounds that, because of alleged mental incompetency, he or she did not understand its legal significance.*** Where the WCJ’s adjudication of a C&R includes a finding of fact declaring the claimant’s understanding of the full legal significance of the parties’ Agreement, the principle of “collateral estoppel” will preclude claimant’s subsequent effort to set aside the C&R Agreement on the grounds of “mental incompetency”<sup>10</sup>;

(7) ***Claimant’s warrant in C&R of lack of other injuries held unenforceable to bar new claim petition.*** A WCJ-approved C&R Agreement will not afford the employer or insurer a viable defense of release for any work-related injury not specifically referenced

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<sup>5</sup> *Strawbridge & Clothier v. Workers’ Compensation Appeal Board (McGee)*, 777 A.2d 1194 (Pa. Commw. 2001).

<sup>6</sup> *Pimentel v. Workers’ Compensation Appeal Board (United Neighborhood Centers of Lackawanna County)*, 845 A.2d 234 (Pa. Commw. 2004).

<sup>7,8</sup> *North Penn Sanitation, Inc. v. Workers’ Compensation Appeal Board (Dillard)*, 850 A.2d 795 (Pa. Commw. 2004). See *Farner v WCAB (Rockwell International)*, 869 A.2d 1075 (Pa. Commw. 2005) (WCJ committed error in setting aside C&R in lieu of evidence of fraud or mutual mistake, and where claimant was in any event collaterally estopped from asserting that she did not understand the full consequences of settling – claimant testified at hearing that it was her understanding that her group health plan benefits would continue, but ultimately they did *not*, under separate resignation form executed) (note: court in footnote also notes conflict in precedents over whether section 413(a), 77 P.S. § 771, provides for review of C&R agreements; and suggests that under certain circumstances involving a deceptive adversary, *unilateral* mistake can amount to *mutual* mistake).

<sup>9</sup> *North Penn Sanitation, Inc. v. Workers’ Compensation Appeal Board (Dillard)*, 850 A.2d 795, (Pa. Commw. 2004).

<sup>10</sup> *Stiles v. Workers’ Compensation Appeal Board (DPW)*, 853 A.2d 1119 (Pa. Commw. 2004). In support of its ruling, the court embraced a fundamental policy consideration advanced by the Torrey-Greenberg treatise – that whenever just and reasonable, the Compromise and Release Agreement should be afforded a substantial degree of finality.

by the Agreement, even where such Agreement includes a representation by the claimant that he or she sustained no other work injury while in the employ of the subject employer.<sup>11</sup> Furthermore, the concept of “judicial estoppel” – which generally prohibits a party from assuming a position before a tribunal inconsistent with his or her asserted position in an earlier action – will not serve to void the C&R Agreement unless the moving party demonstrates that the earlier position was successfully maintained before the first tribunal.

**(8) Claimant cannot review Average Weekly Wage after approval of C&R.** Where the claimant determines months following the WCJ’s formal approval of the Compromise and Release Agreement, that the parties failed to accurately calculate his pre-injury average weekly wage, thereby artificially reducing his potential recovery under the Act, the Agreement will not be subject to rescission<sup>12</sup>;

**(9) Claimant cannot set aside C&R where she was mistaken as to ongoing right to medical care.** Where the injured worker establishes only that she was *unilaterally* mistaken that the parties’ settlement contemplated her entitlement to continued receipt of *non-workers’* compensation benefits into the future, the Agreement will *not* be subject to set-aside.<sup>13</sup> Where, however, the claimant can prove that the defending party was aware of the mistake and the intent of the parties, in terms of the relevant issue, is clear, the courts may well construe the mistake as “mutual” thereby permitting the requested relief.

**(10) Claimant who gives release covering past medical treatment cannot petition for payment of later-discovered bills.** An injured worker’s penalty petition alleging non-payment of outstanding, but non-claimed medical bills accrued prior to the date of the approval of the parties’ Compromise and Release Agreement, will not prevail where the Agreement specifically contemplates resolution of all issues regarding the compensability of all alleged work-related medical expenses.<sup>14</sup>

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<sup>11</sup> *Wallace v WCAB (Bethlehem Steel)*, 854 A.2d (Pa. Commw. 2004).

<sup>12</sup> *Barszczewski v WCAB (Pathmark Stores)*, 860 A.2d 224 (Pa. Commw. 2004) (court refuses to allow a reassessment of the parties’ settlement on the basis of mutual mistake of fact, in light of *res judicata* effect of WCJ’s approval of the Compromise and Release Agreement).

<sup>13</sup> *Farner v WCAB (Rockwell International)*, 869 A.2d 1075 (Pa. Commw. 2005) (WCJ committed error in setting aside C&R in lieu of evidence of fraud or mutual mistake, and where claimant was in any event collaterally estopped from asserting that she did not understand the full consequences of settling – claimant testified at hearing that it was her understanding that her group health plan benefits would continue, but ultimately they did *not*, under separate resignation form executed) (note: court in footnote also notes conflict in precedents over whether section 413(a), 77 P.S. § 771, provides for review of C&R agreements; and suggests that under certain circumstances involving a deceptive adversary, *unilateral* mistake can amount to *mutual* mistake).

Since the C&R Agreement did not address or contemplate the non-workers’ compensation health care coverage that prompted claimant’s attempt to set aside the settlement, one wonders whether the WCJ had jurisdiction over her Petition to Set Aside.

<sup>14</sup> *Iten v. Workers’ Compensation Appeal Board (ABF Freight Systems, Inc.)*, 847 A.2d 814 (Pa. Commw. 2004).

### III. Procedure: “Best Practices” for Attorneys to Follow in Securing Approval

The following seven steps are suggested in order to speed the settlement process and protect the parties against a later challenge that the settlement was improper.

#### 1. *A full understanding of the settlement between the attorneys*

While the claimant’s understanding of the settlement is of the greatest concern, the attorneys negotiating the resolution should agree on all aspects of the proposed settlement before involving the court and the Judge. This is so because the C&R procedure may require details that have not been part of the traditional negotiation process. The parties should take care to discuss all details of the settlement, including

- Credit for continuing payments of TTD or PTD made after the date of C&R hearing and before payment of the lump sum.
- Satisfaction of child support obligations and proof of acceptance by the appropriate authorities.
- Payment of past medical bills that have not been identified during the litigation or pre-C&R process.
- Social Security Disability (SSD) language (the so-called “*Sciarotta*” clause).
- Centers for Medicare/Medicaid Services (CMS) approval, in cases that meet the criteria.<sup>15</sup>

#### 2. *Complete and accurate documentation of the proposed resolution*

Once the parties have reached an agreement on the details of the proposed settlement, the Bureau form (LIBC-755) should be completed. Care should be taken to address each paragraph of the form. The failure to complete all portions of the form may slow down the proceedings before the Judge, and may leave the settlement open to a challenge in the future. Specific care should be taken with regard to:

- Date of the Injury.
- Description of the Injury.
- The exact nature of what is being settled (*e.g.*, wage loss and/or medical, etc.).
- Subrogation rights of the employer under section 319.

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<sup>15</sup> Medicare (CMS) approval must be obtained in certain situations. The current CMS requirement is that *all current Medicare beneficiaries settling their cases must secure CMS approval*. Thus, the amount of the settlement does not control in the case of current Medicare beneficiaries. As for claimants who have only a *reasonable expectation* of becoming entitled to Medicare within 30 months, *i.e.*, a worker who is a recent SSD recipient, *those claimants need only secure approval if the settlement is in excess of \$250,000.00*. See also Appendix V of this text.

### ***3. Full communication prior to the hearing***

Rather than face surprises at the time of the hearing, all participants in the process should communicate well before the hearing. This speeds the process of the settlement hearing itself, and sets expectations among all parties as to the finality of the settlement.

- Counsel – As noted above, counsel should be clear on the details of the resolution and should exchange the proposed documentation within a time frame that will allow for a complete review by the claimant. Any disputes or issues with regard to the wording on the LIBC form should be resolved prior to the time of the hearing.
- Claimant – The single most important factor in the C&R process is the claimant’s understanding of the settlement. Every effort should be made to communicate with the claimant and review the document in its entirety with him or her. (This task usually devolves upon claimant’s attorney, but may involve defense counsel if claimant is representing himself.) All questions should be answered and the claimant should be fully prepared for the potential questions posed by the Judge and counsel.
- Judge – A number of Judges now require a copy of the documentation in advance of the hearing. The manual of procedures, known as the “Judge Books,” available on-line at the L&I website, should be consulted to ensure compliance with the procedures of the Judge to whom the C&R has been assigned.

### ***4. Preparation and presentation of claimant***

As noted above, it is essential that the claimant display a complete understanding of the settlement, and the impact of the settlement on the future stream of benefits.

While the law does not direct the Judge to analyze the “best interests” of the claimant, it is suggested that some effort be made to explain the broader considerations, and the situation, to the Judge in order to prevent any objective or subjective thought or analysis that the claimant could not possibly understand the full legal significance of the Agreement. In other words, it is always a good idea to explain to the WCJ – either by way of representation or through the questioning of the claimant – how and why the parties chose to settle the case on the terms included in the written Agreement.

While it is important to prepare the claimant for the testimony, it is not advisable to “script” the presentation. No specific questions exist that will unquestionably prove that the claimant understand the settlement, but it is helpful to explore the following lines of questioning:

- What will happen to your weekly check?
- What will you do if you no longer are able to receive medical care for your work injury?

- What will happen if your private health insurance carrier rejects payment of medical bills for treatment for your work injury?
- What are your intentions with regard to work if the Judge approves the C&R?
- Have I [the attorney] answered all of your questions regarding this proposed resolution?
- Do you have any questions at this time?
- Do you understand that this will conclude any claims against your employer stemming from this work injury?

### ***5. Finalizing the documents for the hearing***

Once the claimant is fully prepared, and all outstanding questions have been answered, the parties must execute the documents and prepare them for submission to the Judge.

Note that the documents require signatures of all parties, as well as the initials of the claimant with regard to his legal representation or the lack of the same. Note also that two witnesses are required for the signature.

In the alternative, the claimant's execution of the document may be sworn before a notary.

While such formalities may be seen as burdensome, it is noteworthy that at least one of the reported cases of the appellate courts in which a claimant was trying to set aside her C&R was decided at least in part based upon the court's belief that the claimant was of sound mind when she settled her case. The court in that case made specific reference to the claimant's initials in the Certification (release) section of the Bureau form as evidence of her full understanding.<sup>16</sup>

### ***6. Procedure at the hearing (A Checklist)***

The Judge hearing the case controls the specific procedures at the hearing. In most cases the Judge will ask for the signed copy of the Stipulations, and will mark them, along with the signed release (one whole form), as a Bureau or Joint exhibit.

Thereafter, the Judge may ask the claimant's counsel to present the case, or the Judge may begin the questioning of the claimant. For a checklist of basic questions, see Appendix IV.

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<sup>16</sup> *Stiles v. Workers' Compensation Appeal Board (DPW)*, 853 A.2d 1119 (Pa. Commw. 2004).

## 7. *Post hearing actions*

In most cases, the parties can expect an order from the Judge within a week of the hearing. Many Judges issue their decision on the day of the hearing. As with any decision, the parties have twenty (20) days in which to file an appeal.

While a custom and practice exists by which the claimant “waives” his right to appeal in order to expedite payment, this waiver would not, “push come to shove,” be recognized as valid or enforceable.

Often at hearings either one or both of the parties present a “bench order,” or interim (temporary) approval order, to the Judge in order to expedite payment. The Commonwealth Court has ruled that bench orders are not final orders and that employers/carriers who pay pursuant to such orders do so at their own risk.<sup>17</sup>

If a bench order is to be used, it must be done with caution, taking into account the specific details of the case. (The concern is that the employer will pay under the temporary order, claimant will immediately dissipate the funds, change his mind about the settlement, and then appeal the approval of the C&R.)

It is suggested that the parties order a transcript of the hearing in order to have a complete record. The Bureau will not hold onto its file after a year or so, and it may be difficult to secure a copy in the event that a party seeks to set aside the C&R. The representations made at the settlement hearing are, in many cases, the best evidence of the claimant’s understanding.

## IV. Court Decisions on the Reopening/Set-aside Issue

As discussed above, the C&R has been tested on repeated occasions in terms of finality.

Although early decisions reinforced the legislative intent of making settlements final, the court in at least one case allowed the setting aside of the agreement. In another, the court held that the employer was unable to set up the release as a defense against an old but to date non-asserted claim. ***To date, however, the courts have generally followed a policy of according finality to C&R’s.***

A. ***North Penn Sanitation v Dillard (2004).*** The initial and perhaps leading analysis is found in the decision of *North Penn Sanitation v WCAB (Dillard)*.<sup>18</sup> According to the court, a C&R, once approved, may only be set aside in narrow circumstances. These are a clear showing of fraud, deception, duress or mutual mistake of fact.

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<sup>17</sup> *Strawbridge & Clothier v WCAB (McGee)*, 777 A.2d 1194 (Pa. Commw. 2001).

<sup>18</sup> *North Penn Sanitation, Inc. v WCAB (Dillard)*, 850 A.2d 795 (Pa. Commw. 2004).

The above case involved an unrepresented claimant who settled his claim. The defense attorney presenting the case to the WCJ did not inform the Judge of the claimant's blindness, or its relationship to the work injury. Moreover, the evidence suggested that the claimant could not read the settlement documents, and that no one took the time to read them to him prior to the settlement. The claimant did not appeal from the order approving the settlement. Approximately two years later, the claimant filed a petition to set aside the C&R based upon a "material" mistake of fact.

The WCJ assigned to the case set aside the C&R, and the Board affirmed. The Commonwealth Court agreed with the WCJ and Board, although it found that a "mutual" – as opposed to "material" – mistake of fact existed at the time of the settlement. The mistake was, namely, that the claimant and the carrier knew of the work-related blindness, but this fact was not made known to the WCJ who approved the resolution. In other words, the parties were aware of claimant's condition, but caused there to be a judicially recognized "mutual mistake" by their failure to disclose the information to the presiding WCJ.

*Note:* It may be that the real irregularity here was some sort of "fraud on the court," which led the WCJ to approve the C&R without the minimally necessary information on hand to let him know whether claimant really could understand the legal significance of the agreement. (A better example of "mutual mistake" in this realm would be where both the claimant and employer believe that claimant's injury was a mere back sprain, which was resolving, when in fact the back injury went further, aggravating a theretofore latent bone tumor and causing it to metastasize and destroy the claimant's spine.)

Since the *North Penn Sanitation* case was decided, numerous other decisions have been filed involving efforts to set aside settlements. They include the following:

**B. *Stiles v Department of Public Welfare (2004)*.**<sup>19</sup> In this case, following the presentation and approval of a C&R, the claimant filed to set aside on the grounds that the lump sum was inadequate.

She argued, specifically, that her psychiatric condition, along with a post traumatic stress syndrome, made it impossible for her to understand the value of her claim. She also argued that she was not mentally competent at the time of the settlement. Defense counsel argued that the issue of her understanding was precluded by the doctrine of "collateral estoppel."

Under this analysis, the issue will not be relitigated (visited again by the Judge) if the following factors are demonstrated: (1) the legal or factual issues are identical; (2) they were actually litigated; (3) they were essential to the judgment; and (4) they were material to the adjudication. The Commonwealth Court agreed with the employer and ruled that all issues, including the claimant's mental capacity, were previously litigated before the Judge who approved the settlement. Thus, claimant could not have her C&R reviewed or set aside.

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<sup>19</sup> *Stiles v. Workers' Compensation Appeal Board (DPW)*, 853 A.2d 1119 (Pa. Commw. 2004).

The *Stiles* ruling underscores the importance of having the WCJ issue an adjudication approving the proposed C&R that includes a specific finding of fact declaring the claimant's understanding of the full legal significance of the settlement. Indeed, once such an adjudication is issued, the claimant faces a twenty-day appellate window to assert the "I didn't understand the settlement" challenge to the Agreement.

**C. *Barszczewski v Pathmark Stores (2004)*.**<sup>20</sup> In this case, the claimant sought to overturn the C&R based upon a late-discovered improper calculation of his average weekly wage (AWW).

The claimant argued that this represented a mutual mistake of fact. The WCJ dismissed the petition based upon *res judicata*, reasoning that the claimant had a full and complete opportunity to present information regarding his wages previously, but did not do so. The claimant had also failed to appeal from two prior decisions that established his AWW at the same level as that recorded in the C&R paperwork.

The court reiterated the rule that the test to set aside a C&R based on mutual mistake is more stringent than that used to evaluate fraud. In addition, the court pointed out that in Pennsylvania the courts, analyzing the issue of setting aside civil settlements, have long held that underestimating damages prior to settlement is not mutual mistake of fact.

**D. *Wallace v Bethlehem Steel (2004)*.**<sup>21</sup> In a 2004 case, the Commonwealth Court rejected an employer's attempt to have a claim petition thrown out on the grounds that the injury presented in the claim petition was barred by the release the claimant had given in *another* case. This rejection came in a claim petition concerning an injury (A), where the employer had previously taken a release in a C&R agreement with regard to the injury then being prosecuted by a claimant (B), where the release failed to reference the other potential, cognizable claim (A).

Further, the claimant's warrant in the C&R that he had had no other injuries, and had not provided any effective statutory notice, did not create a "judicial estoppel" that would otherwise make the claimant's new claim petition subject to dismissal.

The claimant in the case had filed an original claim for a chemical fume inhalation injury, and had settled. He then prosecuted a claim for a back injury that pre-dated the C&R. While the claimant had made broad warrants, the court upon review of the record could simply find no evidence that the release claimant was giving was contemplated by him as applying to a *back* injury; only the *inhalation* injury was mentioned.

**E. *Farner v Rockwell International (2005)*.**<sup>22</sup> In this case, the Commonwealth Court held that a claimant's "mistake" concerning her purported ongoing eligibility to the employment fringe benefit of group medical coverage did not provide a sufficient basis to

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<sup>20</sup> *Barszczewski v WCAB (Pathmark Stores)*, 860 A.2d 224 (Pa. Commw. 2004).

<sup>21</sup> *Wallace v WCAB (Bethlehem Steel)*, 854 A.2d 613 (Pa. Commw. 2004).

<sup>22</sup> *Farner v WCAB (Rockwell International)*, 869 A.2d 1075 (Pa. Commw. 2005).

set aside a C&R.

Claimant in this case received TTD for over a decade. Employer filed to modify, alleging the availability of light work. Employer maintained that claimant had shown bad faith in the job placement effort. In the midst of the petition, the parties agreed to settlement by C&R. Claimant accepted the lump sum of \$45,000.00 and in return gave a complete release. At the hearing, she stated that it was her understanding that, even though she was resigning from employment, employer would continue to provide group health insurance “under Employer’s plan.” Perhaps inconsistently, on the same day she also signed a document (not provided to the WCJ), which stated,

I fully realize that with this resignation, I am no longer entitled to any of the privileges or benefits to which employees [of Employer] may be entitled except those benefits and rights which are vested as the time of my resignation.

The WCJ approved the Agreement. Roughly eight months later, the employer discontinued claimant’s health care coverage. The claimant then filed a “review petition alleging Employer breached the C&R Agreement by failing to pay her medical insurance premiums ....” A Uniontown WCJ set aside the agreement, finding, among other things:

1. that claimant would not have handed over the release had she understood that employer was going to discontinue the employment fringe benefit;
2. that the release paperwork did not expressly state that the Claimant would or would not be entitled to ongoing medical insurance coverage;
3. that claimant had “the understanding ... that her medical insurance coverage ... was going to continue”;
4. that the claimant “had a mistaken understanding as to whether her medical insurance coverage ... was going to continue following the approval of the [C&R]”;
5. that the “silence of Employer’s attorney” contributed to claimant’s misunderstanding (Finding of Fact No. 11);
6. that “there was a clear misunderstanding/mistake pertaining to a material issue at the time the parties executed the [C&R] Agreement ....., and at the time they asked for it to be approved. As such, the [C&R] Agreement must be set aside.”

The Board reversed, reasoning that “Claimant genuinely misunderstood the Agreement,” but noting “her written acknowledgement in the Voluntary Resignation Statement... The Board concluded that Claimant’s misunderstanding was a unilateral mistake insufficient to set aside the C&R Agreement.” The Commonwealth Court affirmed.

*Observation I:* There are certain indications in the court’s opinion that the employer was perhaps aware of claimant’s purported misunderstanding of the settlement terms while the C&R was pending before the WCJ. The court remarked, “Claimant raises several interesting arguments inviting a re-weighting of the circumstantial evidence so as to support an inference of Employer’s knowledge. However, arguments as to the weight of the evidence are for the fact-finder, not this Court.”

*Observation II:* It is submitted that since the health care coverage issue was obviously central to the parties’ thinking during settlement discussions, the resolution of those discussions should have been addressed in the C&R Agreement and/or should have been reviewed with the WCJ during the course of the C&R hearing.

The Commonwealth Court has made clear, notably, that once the parties invoke the jurisdiction of the WCJ over a non-workers’ compensation issue or benefit in order to facilitate a settlement, the WCJ will retain jurisdiction where one of the parties subsequently alleges a failure to honor that element of the Agreement. See *Department of Public Welfare v. Workers’ Compensation Appeal Board (Overton)*, 783 A.2d 358 (Pa. Commw. 2001); *Department of Corrections v. Workers’ Compensation Appeal Board (Clarke)*, 824 A.2d 1241 (Pa. Commw. 2003).

F. ***Dougherty v United Truck Parts.***<sup>23</sup> In this case, claimant settled his original claim through a C&R, and the employer waived its subrogation rights to a third-party recovery. The third-party (the other driver), apparently had very low limits, and the policy limits were apparently paid. Claimant then made an underinsured insurance (UIM) claim against the carrier providing coverage to the driver of his vehicle.

As it turned out, the workers’ compensation carrier was the same carrier as this UIM carrier. In the UIM arbitration, the carrier used the medical information developed in the workers’ compensation case to dispute disability in the auto insurance forum.

Four years after the C&R approval, claimant tried to set it aside, based on his belief that the actions of the carrier represented a breach of the C&R. His chief argument was that the breach occurred in the employer’s use of the medical evidence, as this allegedly violated the “confidentiality clause” which had been inserted in the C&R.

The court, following the *Stiles* precedent (above), held that the claimant was simply raising the “factual issue of his understanding of the full legal significance of the C&R,” and ruled that the case was to be dismissed under the rule of collateral estoppel. The court added that claimant did not show any fraud in this context. Finally, claimant *admitted* that the clause only bound *him* to confidentiality – *not* the employer and carrier.

G. ***George v Conway Central Express.***<sup>24</sup> In this case, claimant suffered a 1996 head and neck injury with an employer (Conway). He went back to work on a suspension, and thereafter started working for a second employer (JEM).

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<sup>23</sup> Unreported case of Commonwealth Court, filed March 7, 2005.

<sup>24</sup> *George v WCAB (Conway Central Express)*, 871 A.2d 310 (Pa. Commw. 2005).

There, he had another accident, and his left knee was badly injured. REM paid benefits voluntarily.

While off work, he filed a reinstatement and review petition against Conway, and apparently alleged further injuries against REM. A WCJ found that both discrete injuries contributed to his disability, and he issued an order apportioning liability. This is allowed under Section 322 of the Act, added in 1993 in certain limited circumstances.<sup>25</sup>

Claimant then settled with REM, accepting \$100,000.00. Four weeks later, he filed to reinstate onto TTD against Conway on the theory that “because the WCJ found each employer 100% responsible for Claimant’s disability and JEM is no longer in the case, Conway is responsible to pay the full amount of Claimant’s total disability compensation.”

The WCJ, Board and court all rejected claimant’s petition. The court was a bit tart: “Claimant cites no authority for these arguments, and we are not surprised, since there is nothing in workers’ compensation law or civil law that sanctions the windfall Claimant seeks. Therefore, Claimant is not entitled to a reinstatement of total disability payments from Conway solely on the grounds that he voluntarily extinguished his claim against JEM.”

**H. *Postscript – an unexplored area: Nature of the relief that the party challenging the C&R Agreement can hope to obtain from the reviewing tribunal.***

To date, the foregoing issue is one unaddressed by the evolving cases.

Once the challenging party demonstrates that the C&R was procured by or reflective of fraud, or mutual mistake or the claimant’s lack of understanding of the Agreement’s full legal significance, the available remedies would seem to be multiple, *e.g.*, complete rescission of the original Agreement, partial rescission of the original Agreement, the imposition of penalties under Section 435 of the Act or perhaps specific performance.

For example, in the *Farner* case addressed above, query what relief would the WCJ have been empowered to award the claimant had he found as fact that the employer acted fraudulently during the settlement process in terms of her claim for non-workers’ compensation health care coverage?

Would the WCJ have been permitted to issue an order directing the employer to reinstate her non-workers’ compensation coverage? Would the WCJ have been required to simply declare the entire C&R Agreement null and void? Or would the WCJ have been permitted to uphold all of the C&R Agreement while awarding the claimant

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<sup>25</sup> See, *e.g.*, *South Abington Township and St. Paul Fire & Marine Insurance Company v. Workers’ Compensation Appeal Board (Becker and ITT Specialty Risk Services)*, 831 A.2d 175 (Pa. Commw. 2003) (court suggests that apportionment contemplated by Section 322 not a substitute for traditional “aggravation vs. recurrence” assessment).

penalties calculated on the basis of the value of the health care premium over the course of the claimant's anticipated need for that benefit?

It would seem that an argument could be made that the WCJ has the power, under certain circumstances, to provide all of the above relief depending upon the nature of the parties' dispute and the specific relief sought by the challenging party. Presumably, as the case law matures, practitioners will be afforded more guidance from the courts on this critical issue.

#### V. Considerations Apart From Direct Questioning (Torrey)

A. **Full disclosure.** As submitted above, the criterion of approval to be considered by the WCJ is whether claimant understands the full legal significance of the proposed settlement; still, an effort should be made to explain the broader considerations, and the parties' situation, to the Judge.

In this regard, it will be easier for a party, particularly a claimant, to allege entitlement to set aside his C&R, if a lack of full disclosure has occurred. It is submitted that this is the real lesson of the *North Penn Sanitation* case. It is submitted that the WCJ must be apprised of all the material facts of which he or she needs to have awareness in order to make the critical decision as to whether claimant understands the full legal significance of taking a lump sum and settling.

Part of full disclosure may be revealing to the WCJ the fact that the claimant is also resigning, and/or tendering a general release as part of a "global settlement." It is true that most WCJ's likely will not want to attach the resignation letter or general release to the C&R agreement, and some may even disavow any desire to hear of any such collateral arrangements.

Still, an argument can be imagined that the WCJ did not fully appreciate that the claimant understood the full legal significance of the proposal when these other aspects of the settlement have gone unmentioned.

Litigation under the Florida Act has produced at least two cases where the court indicates that lack of full disclosure that prevents the judge from making an educated determination on the proposed settlement constitutes grounds, later, for setting aside the settlement. See East v Pensacola Tractor & Equipment Co., Inc., 384 So.2d 156 (Fl. 1980) (Deputy Commissioner committed error in denying petition to set aside settlement, where counsel for carrier at hearing had not revealed either to claimant – an illiterate, self-represented laborer – **or to the original deputy commissioner** facts that (1) at least one physician had given claimant a 100% loss of his injured leg; (2) claimant had recently got out of the hospital; and (3) claimant was still treating: "We conclude that the totality of circumstances presented shows either a mutual mistake of material facts or overreaching on the carrier's part, and that claimant should be allowed to prove entitlement to benefits foreclosed by the settlement agreement.").

The court also noted that record did *not* show that the deputy commissioner performed his duty and reviewed the file: "If such an oversight occurred, it would

apparently be regarded as fundamental error invalidating the agreement and order.” The *East* matter seems to present the classic “settlement on the courthouse steps” type of case: “The carrier’s attorney assumed responsibility for explaining the terms of the settlement to the claimant, who simply acknowledged that he understood the effect of the document in response to an inquiry from the judge.”

A similar result ensued in Cordell v Pittman Building Supply, 470 So.2d 865 (Ct. Appeals FL 1985) (Deputy Commissioner committed error in denying attempt to set aside settlement, where critical evidence was withheld from original commissioner, which in turn prevented him from performing the essential best interests analysis).

In this case no fraud could be discerned, but “the parties’ failure to inform the deputy of the facts necessary for a true evaluation of the circumstances bearing on claimant’s condition prevented the deputy from being able to perform his statutory duty in furtherance of the public policy” expressed in the statute. The court in this case quoted the Larson treatise comments positing that a workers’ compensation settlement presents different policy considerations than a tort settlement.

**B. *Scope of the release.*** If the employer is demanding a release of liability not only for an accepted or currently-litigated injury, but for all injuries as well, this must be spelled out in plain English and made known to the claimant. (Such a broad release is probably authorized by section 449. The law states that the parties can resolve “any and all liability which is claimed to exist under this act on account of injury or death.”)

This device seems best to avoid future claimant attempts to prosecute pre-C&R injuries. In contrast, the warrant that claimant has no other injuries does not seem to be effective to prevent later claim petitions for injuries which pre-date the C&R.

A broad release, with its provisions spelled out in plain English, should be effective to preclude later claim petitions based on injury dates that precede the C&R.

**Note:** A clause that claimant is waiving injuries about which neither he nor the employer have any knowledge, or which have not yet manifested themselves (for example, insidious disease processes), is probably not enforceable.

**C. *C&R’s, especially on original claims, that are attempts to settle out from under the rights of non-parties invite litigation and often fail.*** Most courts have held that it is unfair for the parties to settle a case, and then have some other entity, not a party to the settlement, shoulder all or a part of the liability. These other entities are prone to appear later, demanding remedies against one or both settling parties. This obviously frustrates the objective of finality.

This situation arose in a well-known New Jersey case that led to a reported decision in 2004. The state supreme court made clear that parties cannot settle out from beneath the claims of third-party medical providers. University of Massachusetts Mem. Medical Center, Inc. v Christodoulou et al., 851 A.2d 636 (S. Ct. New Jersey 2004), *reversing* 823 A.2d 51 (N.J. Super. 2003).

In that case, allied healthcare providers (providers) had a ¾ million dollar billing incurred on account of treatment of a fatally injured employee. The employee's allegedly dependent parents entered into a "section 20" settlement with the carrier, which had denied all liability on the claim. Prior to the settlement negotiations, counsel for the dependents constantly advised the providers that he would advise them of the status of the case.

In the event, however, counsel did not do so, and the settlement did not include any reimbursement of the providers' claims. (Counsel and the employer did set forth that employer would indemnify the deceased worker's father with regard to claims against him pressed by medical providers.) Four months after the settlement, counsel notified the providers that they should send their bills to the employer's carrier.

The employer's carrier denied the bills. It took the position that it agreed to indemnify claimant's father, and that because the father had no liability for his son's medical billings, it was not bound to indemnify him.<sup>26</sup>

The providers then filed a collection action naming the employee's estate, the dependent parents, the compensation carrier and the deceased worker's attorney. A trial court allowed the action, but a middle-level appeal court found that the provider was bound by the settlement in light of its failure to intervene in the compensation proceeding. The Supreme Court, however, reversed, allowing the action, holding "that those medical providers are not bound by a settlement of which they had no notice and to which they were not a party."<sup>27</sup>

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<sup>26</sup> The carrier's counsel "claimed that AIG had agreed to hold [the father] harmless[,] not his son's estate[,] for payment of the medical bills, and because the father was not responsible to pay the bills of his son, AIG 'declined to reimburse' the medical providers.'" University of Massachusetts Mem. Medical Center, Inc. v Christodoulou et al., 851 A.2d 636 (S. Ct. New Jersey 2004), reversing 823 A.2d 51 (N.J. Super. 2003).

<sup>27</sup> University of Massachusetts Mem. Medical Center, Inc. v Christodoulou et al., 851 A.2d 636 (S. Ct. New Jersey 2004), reversing 823 A.2d 51 (N.J. Super. 2003). The court stated, in pertinent part:

The Appellate Division found that permitting plaintiffs to pursue a claim for payment in the Law Division "would render [the Section 20] settlement illusory for the parties to the compensation action, an outcome . . . entirely inconsistent with our strong public policy favoring settlement of litigation." . . . We disagree. Our holding will encourage the parties to address the payment of medical and hospital bills when negotiating a settlement. Because the employee's contractual obligation to pay for medical services rendered will not be extinguished by a settlement, the employee will have an incentive to arrange for payment of the bills in the settlement or to present them in a compensation proceeding in order to obtain payment from his employer. To the extent that a common law collection action allows a medical provider to proceed only against the employee, a medical provider also will have an incentive to intervene in a pending workers' compensation action to proceed against the potential deep pockets of the employer and its insurer.

One of the goals of the Workers' Compensation Act is to secure for the parties an effective, fair, and inexpensive procedure. . . . That objective would be thwarted by a requirement that medical providers obtain legal representation to file claim petitions or intervene in all pending workers' compensation cases out of fear that the injured worker will settle without providing for payment of their bills. Amici point out that hospitals and other medical providers are not equipped or required to collect the type of information needed to prosecute successfully a workers' compensation claim. On the other hand, an

**D. *Enforceability of Pennsylvania C&R when claimant has potential workers' compensation rights in another jurisdiction.*** When a claimant has potential rights against the employer under another state's workers' compensation laws, the parties must be attentive to whether claimant is tendering a release with regard to those rights as well. This would arise, for example, in the case of an over-the-road truck driver who lives in Pennsylvania, was hired in Ohio, regularly reports to the employer's Ohio hub/home office, and suffers an insidious systemic injury in either Ohio or Pennsylvania while in the course of his employment duties.

It is likely that the claimant does not waive his or her rights under the other states' laws simply by releasing his employer under the Pennsylvania Act.

The issue has actually been touched on by the U.S. Supreme Court. In what is likely the most recent case, a claimant with rights under both the Virginia and D.C. laws accepted compensation, and then a settlement, under the Virginia Act. He then prosecuted his claim against employer under the D.C. Act, and in response the employer argued that the claim was barred. In this regard, the Virginia Act forbade further awards. The Supreme Court ultimately held that full faith and credit did not require D.C. to respect the provisions of the Virginia Act. Thomas v Washington Gas Light Co., 100 S.Ct. 2647 (U.S. 1980).

In general, voluntary payments of compensation under one state compensation law do not bar a proceeding for compensation under another state law. See Cline v Byrne Doors, Inc., 37 N.W.2d 630 (Mich. 1949).

Ultimately, whether a Pennsylvania C&R will work as an affirmative defense to a claim in another jurisdiction will turn on whether the administrative authorities and courts of such other jurisdiction are willing to give full faith and credit/*res judicata* effect to the Pennsylvania adjudication. It seems likely, however, that the other jurisdiction is *not* required to do so, meaning that counsel for the employer, and for the employee, should be mindful of the potential for a second claim in another jurisdiction despite the resolution of the Pennsylvania claim at issue.

**E. *Stipulations should match the testimony.*** In many cases, the stipulations and release do not correspond to claimant's representations at the approval hearing.

This can become problematic for a number of reasons from the standpoint of concerns over reopening attempts.

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injured employee will know his employment status and the details concerning a work-related injury. To compel unnecessarily the intervention of medical providers in every workers' compensation case would be a spectacularly wasteful expenditure of resources and effort.

First, if portions of the stipulations are left blank, or have inaccurate information, a later argument can be pressed by claimant that the paperwork was false, or that the inaccuracies of the agreement prove a rushed or leveraged deal.

Second, an arguable ambiguity exists if claimant makes material representations at the hearing as to his understanding of the settlement that are at odds with what is included in the agreement.

**F. A hearing must be, and should be, held in every case.** A few WCJ's may have declined to convene on-the-record hearings on C&R's.

The apparent thinking in this regard is that the judge is simply rubberstamping settlements, so that the hearing can be disposed of as a mere *pro forma* affair. It is submitted that the law's requirement of a hearing is mandatory: "The [WCJ] shall consider the petition and proposed agreement in open hearing .... Hearings on the issue of a [C&R] shall be expedited ...."

And, indeed, the requirement of a hearing under the Pennsylvania practice is critical, and its inclusion in the Act was a stroke of genius. As the Judge has no "best interests" standard, the requirement of the hearing acts as a prophylactic to decrease the likelihood of the parties proposing manifestly improvident settlements. **Further, the requirement of a hearing and transcript ensures that, when a party seeks to open a C&R, a record of the proceeding will exist.**

**G. A decision with fact-findings must be, and should be, rendered in every case.** A few WCJs, meanwhile, although allowing a hearing for the C&R, may not be issuing orders with findings of fact and legal conclusions.

It is submitted that this omission is unsatisfactory, and contrary to statute. The statute refers to the WCJ's "decision," and the decision of a WCJ is, under section 418 of the Act, to be in the form of fact findings: "The referee ... shall make, in writing and as soon as may be after the conclusion of the hearing, such findings of fact, conclusions of law, and award or disallowance of compensation or other order" as the pleadings and evidence require.

The unappealed WCJ decision approving a C&R will, according to Commonwealth Court, be an adjudication effective to collaterally estop a claimant from revisiting the adjudicated facts. *Stiles v WCAB (DPW)*, 853 A.2d 1119 (Pa. Commw. 2004).

This defense cannot be raised by counsel if no underlying principled decision has been issued.

**H. Stipulation and release should be internally consistent.** In some instances, the representations in the release are contradictory. This often occurs because the pre-printed forms states one thing, and the parties inscribe something else.

For example, the form has both parties agree: “We understand that under this agreement, all petitions are resolved.” Yet, in another part of the agreement, the parties may reserve some issue or issues for adjudication.

An ambiguity in a C&R can lead to arguments that the WCJ or court should review the agreement, and possibly modify it.

**I. Claimant, particularly with an accepted case, should not C&R his case unless he is at MMI.** Experience from other states, and some evidence in Pennsylvania, shows that workers who settle their cases before they have stabilized are more likely than others to try to set aside their settlements.

**J. Claimants should be reminded that they do not have to settle, but can take the risk of staying on benefits and possibly receiving more over time.** This reminder is part of the questioning advanced by many claimant’s attorneys and judges. On occasion, the claimant will respond, “No, I didn’t know that; the carrier said, ‘take it or leave it.’”

A claimant who believes that he has been treated unfairly or misled may try to set aside his settlement.

**K. Provide (as requested) the reasons why the parties are settling.** Under Section 449, the parties are to list in the stipulations the reasons for entering into the agreement. In the majority of cases, boilerplate appears to the effect that, “The parties are entering into the agreement because they desire to settle the case.”

The law, however, is likely canvassing the claimant for the *motives* for accepting a lump and handing over a release. The usual intent (among state comp laws) of requiring this information is to ensure that some sort of *bona fide* dispute exists, and that the settlement is not being forced on a claimant just for the carrier to get rid of a meritorious claim. (Pennsylvania, it is true, does not have a *bona fide* dispute requirement.)

A few typical reasons are, in any event, the following:

- Avoidance of a negative result from the *pending* litigation;
- Avoidance of a negative result from *future* litigation which is likely to unfold;
- Claimant has stabilized (reached MMI), believes he or she can return to work, and just wants to get the compensation claim over with;
- Claimant is just tired of dealing with the adjuster and the rehab folk;
- Claimant is just tired of dealing with the attorneys, the judge, and the expensive parking downtown for all those hearings;
- Claimant has become entitled to SSD, which is taking an offset; and will likely have the SSD award increased if he or she takes a C&R lump sum, and the paperwork is drawn up the right way;
- Claimant has debts, and needs to pay them;
- Claimant wants money for re-schooling or retraining.

These reasons (or other(s)) should be stated for two reasons.

First, providing this basic information is part of the full disclosure that equips the WCJ with the ability to make a knowing and educated determination as to whether claimant understands the full legal significance of the proposed settlement.

Second, failure to state the reason will preclude future arguments that the real reason for the settlement was kept secret from the WCJ and/or that the C&R was a rushed or leveraged deal.

**L. *Agreements with regard to subrogation must be made, and made known to claimant and employer.*** Parties have tried to open or review C&R's when the employer's, or a third party payer's right to subrogation, was not taken care of adequately in the C&R agreement.

**M. *Claims representative and attorney dealings with self-represented workers present special considerations.*** The claims representative who negotiates with a self-represented worker should remember, among other things:

- while the WCJ is not supposed to second-guess a compromise settlement, in practice some judges vocally question deals that have the worker accept a *de minimis* amount; or otherwise seem ill-advised. Thus, remember that the deal made will be reviewed in open court for all to see and evaluate – and possibly for the WCJ to refuse if it is manifestly unfair. (Some judges will deny a proposed settlement if its “shocks the conscience” of a reasonable person – even if the claimant says that he wants the money.)
- the practice of retaining “friendly counsel” for the unrepresented worker, for the C&R hearing, is not, according to the state bar association, unethical.<sup>27</sup> This is so as long as the attorney takes over after claimant has negotiated the deal with the employer or its agent; and the attorney makes a full disclosure to the client. (Still, remember that many workers are unsophisticated, and may, after the fact, become convinced that they have been victims of overreaching and manipulation by way of this process. It may be better for the worker simply to be self-represented, with extra care by employer's counsel to assure that the C&R is handled with excruciating detail. This decision needs to be handled on a case-by-case basis.)
- counsel representing employer will need to spend more time than usual preparing for a C&R with a self-represented worker. Claim representatives should submit complete file materials to counsel in such cases to aid in such preparation. Of course, counsel will have to remind the self-represented claimant that he or she is not the worker's attorney.

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<sup>27</sup> Ethics Opinion Letter, in Collected Papers, PBA WC Law Section Meeting, May, 1999, Philadelphia, PA (PBI Pub. No. 1999-2346J) (1999). See D. Torrey & A. Greenberg, PA Workers' Compensation: Law & Practice, § 15:95 (West 2<sup>nd</sup> ed. 2002).

N. ***The release language should be in plain English and in large typeface.*** Long expanses of complicated legal language, and pages of thick boilerplate, are not preferred by most WCJ's reviewing C&R's. It is difficult to conceive of an unsophisticated worker understanding the C&R when the legal professionals have a difficult time understanding – or even *reading* – the fine print.

VI. Appendix I: C&R Statute, Full Text; and Regulation

A. **STATUTE:** Section 449 of the Act, 77 P.S. § 1000.5<sup>27</sup>

(a) Nothing in this act shall impair the right of the parties interested to compromise and release, subject to the provisions herein contained, any and all liability which is claimed to exist under this act on account of injury or death.

(b) Upon or after filing a petition, the employer or insurer may submit the proposed compromise and release by stipulation signed by both parties to the workers' compensation judge for approval.

[T]he workers' compensation judge shall consider the petition and the proposed agreement in open hearing and shall render a decision.

[T]he workers' compensation judge shall not approve any compromise and release agreement unless he first determines that the claimant understands the full legal significance of the agreement.

[T]he agreement must be explicit with regard to the payment, if any, of reasonable, necessary and related medical expenses.

[H]earings on the issue of a compromise and release shall be expedited by the department, and the decision shall be issued within thirty days.

(c) Every compromise and release by stipulation shall be in writing and duly executed, and the signature of the employe, widow or widower or dependent shall be attested by two witnesses or acknowledged before a notary public. The document shall specify:

(1) the date of the injury or occupational disease;

(2) the average weekly wage of the employe as calculated under section 309;

(3) the injury, the nature of the injury and the nature of disability, whether total or partial;

(4) the weekly compensation rate paid or payable;

(5) the amount paid or due and unpaid to the employe or dependent up to the date of the stipulation or agreement or death and the amount of the payment of disability benefits then or thereafter to be made;

(6) the length of time such payment of benefits is to continue;

(7) in the event of a lien for subrogation under section 319, the total amount of

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<sup>27</sup> Edited by Torrey for appearance.

compensation paid or payable which should be allowed to the employer or insurer;

(8) in the case of death:

(i) the date of death;

(ii) the name of the widow or widower;

(iii) the names and ages of all children;

(iv) the names of all other dependents; and

(v) the amount paid or to be paid under section 307 and to whom payment is to be made;

(9) a listing of all benefits received or available to the claimant;

(10) a disclosure of the issues of the case and the reasons why the parties are agreeing to the agreement; and

(11) the fact that the claimant is represented by an attorney of his or her own choosing or that the claimant has been specifically informed of the right to representation by an attorney of his or her own choosing and has declined such representation.

(d) The department shall prepare a form to be utilized by the parties for a compromise and release of any and all liability under this act in accordance with the stipulation requirements of this section, and it shall issue such rules and regulations necessary for it and the board to enforce the procedure allowed by this section.

[N]o compromise and release shall be considered for approval unless a vocational evaluation of the claimant is completed and filed with the compromise and release and made a part of the record: Provided, however, That this requirement may be waived by mutual agreement of the parties or by a determination of a workers' compensation judge as inappropriate or unnecessary. The vocational evaluation shall be completed:

(1) by a qualified vocational expert approved by the department; or

(2) by the department on a fee-for-service basis.

Nothing in this clause shall serve to impose an obligation of liability or responsibility regarding vocational rehabilitation on either party or to require the implementation of vocational rehabilitation.

**B. REGULATION:** 34 Pa. Code § 131.57

**§ 131.57. Compromise and release agreements.**

(a) Under section 449 of the act (77 P. S. § 1000.5), upon or after filing a petition, the parties may engage in a compromise and release of any and all liability which is claimed to exist under the act on account of injury or death, subject to approval by the judge after consideration at a hearing.

(b) Proposed compromise and release agreements, including the stipulations of the parties, shall be recorded on a form prescribed by the Bureau. The parties may attach additional information to the form if circumstances so require.

(c) If another petition is pending before a judge at the time of the agreement of the parties to compromise and release the claim, any party may, in writing, request the judge to schedule a hearing on the proposed compromise and release agreement. The written request will be treated as an amendment of the pending matter to a petition to seek approval of a compromise and release agreement.

(d) The judge will expedite the convening of a hearing on the compromise and release agreement. The judge will circulate a written decision on the proposed compromise and release agreement within 30 days after the hearing.

(e) Subsections (a)--(d) supersede 1 Pa. Code §§ 33.42, 35.40, 35.41, 35.48--35.51, 35.101--35.106, 35.111--35.116, 35.121--35.128 and 35.155.

## VII. Appendix II: Compromise and Release Pitfalls

A committee of Workers' Compensation Judges published, in 2002, an extended article identifying "many pitfalls [that] await the unwary practitioner or party." See Committee on Human Resource Development, PA WC Judge Professional Ass'n, "Compromise & Release Pitfalls", in Bureau of Workers' Compensation *News & Notes*, at 2 (Fall, 2002). Judge Eric Jones, writing for the committee, identified these various perils. They are as follows:

1. Every provision of the C&R must be in the written agreement. For example, the parties cannot amend the C&R agreement by testimony. If necessary, the C&R can be changed at the hearing by writing in the new language and the parties demonstrating their agreement by initialing the handwritten provisions.
2. The C&R has no legal effect until approved in a written decision by a WCJ. A bench order alone is not sufficient. *See Strawbridge & Clothier v WCAB (McGee)*, 777 A.2d 1194 (Pa. Commw. 2001).
3. Lawyers who arrive unprepared for the hearing can cause unnecessary delays. Examples include lawyers not exchanging the C&R agreement previously, by not including all necessary language, or by not meeting with the employee ahead of time to familiarize the employee with the written agreement.
4. Two witnesses must witness the employee's (or dependent's) signature, or else a notary public must notarize the signature. Witnesses need to see the employee sign the agreement.
5. For liens, such as child or spousal support orders, Department of Public Welfare liens, or approval by the Social Security Administration (including any amount set aside for future medical expenses), the parties need appropriate documentation. The procedure can take weeks and requires planning ahead to contact the appropriate authorities.
6. The employee (or dependent) *must testify* at the on-the-record hearing before the WCJ to demonstrate understanding of the full legal significance of the C&R. The law does not impose the standard of "in the best interests" of the employee or dependent. The parties may wish to elicit testimony of the employee's (or dependent's) understanding of the risks and consequences of the C&R.
7. Learn what procedure the presiding WCJ uses. Some WCJs interrogate the employee or dependent. Most WCJs expect counsel to present the testimony of his or her client. Learn how detailed should be the testimony which the presiding WCJ expects to prove employee's understanding of the full legal significance. In C&R's with unrepresented employees or dependents, eliciting testimony by employer's counsel may be beneficial, with the understanding that employer's counsel does not represent the employee.

8. Include, if applicable, language concerning the proration of the *net* amount of the settlement for wage loss benefits (following deduction of attorney's fees) to allow setoff for Social Security disability benefits. Calculate the monthly benefit setoff for the life expectancy of the employee according to *Sciarotta v Bowen*, 837 F.2d 135 (3<sup>rd</sup> Cir. 1987). This also applies to employees intending to apply for Social Security Disability benefits in the near future.
9. When compromising and releasing medical benefits liability, it is desirable to elicit testimony that the employee's continued health care insurance (and Medicare/Medicaid) possibly may *not* pay for treatment considered as a work injury. Therefore, arguably, for an employee to understand the full legal significance of the C&R, he or she must understand that there may be no health care insurance coverage (or there may be a waiting period) to pick up payments of medical expenses previously paid by workers' compensation coverage.
10. It is basic, but it is desirable to elicit testimony as to what net amount the employee or dependent will receive. Surprisingly, a number of employees at C&R hearings do not know the amount they will receive after attorney's fees and other deductions.
11. It is desirable to elicit testimony when any workers' compensation lien exists for a third-party lawsuit recovery arising out of the work injury. Some employees at C&R hearings are surprised to learn that an employer and insurer may ask for subrogation against the entire third-party recovery, based on payment of all wage-loss benefits, medical benefits *and* the amount paid according to the C&R.
12. Do *not* plan on a WCJ having authority to issue any amended decision adding language, such as the *Sciarotta* language above, for Social Security disability benefits setoff. Employee counsel's failure to include the language could subject employee's counsel to liability.
13. Do not include extraneous documents such as every supplemental agreement or every decision ever issued in the entire workers' compensation case. Reference the accepted injury and any changes to the description of injury within the language of the C&R itself. Any attached documents, if incorporated, are photocopies with the decision and scanned at the Bureau of Workers' Compensation. If parties can avoid placing unnecessary papers into the C&R, it eliminates logistical headaches.
14. Although it is common practice to have an employee waive appeal in order to expedite payment of the settlement amount, this practice has not been approved by statute, by regulation or any appeals court decision. It is desirable to elicit testimony from the employee of the full understanding of the legal significance of giving up a right to appeal, even an approval of the C&R agreement.
15. The parties may wish to elicit testimony from the employee that the C&R is a compromise, and the employee understands that if litigation continued the employee could receive either the same, more or less than the amount in the C&R.

16. The parties may wish to elicit testimony that the employee reads and writes English, that employee is not under the effects of any substances affecting his or her understanding of the C&R, and that employee was not coerced or given additional promises to enter into the C&R.
17. Employee's counsel may wish to elicit testimony that an employee is satisfied with the representation by employee's counsel. That obviously reduces the potential for a later assertion that employee's counsel did not carry out the employee's wishes.
18. Resignation-of-employment letters by employers and insurers are sometimes requested, although not addressed in the statute, regulations or any current decisions of appeals courts. The parties may wish to elicit testimony to confirm that no vested benefits, such as vested pension rights, are waived by such a resignation letter. The parties may wish to include a provision in the C&R that an employee is not giving up vested pension rights.
19. Based on an unreported decision of Commonwealth Court, the parties need to confirm in the language of the C&R that there is an express waiver of any additional benefits or payments; in other words, the Commonwealth Court may not construe the language of the employee certification as language waiving all rights to any future payments.

## IX. APPENDIX IV: Checklist for Questioning of the Claimant

As discussed above, the judge hearing the case controls the specific procedures at the hearing. In most cases the Judge will ask for the signed copy of the Stipulations, and will mark them, along with the signed release (one whole form), as a Bureau or Joint exhibit. Thereafter, the Judge may ask the claimant's counsel to present the case, or the Judge may begin the questioning of the claimant. Regardless of whether the claimant is questioned by the judge or counsel, the claimant is – *at the very minimum* – asked to confirm the following<sup>28</sup>:

1. \_\_\_\_\_ that he can read and write; has read the stipulations and release; and has reviewed it with his lawyer (and – optionally – can, in fact, recite the critical aspects of the deal by heart, without being prompted or “led” by attorney or judge);
2. \_\_\_\_\_ that he has signed the release;
3. \_\_\_\_\_ that he understand that, if he accepts the lump sum (or other settlement), and tenders the release, his weekly or bi-weekly check will stop; he will receive a lump sum; and he will not be entitled to further benefits;
4. \_\_\_\_\_ that he knows he cannot open his case again in the future, even if his condition worsens, and/or if new therapies or treatments are developed which can treat the injury;
5. \_\_\_\_\_ that he knows he need not settle, and that the possibility exists that he could receive more – or less – from the employer over time;
6. \_\_\_\_\_ that he is not under the influence of any substances that would impair his or her decision-making;
7. \_\_\_\_\_ that he is under no other physical or mental disability that would interfere with his ability to comprehend the full legal significance of giving a release and accepting a lump sum;
8. \_\_\_\_\_ that nothing else of value has been promised to him in order to persuade him to compromise his claim and hand over the release;
9. \_\_\_\_\_ that he knows that the fee charged by his attorney, a representative of his own choice, will be deducted from his check, and thus that his net will be in a particular lesser amount than the negotiated gross amount;
10. \_\_\_\_\_ that he has not been threatened or coerced into settling; the decision to compromise his claim, and hand over a release, has been reached of his own free will;
11. \_\_\_\_\_ that he knows future medical payers may not pay for work-injury-related medical bills.
12. \_\_\_\_\_ (*for the claimant not represented by counsel*): that defense counsel is not his or her adviser; and that the judge's role is not to protect his or her best interests, but only to determine whether he or she understands the full legal significance of the proposed settlement

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<sup>28</sup> *Note:* This is only a basic outline. Each case will require somewhat different and/or additional questioning.

X. APPENDIX V: The Medicare Secondary Payer Issue (In Brief)

The CMS pre-approval requirement

~ devices to speed settlement and at once protect the worker's interests

~ proposals for reform (the ABA/PBA proposal)

For a full account, see PBA WC Law Section *Newsletter*, Vol. VII, No. 84

~ in general:

According to a Bulletin from the Centers for Medicare & Medicaid Services (CMS), as of May 1, 2004, all Workers' Compensation Medicare Set-aside Arrangement (WCMSA) Proposals (and all subsequently requested documents) must be sent to a national, centralized point of receipt. The address is:

CMS  
c/o Coordination of Benefits Contractor  
P.O. Box 660  
New York, NY 10274-0660

According to the Bulletin, "Once recorded in a centralized database, the WCMSA proposal will be electronically forwarded to the Regional Office having jurisdiction for review as listed in the April 23, 2003, FAQ" available at [http://www.cms.hhs.gov/medicare/cob/pdf/wc\\_faqs.pdf](http://www.cms.hhs.gov/medicare/cob/pdf/wc_faqs.pdf).

CMS in 2004 posted a Proposal Standard Checklist on its website. The checklist is found at <http://www.cms.hhs.gov/medicare/cob/pdf/wcchecklist.pdf>.

The latest public information offering from the Centers for Medicare & Medicaid Services (CMS) on the issue of Medicare Set-Asides is found at a comprehensive and seemingly up to date website and is found on line at: [http://www.cms.hhs.gov/medicare/cob/attorneys/att\\_wc.asp](http://www.cms.hhs.gov/medicare/cob/attorneys/att_wc.asp).

**Note: Recommended articles**

R. Gonzalez, "Reasonable Consideration of Medicare's Interests in Workers' Compensation Settlements," 77 Florida Bar Journal 81 (November, 2003)

Peterson, "Summary of Medicare, Workers' Compensation and Set-aside Trusts," 26 So. Illinois U. Law Journal 713 (2002)