Structured Settlement Program

2013 Report to the Legislature
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Executive Summary

The Department of Labor & Industries (L&I) launched the Structured Settlement program in January 2012. Structured settlements were created by the Legislature as a potential way of resolving certain workers’ compensation claims. Since its adoption, the department has received more than 800 applications from workers who have chosen to pursue this option. Through August of 2013, a total of 51 state fund agreements have been approved. Participation remains lower than originally projected. Therefore, in June of 2013, L&I significantly reduced the program’s projected savings to the workers’ compensation system.

This report is the third in a series of four. The Legislature requires the department to provide written reports on the implementation and results of structured settlement agreements starting December 1, 2011, and annually thereafter through December 1, 2014.

CLAIM RESOLUTION STRUCTURED SETTLEMENT AGREEMENTS

Structured settlements were created by the Legislature as a potential way of resolving certain workers’ compensation claims. It was created as part of the 2011 workers’ compensation reform legislation.¹

According to the law, an injured worker who is age 55 or older, whose claim has a final allowance order and has been in the system for six months, may be eligible to settle the non-medical portion of his or her workers’ compensation claim as long as it is in the worker’s best interest. The Board of Industrial Insurance Appeals (BIIA) must approve all settlements.

The department implemented technology solutions to receive structured settlement applications, make payments and manage cases. The program is staffed by trained specialists who work directly with workers, employers, and their representatives to explore settlement opportunities.

Number of Agreements and Savings Projections

Since the program’s inception in January of 2012, more than 800 applications for settlement have been received. Through August 31, 2013, a total of 51 state fund agreements have been approved. For the most recent reporting period, between August 31, 2012 and August 31, 2013, L&I received nearly 400 applications for settlement agreements on claims insured through L&I or the State Fund. As of that same date, L&I submitted and received approval on 38 of these agreements. Six more awaited approval by the Board of Industrial Insurance

¹ Engrossed House Bill 2123, codified as RCW 51.04.063
Appeals (BIIA) and 69 applications were under review, in negotiations, or in contract drafting. Because these 75 applications (69 plus 6) had not yet been either decided by or sent to the BIIA, it is still too early to report on the results of those applications. The remaining applications received during this time period were not pursued primarily because it could not be shown that settlement was in the best interest of the worker or that there would be a savings to the state fund.

Based on almost a year of settlement experience, in June of 2013, the department revised assumptions to lower the number of expected settlements. This change reduced the structured settlement savings estimates by 75 percent, and through the end of Fiscal Year 2013 savings are now estimated at approximately $100 million.

In 2015, 2019 and 2023, the department will contract for an independent study of claim resolution structured settlement agreements. Those studies will be submitted to Legislature, and will evaluate the quality and effectiveness of structured settlement agreements of state fund and self-insured claims, provide information on the impact of these agreements to the state fund and to self-insured employers, and evaluate the outcomes of workers who have resolved their claims through the claim resolution structured settlement agreement process.
STRUCTURED SETTLEMENTS

This report outlines the current state of the structured settlement program, describing statistical information, the process involved for settling a claim and challenges faced in the implementation.

The Structured Settlement program is still very new. As such, the department continues to educate employers and workers that a structured settlement may be an option and how to apply. Most of the workers who apply for a structured settlement are not represented by an attorney. To date, the average worker who has applied is 62 years of age. Older workers tend to be more financially independent, which is a key factor in deciding whether it is in the best interest of a worker to settle the claim.

SETTLEMENT DATA AND PROCESS

As the administrator for State Fund claim settlements, L&I receives requests for settlement of those claims. A State Fund claim is one in which the employer pays a premium to L&I to cover their employee for work-related accidents. This is in contrast to a self-insured claim where the employer insures its own risk and the State Fund has regulatory oversight.

To administer the program, the department developed an application that met the three statutory criteria:

- The worker is age 55 or older at the time of settlement application.
- At least 180 days have passed since the claim was received by L&I.
- The claim has a final allowance decision.

Between August 2012 and August 2013, L&I received nearly 400 applications for State Fund claim structured settlements. The majority of these, 328, were submitted by workers without legal representation. Of the total received, 38 applications led to final settlement contracts approved by the BIIA and as of August 2013, 75 others were either in process at the BIIA or L&I. Since the beginning of the program, a total of 51 state fund agreements have been approved.

Each Contract Unique

L&I continues to carefully explore settlement with eligible workers, keeping in mind the need to consider outcomes for the worker and reduce costs to the fund.
The approach includes a thorough review of each applicant’s claim file and any information the worker supplies to supplement the application. Among other things, this means taking into consideration:

- The medical status of the worker and whether further treatment is indicated.
- The financial viability of the worker apart from workers’ compensation benefits.
- Whether the worker can return to employment.
- Whether he or she is interested in retraining.

Staff takes all of these factors into consideration so that the decision whether to enter into a settlement can reflect the best interest of the worker and realize savings to the state fund.

Each negotiation and contract is unique and can present a host of new issues. L&I, the worker and, when appropriate, the employer, work together to sort through each of these new issues as they arise. Together they decide whether it would be more advisable to enter into a structured settlement or continue administering the claim. More often than not, the decision comes down to what the worker wants and whether he or she is financially independent apart from receiving workers’ compensation benefits. If the worker is fully able to return to employment, or needs significant medical treatment or has no means of financial support apart from retraining or other means, a settlement usually is not indicated.

Spending time educating stakeholders remains an important function. Since this program is still relatively new, the Structured Settlement staff spends a large part of their day teaching workers, attorneys and employers about the program. Program managers have spoken to stakeholder groups including labor and business groups, vocational groups and attorney groups. Internal staff have been taught how to communicate with eligible workers who might be considering this option.

As the settlement process and requirements continue to become more familiar to workers, attorneys and employers, there may be a wider use of the option. Not all of the applications will result in an approved settlement from the BIIA, but the applications being received do seem to indicate a more educated use of the option by the parties.

**The Approval Process**

In order for the BIIA to determine whether settlement contracts meet their approval criteria, a significant amount of personal information is required. Some workers choose not to disclose the information, either because they may fear the information will be released or they are concerned about sharing such personal information with a state agency.

BIIA approval requires that workers disclose:

- Their household income and expenses.
• How they will continue to pay their monthly expenses.
• Details of how their use of settlement funds will factor into their future financial situation.
• Why they would rather settle their claim than continue in the system.

Predicted Cost Savings

In the 2011 fiscal estimate for the enabling legislation, the department estimated savings from structured settlements through the end of Fiscal Year 2013 would total approximately $405 million. These savings included estimates for existing claims that would settle and for new claims that occur each year. Estimates were based on assumptions about which types of claims would settle, how many would settle, when settlements would occur in the life of the claim, and what the average savings would be.

Based on almost a year of settlement experience, in June of 2013, the department revised these assumptions to lower the number of expected settlements. This change reduced the structured settlement savings estimates by 75 percent, and through the end of Fiscal Year 2013. Savings are now estimated at approximately $100 million.

Tracking Settled State Fund Claims

To measure the effectiveness of the program, L&I is tracking certain characteristics of settled State Fund claims:

• Age range of claim: 17-199 months
• Median claim age: 59 months
• Age range of worker: 56 to 77 years
• Median worker age: 62 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, the department can determine that, as of August 31, 2013 of the self-insured settlement agreements submitted, the BIIA approved 19 self-insured settlements and rejected seven.

In one rejection, the BIIA determined it lacked sufficient information to determine whether the agreement was in the worker’s best interest. Because the worker had legal representation, the self-insured employer appealed the decision to Superior Court on the basis that the BIIA could not make a best interest determination if the worker has legal counsel. The Superior Court reversed the BIIA’s decision. The BIIA appealed the decision to the Court of Appeals, and it is currently pending.
Education and Outreach

The program engages in education and outreach, both inside the agency and with external stakeholders. In doing so, department staff sometimes use an example of a settlement. The stories are told carefully to protect the privacy of the workers involved, but they effectively give listeners more information as they consider settlement for a client or employee.

L&I's website has a dedicated Structured Settlement web page that presents information specifically tailored to injured workers and employers. The site also offers a new “Apply Online” feature, which allows injured workers or employers to file their settlement application electronically.

As of this writing, about 7,000 workers have open claims eligible for structured settlement. All of these workers received a letter from the department informing them of the structured settlement law and inviting them to contact the department for additional information.

CONSIDERATIONS IMPACTING SETTLEMENT SUCCESS

Since the last report, the structured settlement submissions to the BIIA have been more successful, but certain considerations remain. Three issues continue to impact the frequency and success of settlement negotiation:

- Social Security offset
- The BIIA’s application of the best-interest standard with represented workers
- Worker privacy concerns relating to the BIIA approval process

Social Security Offset

L&I always bears in mind that the objectives of the Structured Settlement program are to ensure that settlements are in a worker’s best interest and that costs are reduced. Any settlement must effectively balance these two considerations.

L&I has declined negotiations with certain applicants when their benefits are reduced because of the worker’s Social Security entitlement. When a worker is receiving both Social Security benefits (either retirement or disability) and pension benefits, L&I reduces the amount of its payments so that the combined total of benefits received by the worker does not exceed the cap established in federal law. The lower workers’ compensation benefit level makes it impossible to negotiate a settlement amount consistent with the worker’s expectations. Since workers must be age 55 or older, Social Security offset considerations come up in a high percentage of cases.
Best Interest Standard with Represented Workers

As reported previously, all Structured Settlement Agreements are subject to review by the three members of the BIIA. They 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.
5. The agreement is unreasonable as a matter of law.

For those workers represented by an attorney, settlement agreements go directly to the three members of the BIIA for the review described above.

Unrepresented workers have 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 make sure 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 law to be that they are required to determine if a settlement is in the worker’s best interest, regardless of whether they are represented by an attorney. As of August 31, 2013, the BIIA has rejected 11 self-insured and 5 State Fund proposed settlement agreements involving represented workers, based, at least in part, on the agreement not containing sufficient information to prove that the agreement was in the best interest of the worker.

Worker Privacy Concerns

Demonstrating that an agreement is in a worker’s best interest means that the worker will need to share extensive personal information that is not usually part of the industrial insurance claim file. While a claim file is protected from disclosure, an agreement submitted to the BIIA is not. During a typical negotiation, a worker might share with the department information about retirement and union benefits, spousal income, motivations for settling, and information about medical conditions unrelated to a claim.

By law, all L&I claim information is protected from public disclosure. Per the statute, the agreement itself is protected because it is maintained in the claim file, which is confidential and not disclosable to anyone unless they are actively negotiating a subsequent agreement. This protection does not extend to the files held by the BIIA.
A structured settlement agreement in a claim file is confidential, but once it is forwarded to the BIIA, that protection does not apply. If the BIIA must review a represented worker’s personal information in order to confirm that the settlement is in the worker’s best interest, that information becomes part of the hearing file, which is subject to public disclosure as a public record.

Some workers and their representatives are 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 laws.
Conclusion

The Structured Settlement program got off to a slow and cautious start, allowing L&I, injured workers, employers and attorneys to carefully review this new option. The settlements entered into were given thoughtful consideration, and the workers have had extensive one-on-one time with department staff and Assistant Attorneys General. This has led to a well-developed sense of what is in the worker’s best interest and confidence that the settlement agreements L&I submits to the BIIA are of high quality and will receive approval.

The technological systems built to accommodate the new program have placed L&I at the forefront of Lean methodology, and they intentionally have widespread application beyond the Structured Settlement program.

Considerations impacting settlement success remain the same as those reported in 2012, so L&I continues to keep these issues in mind as it settles with workers.

Because of these considerations — and the fact that the program is still new — parties have entered into far fewer settlements than originally projected. With this smaller number of settlements, the agency has significantly decreased savings assumptions.