

# Washington Claims School

Presented by Reinisch Wilson Weier PC  
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# Claim Resolution Options: Strategies for employers

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### Overview

- Exploring the requirements, benefits, and challenges with the primary claim resolution strategies: claim closure, direct-effects pension, Second Injury Fund pension, sidebar settlement, and Claim Resolution Structured Settlement.
- Practice how to decide the best resolution option in a complex claim.

### Claim Closure

- *Authority:*
  - No single authority.
  - See RCW 51.32.055; WAC 296-15-450, and the Closure Checklist at <http://www.lni.wa.gov/ClaimsIns/Files/SelfIns/ClaimMgt/ClosureChecklist.pdf>
- *Requirements:* Claim closure requires that a worker be medically fixed, as well as determinations as to claim-related impairment and claim-related restrictions/employability.
  - *Medical fixity:* An industrially related condition is at medical fixity when no fundamental or marked change in an accepted condition can be expected, with or without treatment. WAC 296-20-01002; WAC 296-20-19000; *In re Lyle Rilling*, BIIA Dec., 88 4865 (1990).
  - *Permanent partial disability/impairment:* Permanent partial disability is an anatomic or functional abnormality proximately caused by the claim. WAC 296-20-19000. An impairment award is a monetary award designed to compensate the worker for the loss of function of a body part or organ system. Impairment is not dependent upon or influenced by the economic impact of the claim on an individual worker. WPI 155.06.03.
    - See <http://lni.wa.gov/ClaimsIns/Claims/Benefits/Disability/PpdAwardScheds.asp> for impairment schedules by year.
    - See provisions of WAC 296-20 and Department rating worksheets for details of category impairments (mental health, spine, etc.).
    - See *AMA Guides to the Evaluation of Permanent Impairment*, 5<sup>th</sup> Edition, to rate impairments of body parts that could be amputated.
  - *Employability:* “Employable” means having the skills and training that are commonly and currently necessary in the labor market to be capable of performing and obtaining gainful

employment on a reasonably continuous basis when considering a variety of factors (age, education, experience, preexisting conditions, and restrictions caused by the claim). WAC 296-19A-010.

- See RCW 51.32.095 for return to work priorities.
- If a worker is not able to return to work in the job of injury or via transferable skills, may be eligible for retraining.
- A worker eligible for retraining can elect Vocational Option 2. The worker would get an award of nine months of time loss compensation and retraining funds up to (currently) \$\_\_\_\_\_ held in an account for future training/education. If a worker elects Option 2, vocational issues are generally resolved.
- *Benefits of Claim Closure:*
  - In claims that are not complex, this is the typical way claims resolve.
  - Even in complex claims, this may be the cost-effective resolution strategy in the short term (but perhaps not long term).
  - Ability to request segregation.
- *Challenges with Claim Closure:*
  - Obtaining closure at the Department:
    - May be challenging when there is disagreement between providers. The attending provider's opinion receives special consideration. This does not mean extra evidentiary weight, but rather careful thought. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 572 (1988).
    - Medical evidence typically considered stale over six months old.
  - Potential appeal to Board of Industrial Insurance Appeals and associated litigation costs.
  - Potential exposure for all benefits upon successful reopening of the claim.
    - Possible exposure reduction if the reopening is seven years after the initial claim closure. RCW 51.32.160
    - Possible exposure reduction if conditions or treatment are segregated or denied. RCW 51.32.080(5).
- *Costs*
  - Potential costs to obtain closure.
    - Independent medical examinations.
      - The independent medical examination costs are found in the fee schedule available at <http://www.lni.wa.gov/ClaimsIns/Providers/Billing/FeeSched/2016/MARFS/Chapter13/default.asp>. Typical cost for a single independent medical examination is approximately \$\_\_\_\_\_ to \$\_\_\_\_\_.

- May need multiple independent medical examinations in different areas of medical expertise if there are multiple medical issues on the claim.
- May need additional independent medical examination(s) if the attending provider disagrees with prior independent medical examination(s). See WAC 296-15-450(3) (when an attending provider disagrees with an independent medical examination report, one option is to obtain a supplemental independent medical examination for preponderance purposes).
- Medical or vocational provider conferences.
  - Why?
    - Understand strengths/weaknesses of the case and of the provider's opinion.
    - Clarify inconsistent statements.
    - Update/confirm opinion in light of new records or events.
    - Potentially memorialize opinion in a declaration.
  - Costs?
    - Significant variance based on the issues involved, relevant record, length of conversation, and provider fee schedules.
    - \$\_\_\_\_\_ for a 30 minute conversation is not unusual, plus possible attorney fees for preparation and participation.
- Investigation.
  - In some cases, it is helpful to obtain further investigation on factual and legal issues and/or request medical records.
  - Costs will vary.
- NOTE: Many of the costs to obtain closure would likely be incurred in other resolution options.
- Potential costs to litigate a Department order related to closure.
  - *Employer's expert witnesses.* The costs to present one medical or vocational expert will vary based on several factors, but \$\_\_\_\_\_ to develop the testimony of each employer expert witness (meaning expert witness fees, predeposition conferences, and attorney fees to prepare for and travel to depositions) is not unusual.
  - *Opposing party's expert witnesses.* The attorney fees to prepare for and attend the deposition of each expert witness called by opposing party(ies) will vary, but \$\_\_\_\_\_ for each witness is not unusual.
  - *Lay witnesses.* Lay witnesses typically present testimony on the day of hearing. Usually cases will have one or two days of hearing. The costs for each hearing

will vary, but \$\_\_\_\_\_ for attorney time to prepare for and attend the hearing and travel costs would not be unusual.

- *Miscellaneous costs.* Litigation often involves conferences, motions, oral arguments on motions, etc. The costs will vary, but \$\_\_\_\_\_ in miscellaneous costs would not be unusual.
- *Example:* A one-day hearing with three employer medical experts, one employer vocational expert, two worker medical experts, and one worker vocational expert could cost approximately \$\_\_\_\_\_.
- *Further appeals:* There will be additional costs if the Board's decision is appealed to higher courts.
- The efficacy of litigation depends on the chances of success, costs of litigation, liability exposure, and other factors important to the parties.
- When to consider closure over other resolution options.

### Direct-Effects Pension

- *Authority:* RCW 51.08.160 "Permanent total disability" means loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation.
- *Requirements:*
  - Worker either has a medical condition listed in RCW 51.08.160 or is permanently unable to return to work.
  - Technical requirements.
- *Benefits of direct-effects pension:*
  - If employer agrees with this option, the worker will often cooperate, and there is little exposure for litigation.
  - Typically encompasses all future exposure regarding disability.
  - May be able to reduce pension costs by prior permanent partial disability. RCW 51.32.080(4).
  - May resolve exposure related to medical benefits (although workers may apply for post-pension treatment order under RCW 51.36.010).
  - Possible cost reduction if the worker is receiving Social Security Disability benefits. RCW 51.32.220, RCW 51.32.225, RCW 51.32.230.
- *Challenges with direct-effects pension:*
  - Often one of the most expensive resolution options.
  - Pension reserves are subject to change.
  - Must meet substantive requirements and obtain Department approval.

- The Director has discretion to award post-pension medical treatment. RCW 51.36.010.
- *Cost:*
  - Contact the Department's Pension Benefit section at 360-902-5119 and request a pension reserve estimate.
  - Will often be roughly equivalent to the time loss compensation rate multiplied by life expectancy, with reduction considering rates of investment.
- When to consider direct-effects pension over other resolution options.

## **Second Injury Fund Pension**

- *Authority:* RCW 51.16.120. When a worker is rendered totally and permanently disabled from the combined effects of preexisting and industrially-related conditions, the employer must pay the accident cost at its employment to the Second Injury Fund, and the Second Injury Fund will be used to cover the costs of pension.
- *Requirements:*
  - Preexisting, partially disabling condition combines with industrially related condition to render the worker totally and permanently disabled.
  - The employer will need to pay Second Injury Fund access premiums for three years plus the amount of permanent partial disability attributable to the claim.
- *Benefits of Second Injury Fund pension:*
  - Worker and employers are usually able to cooperate, and there is little exposure for litigation.
  - In some cases, may allow employer to avoid full costs of pension.
  - Generally encompasses all liability related to disability.
  - May resolve exposure related to medical benefits, although workers may apply for post-pension treatment order. RCW 51.36.010.
  - Possible cost reduction if the worker is receiving Social Security Disability benefits. RCW 51.32.220, RCW 51.32.225, RCW 51.32.230.
- *Challenges with Second Injury Fund pension:*
  - Due to recent premium increases, Second Injury Fund "relief" is usually more expensive than direct-effects pension.
  - Must meet substantive requirements and obtain Department approval.
  - Frequent challenges with obtaining an appropriate pension effective date (potentially avoided with stipulation to waive difference between time loss compensation and pension rates between pension effective date and pension order).
  - The Director has discretion to award post-pension medical treatment. RCW 51.36.010.

- *Steps for obtaining a cost estimate:*
  - Step one: Contact the Department's Pension Benefit section at 360-902-5119 and request a pension reserve estimate.
  - Step two: Contact Brenda Brown at [brbt235@LNI.WA.GOV](mailto:brbt235@LNI.WA.GOV) and request an estimate of the effect of a new pension on employer's Second Injury Fund premium.
    - Include the claim number and pension reserve estimate.
    - Ms. Brown will then email a spreadsheet estimating how much the new pension would increase the employer's premium for year one.
  - Step three: Calculate the premium increase for all three years by multiplying the premium increase for year one by 1.05 (this will equal the year two increase); and then multiply the year to increase by 1.05 (this will equal the year three increase). Add the increases for all years together.
    - Why do we multiply by 1.05? To account for estimated yearly premium increases. Please note increases cannot be predicted with certainty.
    - Example: Ms. Brown conveys that accessing the Second Injury Fund would cost the employer \$50,000 in access premiums in the first year.
      - Year one premium: \_\_\_\_\_.
      - Year two premium: \_\_\_\_\_.
      - Year three premium: \_\_\_\_\_.
      - Total premium estimate over three years: \_\_\_\_\_.
  - Step four: Add impairment award for claim-related impairment.
  - Step five: Compare cost of direct-effects pension and Second Injury Fund pension.
- When to consider Second Injury Fund pension over other resolution options.

## Sidebar Settlements

- *Authority:* No explicit statutory authority.
  - RCW 51.04.060 states: "No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void."
  - Sidebar settlements must avoid the prohibitions of RCW 51.04.060.
- *Requirements:* Sidebar agreements are contracts outside of the Industrial Insurance Act. Like typical contracts, there must be an offer, consideration, acceptance, and other legal requisites.
- *Benefits of sidebar settlements:*
  - Controlling risks and avoiding litigation.



- Potentially segregation of conditions if supported by medical evidence and approved by adjudicative body.
- *Challenges with sidebar settlements:*
  - Potential exposure for all benefits upon successful reopening of the claim.
    - Possible exposure reduction if the reopening is seven years after the initial claim closure. RCW 51.32.160
    - Possible exposure reduction if conditions or treatment are segregated or denied. RCW 51.32.080(5).
  - Potential to pay amounts greater than those allowed under the Industrial Insurance Act and/or not recover sidebar payments from future benefits.
  - May require Medicare Set Aside or Conditional Payment. Generally, Medicare concerns are raised if the worker is a Medicare beneficiary or has a reasonable expectation of Medicare enrollment within 30 months of settlement date, the settlement segregates medical conditions, and the settlement amount is greater than \$25,000. Medicare Set Aside Arrangements Transmittal (Patel Memo), July 23, 2001 at <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Memorandums/Downloads/July-23-2001-Memorandum.pdf>.
- *Costs*
  - May require similar workup and associated costs as those needed to close the claim.
  - Attorney costs to negotiate and draft sidebar settlement agreement.
  - Agreed upon settlement value.
- When to consider sidebar settlement over other resolution options?

### **Claim Resolution Structured Settlement (CRSSA, or “structured settlement”)**

- *Authority:* RCW 51.04.063: “Parties to an allowed claim may initiate and agree to resolve a claim with a structured settlement for all benefits other than medical.”
- *Requirements:*
  - 180 days or more since claim received by employer or Department.
  - Final and binding order allowing the claim.
  - The worker must be at least 50 years old.
  - Once agreement is made/executed, file with Board of Industrial Insurance Appeals for approval.
  - Installment payments.
- *Benefits to CRSSA:*

- Controlling risks and avoiding litigation.
- Potentially segregation of conditions if supported by medical evidence and approved by adjudicative body.
- Party cooperation.
- Eliminates future disability benefits liability (time loss, loss of earning power benefits, permanent impairment, and pension). NOTE: Employer remains liable for future claim-related medical treatment.
- Potential to avoid Medicare concerns because worker retains right to reopen for medical treatment.
- *Challenges with CRSSA:*
  - Does not eliminate future medical benefit liability upon successful reopening.
  - Time consuming. Must provide detailed information and obtain Board approval.
  - If a worker is not represented the Board will consider the “best interests” of worker – an ambiguous and difficult standard. *Bd. of Indus. Ins. Appeals v. S. Kitsap Sch. Dist.*, 181 Wash. App. 357 (2014).
- *Costs*
  - May require similar workup and associated costs as those needed to close the claim.
  - Attorney costs to negotiate and draft sidebar settlement agreement.
  - Settlement value.
- When to consider a Structured Settlement over other resolution options?

## Examples

**Example 1:** Claimant is currently 48 years old with preexisting and partially disabling cervical issues. She sustained a compensable injury to her low back on January 1, 2015 that was allowed pursuant to a final and binding Department order on April 1, 2015. The employer provided lumbar decompression surgery on June 1, 2015, but claimant's recovery has been long and difficult. While there is disagreement as to the extent of the injury, there is no disagreement that claimant was injured and has claim-related impairment and claim-related restrictions. Claimant is represented and the claim is open at the Department.

Two independent orthopedic surgeons have stated claimant is medically fixed with Category 4 lumbar impairment (\$29,566.59) and employable in a sedentary position. A vocational counselor has found claimant employable in multiple sedentary transferable skills jobs. However, claimant's attending provider believes claimant needs a lumbar fusion and the need for fusion surgery is related to the claim. The attending provider has stated that if claimant does not receive a lumbar fusion she will have "at least" Category 6 lumbar impairment (\$78,488.23). The attending provider wants claimant to undergo a functional capacity evaluation before they will comment on employability and has mentioned in passing that vocational retraining is likely. However, you suspect the attending provider will ultimately opine claimant is not employable, even considering vocational retraining. Claimant has not obtained a vocational opinion.

You contact the Department and learn that a direct-effects pension would cost approximately \$250,000 and Second Injury Fund premiums for year one would cost \$75,000.

### *Closure:*

1. Are requirements for closure met?
2. How much would closure cost?
3. Would closure eliminate future liability?
4. What can the employer do to make this option more attractive?

### *Pension:*

1. Are requirements for pension met?
2. How much would pension cost?
3. Would pension eliminate future liability?

*Second Injury Fund pension:*

1. Are requirements for Second Injury Fund pension met?
2. How much would Second Injury Fund pension cost?
3. What can the employer do to make this option more attractive?

*Sidebar Settlement:*

1. Is sidebar settlement possible and/or likely at this time?
2. What would be a reasonable sidebar settlement?
3. What can the employer do to make this option more attractive?

*Claim Resolution Structured Settlement Agreement (CRSSA)*

1. Are requirements for CRSSA met?
2. If yes, what would be a reasonable offer for CRSSA?

*Conclusion:*

.....

**Example 2:** Same facts as above but the worker is 50.

*Claim Resolution Structured Settlement Agreement (CRSSA)*

1. Are requirements for CRSSA met?
2. If yes, what would be a reasonable offer for CRSSA?
3. What can the employer do to make this option more attractive?

*Conclusion:*



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