Claim Resolution Structured Settlement Agreements

Executive Summary

Structured settlement is a new tool for resolving workers’ compensation claims created as part of the 2011 workers’ compensation reform legislation, Engrossed House Bill 2123. Effective January 1, 2012, a worker who is age 55 and older may be eligible to settle the non-medical portion of his or her workers’ compensation claim.

By January 1, 2012, Labor and Industries (L&I) had successfully established the new Structured Settlement Program, staffed by trained claims analysts and negotiators who work directly with workers, employers, and their representatives to explore settlement opportunities. Technology changes had been implemented to receive applications and make payments from our bill system. Development continues on a case management system for structured settlement agreements; it is on track, with phased delivery of various components. The first component, an automated data entry function for detailed case reviews, has been successfully completed and implemented in the program.

As of September 30, 2012, L&I had received 349 applications for settlement agreements on claims insured with the State Fund (through L&I). As of the same date, L&I had submitted 18 agreements to the Board of Industrial Insurance Appeals (BIIA). Fourteen had received approval and the remaining 4 were pending approval as of September 30.

This report is the second of four required by RCW 51.04.069. The Legislature directed the department to report to the appropriate legislative committees concerning implementation and results of structured settlement agreements for injured workers beginning on December 1, 2011, and annually thereafter through December 1, 2014.

Settlement Data

The new law took effect on January 1, 2012, and L&I began accepting requests for state fund claim settlements from workers and employers, and their representatives. Applications were screened to determine if they met the three minimum statutory criteria:

- The worker is aged 55 or over at time of settlement application;
- At least 180 days have passed since the claims was received by L&I; and
- The claim has a final allowance order (no protest or appeal filed within the statutory timeframe of 60 days since communication).

As of August 31, 2012, L&I had received 340 applications for state fund claim settlements. The majority of these, 264, were submitted by workers without legal representation. Thirteen applications led to final settlement contracts submitted to the BIIA and approved. One agreement was initially rejected because the BIIA required additional information to determine if the agreement was in the worker’s
best interest. L&I gathered the additional information, resubmitted the agreement, and received approval from the BIIA.

From the beginning, L&I carefully explored settlement with eligible workers mindful of the need to ensure good outcomes for the worker and savings to the fund. This careful approach was characterized by thorough review of each applicant’s claim file and financial circumstances. There was also a large educational component as no one in the state had ever done this before. The low percentage of applications that resulted in successful contract negotiations and submission to the BIIA is primarily due to two considerations:

First, the settlement law creates a dramatically new option for parties. Each negotiation and contract is unique and presents new issues that have not been seen in Washington’s workers’ compensation system. L&I, the worker and, when appropriate, the employer work together to sort through each of these new issues as they arise. The primary issues that can affect the use of structured settlements are discussed further in the “Emerging Issues” section below.

Second, the amount of information required for a settlement contract to successfully meet the BIIA’s approval criteria is significant, particularly regarding the worker’s financial and personal information and future plans. BIIA approval requires workers to disclose their household income and expenses, to formulate specific plans for how they will continue to satisfy their monthly expenses, and details of how their use of settlement funds will factor into their future financial situation. Gathering this information takes time and some persuasion. It is anticipated that over time settlements will become more familiar to workers, attorneys and employers resulting in wider use of the option.

L&I is tracking characteristics of settled state fund claims, as follows:

- Age range of claim: 13 to 139 months
- Median claim age: 47 months
- Age range of worker: 56 to 71 years
- Median worker age: 59.2 years

L&I does not track characteristics of settled self-insured claims, nor is it party to self-insured claim settlements. By monitoring BIIA orders, we can determine that as of August 31, 2012, of the self-insured settlement agreements submitted, the BIIA approved three settlements and rejected fourteen submissions. Generally, the agreements were rejected because the agreements did not meet the technical requirements of the law. For example, several did not meet the minimum or maximum amounts for the payment schedule. Others failed to stipulate that the agreement was entered into knowingly or willingly, or requested the BIIA to adjudicate disputed issues as part of the settlement.

L&I took steps early on to help ensure structured settlements in state fund cases met BIIA expectations. Staff worked early on with Attorney General staff to ensure settlement contracts would comply with the technical requirements of the law. Also, our implementation team interacted with the BIIA’s settlement team to understand expectations leading up to the January 1, 2012 implementation date. This detailed coordination better equipped L&I to draft comprehensive contracts. The department made its contract
templates available to labor and business groups in an effort to share the knowledge accumulated and facilitate contract acceptance by the BIIA.

**Emerging Issues in Settlement Negotiation**

L&I’s settlement consideration and review process has revealed four emerging issues influencing the frequency and success of settlement negotiation: Social Security entitlement, future liability, the BIIA’s application of the best interest standard with represented workers, and worker privacy concerns relating to the BIIA approval process.

**Social Security Offset**

L&I is mindful that one of the objectives of the structured settlement reform legislation is to ensure that settlements are in a worker’s best interest. As a result, worker’s interest is a key consideration for L&I in determining whether to pursue settlement. Another objective is to control rates, reduce pensions, and generally save costs to the industrial insurance funds. As a result, a second key consideration is the expected cost of a claim. Any settlement must effectively balance these two considerations. L&I has declined negotiations to several applicants who presented compelling personal reasons for settlement because of the impact of Social Security offset. As explained further below, the offset’s reduction to the worker’s benefit level made it impossible to negotiate a settlement amount that would both meet the worker’s best interest and avoid some cost to the funds.

When a worker is receiving both Social Security benefits (either retirement or disability) and pension benefits, L&I reduces the amount of payments so that the combined total of benefits received by the worker does not exceed the cap established in federal law. This reduction is called “Social Security offset.” This effectively reduces the cost of the claim. The offset in some cases, for example where the worker has high Social Security benefits but a smaller workers’ compensation benefit rate, is significant. In contrast, there is no “offset” for benefits paid as a result of a structured settlement; the industrial insurance funds pay the full amount.

Many workers seeking settlement are either receiving Social Security disability or will soon be eligible for Social Security retirement. As a routine practice, L&I must determine the impact of existing or future offset to the cost of a potential pension claim. L&I is finding that in many cases, settling a claim for structured settlement payments appears more costly than placing a worker on an offset pension. Or, it practically reduces the amount that can be offered to the point that it would not be in the best interest of the worker to accept it.

**Future Liability for Workers Returning to Work**

In any settlement, L&I must consider possible future benefits for the worker; future liability is a key element of consideration when deciding whether to negotiate a settlement. Future liability must be considered not only for the claim in settlement, but for other claims that might reopen, and for future claims that might be filed.
Future liability is a strong consideration for workers who want to return to work after settlement. This is because they may be injured on the new job, at which point they become eligible for benefits on a new claim, including potential permanent partial disability (PPD) and pension awards. Regular benefit payments of PPD are deducted if a worker eventually receives a pension. But structured settlement payments cannot be deducted. As a result, a worker who settles for structured settlement payments and later is awarded PPD or a pension on a new claim will receive more in benefits, resulting in higher net costs to the fund, than a worker who does not enter into a settlement.

For example, consider the following scenario. A 62 year-old certified nursing assistant in a retirement community injures her knee while lifting a patient. After several months of treatment and rehabilitation, the worker approaches the department to settle her claim. She intends to retire, does not want to go through vocational training, but wants her PPD award and future surgery when she needs it. At this point, because the worker is unlikely to return to work, the future liability on the claim and the cost to the funds are fairly certain. L&I can settle for an amount that compensates the worker fairly, but that will also likely save some amount (the administrative costs associated with retraining, for example).

Now consider the same nurse’s aide, who tells L&I she doesn’t want to go through vocational training, but wants to work part time in the same retirement community. Because she’s returning to work, chances are much higher that she’ll be injured again. Under a new claim, she will be entitled to full benefits, including a pension (which may be more likely, especially as she gets older). Future costs for this worker are now uncertain, and potentially high. And because, unlike PPD, we cannot deduct settlement payments from a future pension, settling is likely to increase overall costs to the fund for this worker.

As these scenarios illustrate, it is practically very difficult to determine a feasible settlement for a worker who intends to return to active work. As a result, L&I may decline settlement if there is a strong likelihood that the worker will return to the job that has a high potential to result in a new injury or occupational disease. Without any ability to offset future claim benefit payments by prior settlement payments, this trend is likely to continue.

Best Interest Standard with Represented Workers

All structured settlement agreements are subject to review by the three members of the BIIA, who will reject or approve the agreement based on factors listed in the law. Specifically, the BIIA must reject a settlement if it finds that:

1. The parties have not entered into the agreement knowingly and willingly;
2. The agreement does not meet the requirements of a claim resolution structured settlement agreement;
3. The agreement is the result of a material misrepresentation of law or fact;
4. The agreement is the result of harassment or coercion; or
5. The agreement is unreasonable as a matter of law.
For those workers represented by an attorney, settlement agreements go directly to the BIIA for the review described above.

For unrepresented workers, there is an additional pre-BIIA review. An industrial appeals judge (IAJ) holds a conference between all parties to review the proposed settlement. At the conference, the IAJ must ensure that the unrepresented worker understands what industrial insurance benefits are generally available and how the proposed settlement will impact those benefits. The IAJ must also determine whether the proposed agreement is in the “best interest” of the worker; only those in the worker’s best interest are passed on to the full BIIA for review.

The BIIA has interpreted the requirement that they reject agreements that do not “meet the requirements of a claim resolution structured settlement agreement” to mean that they must review all proposed settlements to determine that it is in the worker’s best interest, whether the worker is represented by an attorney or not. The BIIA’s decision determines that this review is in accord with the legislative intent. To date, the full BIIA has rejected two self-insured and one state fund proposed settlement agreement involving represented workers, on the basis that there was not sufficient information in the record to prove that the agreement was in the best interest of the worker.

In one of these rejections, both the worker and the self-insured employer were represented (the department is not a party to self-insured settlements). The BIIA rejected the agreement. The self-insured employer appealed the BIIA’s decision to superior court. The superior court reversed the BIIA, holding that the BIIA should not conduct a best interest review for represented workers. The BIIA has appealed the superior court’s decision. The matter is now pending in the Court of Appeals.

**Worker Privacy Concerns**

Structured settlement agreements are required to be in the best interests of the worker. To demonstrate that an agreement is in a worker’s best interest, the worker will often need to share extensive personal information that is not usually part of the industrial insurance claim file. For example, during a typical negotiation process, workers share with the department information about retirement and union benefits, spousal income, motivations for settling, and information about medical conditions unrelated to a claim.

At L&I, this information is protected from public disclosure because it becomes part of the workers’ claim file, which is statutorily protected. However, once a structured settlement agreement is forwarded to the BIIA, as required, that protection does not apply. The BIIA must review the same personal information in order to confirm that the settlement is in the worker’s best interest, but the information becomes part of the hearing file, which is subject to public disclosure as a public record.

Some workers and their representatives may be hesitant to pursue settlement and expose sensitive personal information to any requestor. The potential effect of this disclosure will continue as long as settlement information is subject to existing public disclosure law. L&I has submitted agency-request legislation to protect this personal information.
Project Objectives

The Structured Settlement Program’s objectives remain unchanged since the initial report:
1. Create a highly effective, streamlined process that requires minimal additional effort for injured workers /employers to participate fully
2. Establish appropriate public policies and operational oversight to govern the program
3. Develop a wide-reaching and compelling communication and education campaign for customers and agency staff
4. Implement information technology to support business operations of the Structured Settlement Program, short-term and long-term
5. Develop effective program controls and processes that follow agency compliance standards
6. Identify objective measurements and develop reporting to monitor the operational performance and efficiency of the program

Update on Objectives

1. Create a highly effective, streamlined process that requires minimal additional effort for injured workers /employers to participate fully

L&I’s Structured Settlement Unit is the single point of contact for workers and employers regarding all settlement requests and negotiation activity. Concentrating structured settlement information gathering, analysis, negotiation, and contract drafting in this core workgroup allows L&I to ensure workers and employers receive timely and accurate information that is specific to their claim(s). This single point of contact is dedicated to guiding parties through the process while working with L&I management and executive leadership for policy and negotiation direction.

Settlement Unit Staff

L&I’s settlement unit staff includes workers’ compensation adjudicator 4s (WCA4), program specialist 4s, office assistants, and a program specialist 5 supervisor. L&I was allocated 13 FTEs for the settlement program based on the agency’s fiscal note. However, applications for structured settlements are being submitted at a slower rate than early estimates used to determine potential workload. In January, the first month of operation, L&I received 34 settlement applications—12 from injured workers and 21 from employers. From January to April, the monthly total of applications slowly increased to a peak of 86 in April, averaging 43 per month through September 2012. Employer participation is very low with only six additional employer applications since the initial 21 received in January.

L&I has adjusted staffing levels in response to the workload. Currently, six unit staff are assigned to review and negotiate settlements on a daily basis. In addition to responding to applications, they review claims for settlement potential and work with internal vocational and appeals specialists to identify appropriate opportunities. The remaining staff members are on assignment assisting other program areas.
Process Overview

Settlement applications are initially assigned to a WCA4, who operates as a “settlement analyst.” The settlement analyst contacts the party applying for settlement to discuss background and gather additional information necessary for settlement discussions that is not normally contained in the department’s claim file. For workers who apply, this information typically consists of all income and expenses, for both the worker and spouse, any non-claim-related medical conditions, retirement or Social Security benefits, and a discussion of whether settlement is in the worker’s best interest and will result in a better outcome than if the worker continued to participate in the claim process. For employers who apply, this further inquiry usually focuses on any return-to-work or retirement opportunities that structured settlement may help facilitate, such as a permanent job offer within the worker’s physical restrictions at a work pattern involving fewer hours than at date of injury.

L&I settlement analysts also perform a full claim file review including analysis of other workers’ compensation claims the worker may have. This claim review information is analyzed along with the additional information gathered from the applying party and the analyst recommends for or against entering negotiations for a structured settlement.

The analyst presents this analysis and recommendation at a review session with other settlement unit staff, program manager, and assistant attorney general (AAG) where it is determined if negotiations should proceed. If negotiations are not recommended, the analyst notifies the requesting party by letter. L&I will only contact other parties if it decides to enter into negotiations.

If negotiations are recommended, the request is assigned to a program specialist 4, who operates as a “settlement negotiator.” Negotiations typically include an in-person meeting between the negotiator and worker to discuss the structured settlement option, answer any questions, and negotiate towards an agreed settlement amount and key contract terms. At this time, other parties are participating if interested.

If the parties successfully negotiate an agreement, the negotiator drafts the settlement contract for AAG review. The AAG-approved contract is distributed to the parties for signature and submitted to the BIIA for approval. If the worker is not represented by an attorney, our negotiator and AAG will arrange for another in-person or telephone meeting to present the contract and review each section of the document to insure the worker understands the terms. The contract is left with the worker at this point to be considered and signed without AAG or L&I personnel in attendance. When L&I receives the signed contract, it submits it to the BIIA. The BIIA then has 14 days to set a settlement conference with an IAJ if the worker is unrepresented. If the worker is represented, the contract goes directly to the BIIA for approval or rejection.

After the BIIA has approved the agreement, and the 30-day revocation period has passed, the agreement is final. Currently, L&I’s payment system accommodates periodic payments made on a monthly or bi-weekly basis with the initial payment limited to six times the state’s average monthly wage and subsequent payments of up to one-and-a-half times the state’s average monthly wage, as provided by law. L&I is exploring options to offer workers more flexibility with settlement payments,
such as offering periodic payments on a quarterly basis and accommodating requests for the periodic payment amount to change over time.

2. Establish appropriate public policies and operational oversight to govern the program

Daily settlement unit operations are overseen by the unit supervisor. The unit program manager coordinates with the unit supervisor for operational efficiency, focusing on ensuring smooth operation of the settlement analysis and negotiation process outlined in section 1. The supervisor or program manager accompanies unit negotiators to meetings with workers to insure uniform training and mentorship of settlement unit staff. Unit leadership emphasizes and works with staff to develop behaviors that manage worker expectations regarding settlement processes and results.

Beyond this close coordination between supervisor and staff, L&I follows a robust dual-review cycle of all settlement requests.

The settlement review sessions offer the full settlement staff, program manager, and AAG opportunity to review all claims in which the analyst recommends settlement negotiations. This forum brings together the collective knowledge and experience of settlement staff, leadership, and attorneys for an opportunity to discuss potential barriers to settlement and risks to all parties, including L&I. By spotting issues that will prevent successful claim resolution through structured settlement at this point in the review, L&I minimizes disruption to the claims administration process and ensures workers who will not benefit from settlement are informed of the decision as early as possible in the process.

Once a request passes this review, it proceeds to a subsequent approval session. That session includes high-level program managers who assist settlement staff in planning for negotiation issues.

This two-tiered review process focuses on building institutional knowledge and ensures proper oversight is in place to maintain L&I’s role of ensuring public policy interests are met through each settlement decision.

3. Develop a wide-reaching and compelling communication and education campaign for customer and agency staff

External communication focuses on providing easy to understand explanations of the state fund structured settlement program, process, and law to injured workers and employers. L&I’s website has a dedicated structured settlement webpage that presents information tailored to injured workers and employers. L&I also created three structured settlement brochures focused on three key customer areas: injured workers, state fund employers, and self-insured employers.

Managing expectations is a key component of successful settlement request resolution. Each settlement agreement is unique to the individual case circumstances and requires that L&I incorporate the worker’s best interest based on his or her individual facts and circumstances. Based on this, the settlement process does not lend itself to formulating overall criteria or guidelines for what case factors will or will not support settlement. Likewise, the individualized nature of the settlement option does not
leave room for generalized or standard settlement offers. Currently, L&I does not support a settlement approach that creates a standard formula for a settlement offer.

L&I has not published its settlement application form online; all of L&I’s materials, both print and web-based, invite interested parties to apply for state fund claim settlement by first calling our structured settlement unit. Because the settlement option is voluntary and available to only a portion of the injured worker population, L&I prefers interested parties first speak to a settlement unit staff member to learn more about the option and process before applying.

All workers eligible for settlement received a letter from L&I informing them of the new structured settlement law and inviting them to contact the structured settlement unit for additional information. Approximately 7,000 workers have open claims eligible for structured settlement.

L&I settlement staff have also presented to the legal community via workers’ compensation-themed continuing legal education conferences. These presentations were tailored to the worker representative community, presented L&I’s settlement review and consideration procedures, and provided updates on policy and rule implementation.

Staff have also presented to the labor community, speaking at conferences hosted by the Washington State Labor Council and Project Help. Additionally, L&I has delivered presentations to business and retrospective rating groups, helping develop an understanding of how settlement can benefit employers. Regular updates at the Workers’ Compensation Advisory Committee and the Retrospective Rating Advisory Committee have kept key stakeholders up-to-date with the progress and successes of the program.

Agency staff education is focused on delivering structured settlement trainings and presentations at regular meetings of various programs within the Insurance Services Division of L&I. L&I’s central messaging to internal staff remains for them to direct all customer inquiries and discussions to the structured settlement unit.

4. Implement information technology to support business operations of the Structured Settlement Program, short-term and long-term

Changes to existing information technology structures were designed and put into place to allow the settlement unit to intake applications and automate payments for final settlement agreements. These system changes have proven successful in facilitating the settlement unit’s review of requests and successful negotiation and payment of final settlement agreements.

L&I is now focusing on continued development of its case management system, which will build new technology applications to increase the unit’s efficiency and capacity to process a higher volume of settlement requests without the need for increased staffing.

The first component of the system was promoted to production on September 6, 2012. It consists of an online interface that allows settlement staff to generate a settlement evaluation form that auto-
populates all relevant electronic claim file information into an editable electronic document. The tool is comprehensive and integrates information from all of a worker’s claims into a single document. Key information includes:

- Name, contact, and legal representation information for all parties and key participants (worker, employer, and retrospective rating group)
- Settlement criteria information including date of injury, worker age, and claim allowance status
- History of other claims for the worker, including injury date, accepted conditions, time-loss, and permanent partial disability
- Accepted and denied conditions
- Vocational referrals and outcomes

Prior to this automated tool, staff typically spent an hour or more gathering this information from multiple screens and claim file documents.

The development team is now focusing on future deliverables, including the ability to search multiple claims for specific document types, such as vocational or medical.

5. Develop effective program controls and processes that follow agency compliance standards

Settlement unit leadership consulted with L&I’s Internal Audit Program early on and throughout implementation of the program. Key focus areas include settlement payment and information integrity.

The improvements to existing information technology systems built in systemic controls that minimize payment errors and potential misdirection of funds. The system restricts any settlement staff member who participates in negotiating or approving structured settlements from creating settlement payments. All payments require manager review and approval. The system applies the statutory payment limits and will not allow a periodic payment if its amount falls outside of the statutory range.

6. Identify objective measurements and develop reporting to monitor the operational performance and efficiency of the program

The settlement unit developed daily operational performance metrics tied to the settlement process. These measures focus on ensuring settlement applications are reviewed, negotiated, and contracts drafted and submitted within target completion timeframes. These metrics tie directly to L&I’s emphasis on service and value. Customers are served through prompt action on their requests and timely follow through with contract drafting and payment. Performance outcomes are reported to executive leadership.

Project Scope

L&I continues to clearly identify and manage scope. Phases 1 and 2 are complete and functioning as planned. Phase 3 development and phased implementation continues and is on track for completion within scope and budget by the end of the current biennium.
Policy & Rules

L&I enacted emergency rules effective January 3, 2012, to coincide with the program’s launch and provide instruction and clarification in these areas:

- Initiation of a structured settlement agreement negotiation
- Definition of an affected employer and employer notification
- Continued entitlement to Title 51 benefits
- Description of when a claim is in active negotiation
- Prohibition against including non-Title 51 issues in a settlement agreement
- Prohibition against settling future Title 51 claims, including claims by survivors
- Clarification that all outstanding protests and appeals on a claim are deemed resolved by a structured settlement on the claim
- Finality of agreement
- Process for prior approval by director when self-insurance agreement impacts Title 51 funds
- Definition of periodic payment schedule
- Established procedure for parties to request copies of prior settlement agreements

Along with filing its rules on an emergency basis, L&I filed the same rules for enactment on a permanent basis. L&I held four public hearings in February at L&I office locations in Tukwila, Tumwater, Vancouver, and Spokane.

Key Project Milestones

The following are high-level milestones of the Structured Settlement Program:

- January 1, 2012 – launch of structured settlement program, with intake of structured settlement requests
- January 1, 2012 – emergency structured settlement rules effective
- March 22, 2012 – structured settlement system payment readiness
- March 30, 2012 – first structured settlement agreement effective
- April 2, 2012 – first state fund structured settlement payment
- April 20, 2012 – permanent structured settlement rules effective
- September 6, 2012 – phase 3 case management system first release
- June 30, 2013 – phase 3 full release

Next Report

L&I’s next report to the Legislature is due December 1, 2013, with a final report from L&I on December 1, 2014. In 2015, 2019, and 2023, L&I must contract, in consultation with the Workers’ Compensation Advisory Committee, for an independent study of agreements. The studies must evaluate the quality and effectiveness of agreements, provide information on the impact of agreements to state fund and self-insured employers, and evaluate worker outcomes.