

# **WAMO GUIDELINES**

## **INTRODUCTION**

Among the goals of the 2007 Workers' Compensation Reform Legislation are increasing benefits to injured workers, implementing cost-savings, and closing the Special Disability Fund to new cases. The addition of subdivisions (e), (f), (g), (h), and (i) to Workers' Compensation Law ("WCL") Section 32 will assist in attaining those goals. The Waiver Agreement Management Office ("WAMO"), on behalf of the Special Disability Fund, may enter into waiver agreements to resolve workers' compensation claims, utilizing funds generated by the proceeds of bonds sold by the Dormitory Authority of the State of New York. Creation of WAMO will encourage fair settlements of claims involving the Special Disability Fund. Such settlements will aid the statutory design to reduce the liabilities and ultimately close-out the Special Disability Fund. Such settlements will initially stabilize and ultimately reduce assessments and thereby lower the cost of providing compensation insurance. Those actions will in turn result in an improved business climate and increased employment opportunities in New York State.

The following Guidelines will be followed by WAMO in negotiating and seeking Board approval of waiver agreements (WCL §32(e)). These Guidelines shall also be followed by any third party with whom WAMO may contract to manage, administer, or settle claims on its behalf (WCL §32 (i) (1)).

## GUIDELINES

1) In accordance with WCL §32 (b) (1), (2), no waiver agreement proposed by WAMO, or any third party with whom WAMO may contract to manage, administer, or settle claims on its behalf<sup>1</sup>, shall be unfair, unconscionable or improper as a matter of law; nor shall any waiver agreement proposed by WAMO be based upon intentional misrepresentation of material fact.

2) To the extent that there is established Special Disability Fund liability involved, WAMO will cooperate with all insurance carriers as defined in WCL §2(12) in meeting their obligation under WCL §32(a) to offer each claimant the opportunity to enter into a waiver agreement within two years after the date the claim was indexed by the Board or six months after the claimant is classified with a permanent disability, whichever is later, and in the case of death, within six months after entitlement to benefits is established for all beneficiaries. WAMO shall further cooperate with any insurance carrier, self-insured employer or the State Insurance Fund in apportioning responsibility for making payments under such agreements. Any such agreement shall clearly set forth the individual payment obligations of the signatories, or shall signify that all signatories are jointly and severally liable.

3) In compliance with WCL §32(a), any waiver agreement offer made by WAMO shall clearly state what portion of the offer is for:

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<sup>1</sup> Unless otherwise specified hereinafter in these Guidelines, the use of the term “WAMO” shall mean, “WAMO or any third party with whom WAMO may contract to manage, administer or settle claims on its behalf.”

- a) Compensation, as defined in WCL §2(6), if any.
- b) Medical benefits, including prescription medicine, if any.
- c) Fee of claimant's attorney or licensed representative, if any.

4) If the claimant is not represented by an attorney or licensed representative, any waiver agreement offered by WAMO to the claimant shall be accompanied by a written statement of claimant's rights, obligations and potential liability if the offer is accepted.

5) In negotiating waiver agreements, WAMO will balance competing interests: providing fair settlements for claimants while acting within the financial interest of the Special Disability Fund. WAMO will also assist in meeting the statutory goal of closing out the Special Disability Fund. Therefore, WAMO will make waiver agreement offers to claimants in appropriate cases and receive, review, analyze, and respond to waiver agreement offers made to WAMO by and on behalf of claimants.

6) WAMO's jurisdiction extends to cases with established Special Disability Fund liability under both WCL §15(8) ("second injury fund") and WCL §14(6) ("concurrent employment fund"). It is therefore evident that WAMO's cases will be quite diverse: some will involve permanently disabled claimants, some will not; some will involve anticipated continuing benefits for both indemnity and medical expenses, some will involve only continuing indemnity or only continuing medical benefits; and therefore, some cases will require Medicare Set-Aside Agreements and some will not. Within each of the foregoing sets of cases, individual cases will have distinct facts and

circumstances to be considered in the negotiation of appropriate waiver agreements. In view of such diversity of cases, it is not feasible to create a settlement formula that would fit every case. Instead, WAMO will analyze each case on its merits, giving due consideration to the following list of issues:

- a) Anticipated duration and amount of future Special Disability Fund exposure.
- b) Whether claimant has been classified as permanently disabled.
- c) Current weekly indemnity rate.
- d) Claimant's present medical condition and prognosis; recent treatment history; current prescription medication regimen; and reasonably projected future medical costs.
- e) Claimant's life expectancy and whether it is impacted by unrelated medical condition(s).
- f) Other sources of income.
  - i. Pension
  - ii. Income of Spouse
  - iii. Other
- g) Whether there are unresolved issues in the case relative to WCL §114-a.
- h) Whether claimant is a current Medicare recipient, or is anticipated to become a Medicare recipient within thirty (30) months.
  - i. If either scenario applies, see Guideline #8 below.
- i) Whether the case involves a pending or reasonably anticipated third party action. (See: WCL §29).

j) It is not intended that the foregoing list of issues and circumstances be considered exclusive or exhaustive. WAMO will consider any and all relevant facts and circumstances in determining whether a waiver agreement is appropriate in each case and, if so, the appropriate amount to be paid pursuant to such agreement.

7) If the claim to be resolved via a waiver agreement is a death claim, WAMO must ascertain the identity of all eligible beneficiaries and confirm that all are parties to the proposed waiver agreement. Where infant beneficiaries are involved, confirm that all appropriate steps are taken to protect their interests and ensure that the waiver agreement is binding upon them.

8) Before entering into a proposed waiver agreement, which exceeds seven (7) years of indemnity benefits (plus funds for a reasonable medical allocation or Medicare Set-aside, where applicable), WAMO will obtain confirmation from an appropriate financial professional that the proposed waiver agreement is within the best financial interest of the Special Disability Fund.

9) Medicare's interests must be considered in the context of the settlement of workers' compensation claims via waiver agreements pursuant to WCL §32. Therefore, WAMO shall be cognizant of all statutes, rules and regulations pertaining to the interplay of Medicare and WCL §32 settlements; and WAMO shall not enter into waiver agreements under WCL §32 wherein Medicare has viable interests and those interests are not considered and addressed. In particular, if claimant is a current

Medicare recipient, or is anticipated to become a Medicare recipient within thirty (30) months, and if the proposed WCL §32 waiver agreement will extinguish claimant's right to further causally related medical benefits in the compensation claim, WAMO shall obtain prior approval from Medicare before seeking Board approval of a WCL §32 waiver agreement which includes termination of claimant's rights to future causally related medical benefits.

All claimants shall be duly advised of their responsibility to protect Medicare's interest when settling a claim by means of a WCL §32 waiver agreement. In particular, claimants who choose to protect Medicare's interest by means of a self administered Medicare set-aside account, will be duly advised of the requirement that such account be maintained separately from claimant's personal checking and savings accounts; and that such account be used solely for payment of causally related medical expenses that would otherwise be payable by Medicare. In addition, such claimants will be duly advised regarding the annual reporting requirements relative to self administered Medicare set-aside accounts.

10) In order to properly evaluate claims for the purpose of negotiating or managing waiver agreements, WAMO will require relevant data from insurance carriers, employers, the State Insurance Fund and the Special Funds Conservation Committee. In accordance with WCL §32(i)(4), WAMO shall issue written requests to the above referenced parties for any such relevant data that is lacking and necessary

to an evaluation of the value of a claim. (See: Subject No. 046-310, issued April 21, 2009, for procedures to follow if the recipient of such request objects to disclosure.)

11) As set forth in WCL §32(e), WAMO may enter into waiver agreements without consulting with, or obtaining the approval of, any employer, insurance carrier, self-insurer, the State Insurance Fund, or the Special Funds Conservation Committee. However, as set forth in WCL §32(f), WAMO shall give written notice to any employer, insurance carrier or the State Insurance Fund entitled to receive reimbursement from the Special Disability Fund in regard to any claimant, of any waiver agreement signed by WAMO with such claimant within fourteen (14) days of submitting such waiver agreement to the Board for approval.

12) If a claimant seeks a WCL §32 waiver agreement with WAMO whereby only the indemnity portion of the claim is to be closed, WAMO will contact the carrier/self-insured employer to obtain an agreement to waive any potential future right to transfer liability for medical liability to the Special Fund for Reopened Cases under WCL §25-a. If the carrier/self-insured employer agrees to waive said WCL §25-a rights, that provision shall be incorporated into the WCL §32 waiver agreement and the carrier/self-insured employer shall be a party and signatory to the WCL §32 waiver agreement. Absent such agreement by the carrier/self-insured employer, WAMO will not enter into the proposed WCL §32 waiver agreement with the claimant.

13. WAMO will be added as a party of interest on each case in which WAMO will be paying all or any portion of a WCL §32 waiver agreement. Examiners in the Section 32 Workgroup of the Workers' Compensation Board shall review proposed waiver agreements to which WAMO is a party with the same level of scrutiny applied in their review of proposed settlement agreements submitted by all carriers, self-insured employers, and the State Insurance Fund.

Similarly, Workers' Compensation Law Judges shall review proposed waiver agreements to which WAMO is a party with the same level of scrutiny applied in their review of proposed settlement agreements submitted by all carriers, self-insured employers and the State Insurance Fund in determining whether to approve or disapprove the proposed settlement agreement.

14) WAMO representatives may appear by telephone conference or by videoconference at the hearings scheduled for consideration of proposed waiver agreements.

15) Upon approval of waiver agreements to which WAMO is a party, timely payment shall be made of WAMO's liability pursuant to such agreements. (See Guideline #5 above regarding cases in which liability is apportioned between WAMO and one or more other parties.)