STATE SURVEY: SETTLING CLAIM AND FUTURE MEDICALS
(7/18/2016)

Q. With regard to lump-summing, how easy is it in your state for a claimant to settle out her claim if she has reached MMI with, say, a modest PPD level (e.g., she is still employable), yet she still has the need for future medicals?

A. We've surveyed members of our Larson's National Workers' Compensation Advisory Board and some of our LexisNexis authors. Their responses and comments are below. This document is a work in progress.

STATE	COMMENTARY	EXPERT
CA	Pretty easy in California. If she is working for the same employer and the carrier is no longer on the risk for this injury, it is fairly easy. I would rate the PD and determine the value of the FM for maybe the next 5 years, add them together and that is basically the value of the Compromise and Release Agreement (the document we use to lump sum settle) If she is on Medicare and let's say the C&R is $150,000, although not actually required in the Medicare Secondary Payors Act, none of my clients would settle without a Medicare Set Aside approved by Medicare.	John W. Miller Martin, Baker & Miller, LLP Westlake Village, CA (818) 844-8540 jmiller@martinbakermiller.com
CA	In CA the settlement is reviewed by a WC judge for adequacy and routinely approved. If a WCJ feels the settlement is not adequate, the parties frequently agree to a larger figure and obtain approval. About the only time a case could not settle for a lump sum is if the WCJ determines that the settlement is not in the best interests of the applicant. This might involve a minor or a an individual who is mentally incapable of making their own decision and a WCJ does not think the lump sum is in the best interest of the employee). We can, and do, even settle cases on occasion without any final medical evaluation where there is a desire on the part of both parties to settle and a record that is adequate for a WCJ to approval the agreement.	Richard M. Jacobsmeyer Shaw, Jacobsmeyer, Crain & Claffey PC Oakland, California (510) 645-7172 jakejacobsmeyer@shawlaw.org
CA	Routine if amount is adequate to cover cost of future medical. Bear in mind MSA and CMS approval may be needed if circumstances exist for such to be required.	Roger A. Levy Levy Mediations mediatelevy@gmail.com
CA	My CA defense colleagues are correct except that the value of future medical costs should be lifetime not 5 years. Medical includes home care, mileage and all modalities to cure or relieve the effects of the injury. Strict utilization review however, has reduced the value and many carriers and self insured chose to not settle. The irony is that if an MSA is obtained much of the Medicare covered expense is not being covered by comp. The care is being shifted to group health, Expanded Medicaid and other public funded payers.	Melissa C. Brown Fraulob • Brown Sacramento, CA (916) 442-5835 melissa@rivercityattorneys.com
CT	Connecticut simply requires that the settlement be approved by the Commission; the settlement may include past and future medical liability.	Stephen C. Embry Embry and Neusner Groton, Connecticut sembry@embryneusner.com
DE	Delaware permits global settlements, inclusive of future medical. It is very easy to settle on that basis, but noting that if Medicare is involved, there must be MSA and CMS	Cassandra F. Roberts, Partner Young Conaway Stargatt & Taylor, LLP

	compliance. Of note, we do **not** have any formal concept of "MMI" (maximum medical improvement) and, to the contrary, our law allows ongoing palliative or maintenance care. In fact, if you do not settle out the medical, it is difficult, if not impossible, to curtail treatment. Thus, these lump sum full and finals (we call them "commutations") are enormously attractive to carriers and are very common. As a result, we also see with increasing frequency "serial claimants", workers who move on from one global settlement and employer to the next. Bottom line is that the full buyout on a claim is the norm and not the exception.	Wilmington, Delaware 302.571.6622 croberts@ycst.com www.youngconaway.com http://www.cassandraswcblog.com/
GA	In Georgia, it is quite easy since a claim can be settled at any time by agreement of the parties and medical benefits can be closed or left open, again, at the agreement of the parties. MMI is not required for settlement and no PPD rating is required. A rationale for closure of medical must be provided in the settlement and the settlement documents must state that all authorized medical through the date of the approval has been paid or will be paid in the claim if it is a bona fide settlement as opposed to a no-liability settlement. A resignation and release is almost always obtained in settlements because if the employee were to return to work for the same employer, they could allege a new accident based either on a new trauma or on an aggravation of the original condition and essentially start with a new compensable claim. The resignation and release are separate from the stipulation and agreement that the Board reviews and approves and are simply a separate binding agreement between the parties.	Douglas T. Lay Kissiah & Lay Alpharetta, Georgia (770) 667-0600 dtlay@kissiahlay.com
IL	It is very easy in Illinois so long as the employee is willing to give up his/her rights to future medical.	Kenneth F. Werts Craig and Craig LLC Mt. Vernon, Illinois (618) 244-7511 KFW@craiglaw.net
IA	Iowa allows closed-file indemnity, with open medical, subject to the jurisdiction of the agency. Iowa allows the carrier to choose the provider. However, if there is a dispute, the agency makes very speedy determinations (within ten days of the filing of the application for a hearing), and can order the carrier to provide care, including the authority to specify which provider the carrier must send the claimant to. Section 85.35(6) of the Iowa Code provides: "6. The parties to any settlement made pursuant to this section may agree that the employee has the right to benefits pursuant to section 85.27 under such terms and conditions as agreed to by the parties in the settlement, for a specified period of time after the settlement has been approved by the workers' compensation commissioner. During that specified period of time, the commissioner shall have jurisdiction of the settlement for the purpose of adjudicating the employee's entitlement to benefits provided for in section 85.27 as agreed upon in the settlement." Although all settlements are subject to agency review, for the last 20-30 years, the agency head, the Iowa Workers' Compensation Commissioner, assumes that settlements in which a claimant has legal representation are appropriate, and review is mostly limited to looking over the math in the settlement documents.	Ed Detlie www.detlielawfirm.com Ottumwa, IA (641) 682-8119 eddetlie@pcsia.com
KY	Kentucky allows a lump sum waiver of right to future medicals (and other rights under KRS Chapter 342)	Marcus A. Roland Roland Legal PLLC

	provided adequate consideration is set forth in the settlement agreement in exchange for the waiver(s). This can be as simple as ear-marking $1000 to be paid for a waiver of future medical benefits. Plus, the claimant has to sign a special section in the agreement acknowledging the waiver of medicals. The agreement is, of course, subject to ALJ approval.	859-402-2671 mroland@rolandlegal.com
LA	Future medicals can be settled in Louisiana. This is a wage loss state so the PPD rating is not usually relevant for settlement of the indemnity. We can settle the future wage loss claim but we usually need to have vocational work done to show earning capacity so that we can determine the extent of any wage loss – total weeks for wage loss (SEB) is 520 weeks with credit for any TTD paid.	Denis Paul Juge Juge,Napolitano,Guilbeau,Ruli, & Frieman Metairie, Louisiana 504-831-7270 djuge@wcdefense.com
MD	It is not that difficult. If reviewable by CMS, our WCC expects and encourages an MSA and CMS review. In such a situation, without that, the settlement is not likely to be approved. It is possible, but the WCC then requires some pretty specific identification of the how and why no CMS approval and the manner of protecting the Claimant and CMS. If not reviewable, then the WCC requires a statement as to how much of the settlement is apportioned for future medical costs and then also how CMS's interests have been considered, generally with a medical statement supporting the amount of (even if $0.00). If the claim is contested, that may have a bearing on the above process.	Lance G. Montour, *Principal* Humphreys, McLaughlin & McAleer, LLC Baltimore, Maryland (410) 539-0906 montour@hmmlawyers.com
MD	In Maryland, it is fairly easy to settle claims fully and finally, including closed medicals. The Maryland Workers' Compensation Commission must approve all settlements. In order to approve one with closed medicals, the parties must satisfy the WCC that future medicals are properly accounted for in the settlement – for instance, there either needs to be 1) a statement that no further treatment is needed; 2) an MSA; or, 3) a medical cost projection (not necessarily an MSA) that outlines future medical treatment and costs and that those costs are provided for in the settlement itself. This is pursuant to COMAR 14.09.10.02 and Labor & Employment Article, Maryland Annotated Code, Section 9-722.	Albert (Bert) B. Randall, Jr., Esq. Franklin & Prokopik, P.C. Baltimore, Maryland 410-230-3622 arandall@fandpnet.com
MA	Lump sum settlements Massachusetts. Mass. GL Ch.152 sec 48 governs lump sum settlements: 2 categories- a settlement without liability (carrier questions whether it is a wc case or not) lawyers fee is capped at 15% and future medicals close with the settlement. Employer must consent in writing. Medicare set aside required if the conditions are met. Settlement with liability (most common); atty fee 20% AND medicals stay open. Employer must consent in writing. In Mass the indemnity is TTD, TPD and PTD we have no PPD. So value of settlement for indemnity (and our relatively low scheduled awards) is usually a factor of the remaining weeks, months or years of temporary disability or present day value of permanent total disability. TTD 156 weeks; TPD 260 weeks: PPD no durational limits. Rarely do employees after a settlement return to work for the same employer. All settlements may be approved by an AJ as being in claimant's best interest.	Alan S. Pierce Pierce, Pierce & Napolitano Salem, Massachusetts 978-745-0914 apierce@ppnlaw.com
MI	In Michigan, we don't have PPD levels. However, it's very easy and very common in Michigan to settle a claim in its	James J. Ranta Charfoos Reiter Hebert, P.C.

	entirety (including past, present and future medical) even if that individual requires future medical care. The Magistrate still has to approve the settlement as "reasonable" (in other words, if the future medical care includes a possible surgery, and you're trying to settle the case for $5,000.00, you might have a problem) – however, in general, settlements are very rarely, if ever, denied as being unreasonable. Leaving future medical open in Michigan as part of a settlement is the exception, and not the rule.	Farmington Hills, Michigan (248) 626-7300 James.Ranta@CRH-Law.com
MN	In Minnesota the parties can lump sum cases. In other words, they can settle matters on a full final and complete basis with medical closed. The judge must make a determination that the settlement is fair, reasonable and in conformity with the statute. Whether a settlement will be approved is dependent on the facts and the judge. Generally, most lump sum settlements are approved.	Thomas P. Kieselbach Cousineau McGuire Chartered Minneapolis, Minnesota (952) 525-6955 tpk@cousineaulaw.com
MO	In Missouri any worker's compensation settlement must be approved by an administrative law judge to be valid and enforceable. The statute requires a settlement be in accordance with the rights of the parties, not the result of undue influence or fraud, the employee fully understands his or her rights and benefits, and voluntarily agrees to accept the terms of the agreement. A final settlement extinguishes any right to compensation, including future medical. There are some limited circumstances in which a party can re-active a claim related to prosthetics and life threatening procedures. Parties in Missouri can resolve any claims of future medical as they wish either as a waiver, an agreement to leave medical open or some lump sum to dispose of future medical contingencies. In the latter, the parties may structure a settlement within a Medicare set aside. If the parties have counsel they can pretty much strike any deal they want and take their chances with Medicare. In cases in which future medical appears likely and the worker does not have an attorney, some judges may not approve settlement contracts. Similarly, the ALJ may recommend independent review by counsel of any complex Medicare addendums before approving a settlement with a pro se worker to be sure they "understand his or her rights."	Martin Klug Huck Howe & Tobin St. Louis, MO (314) 721-6650 klug@huckhowe.com
MS	In Mississippi, it is very easy unless there is Medicare involvement.	Paul B. Howell, Esq. Franke & Salloum, PLLC 228.868.7070 pbh@frslaw.com
NH	In a traditional LSS in NH the medical stays open anyways. Note: There are various additional permutations beyond this that need to be considered.	Paul Salafia
NJ	To answer your question, in New Jersey the only way to have a lump sum, full and final settlement which closes the case for good, is pursuant to Section 20 of the WC act. We call these Section 20 settlements. There must be a bona fide issue in the case. That would be an issue of compensability (denied claim where the denial has held up throughout the case) or a question of causation of the alleged injury to the work accident or an admitted accident with an intervening event that then questions causation of the resulting disability. There can also be an issue of jurisdiction as well. Otherwise, if the case is accepted, benefits paid and any permanent disability, there can be no section 20 settlement. These section 20 settlements are not the norm. More common are the compensable claims,	Lora V. Northen, Shareholder Capehart Scatchard Mount Laurel, NJ 856-914-2070 lnorthen@capehart.com

	benefits are paid and the petitioner receives an award of a percentage of permanent disability. The petitioner then has 2 years from the date the award is last paid (they are paid out over weeks) to file what we call an application for review of modification of award and seek additional benefits, indemnity and/or medical. New Jersey does not like to close off future medical in compensation claims without good cause.	
NJ	NJSA 34:15-20 requires a real and substantial issue of liability, jurisdiction, or causal relationship in order to allow for a lump sum dismissal with a payment. It is a payment of compensation for rating purposes only, by the way. The Petitioner must be represented by counsel. The SIZE of the Section 20 does not matter as much as whether there is a legitimate reason for employing that provision. Some Judges are extremely protective of Petitioners, and disallow the tactic unless a real and substantial basis is reflected at conference, and amplified on the record at the time of Hearing. Others choose to read into the law a *Perez v. Pantasote*/Section 36 standard not mentioned in the law, wherein if the Petitioner might not meet the burden of proving permanent partial disability, Section 20 is appropriate. Section 20 closes a case once and for all as to all issues, except where reserved by the parties. While one can Section 20 part of a claim (a leg that is disputed, for instance, while preserving an admitted back injury) the concept of preserving future medical rights is not mentioned in the Statute, and while it could theoretically be done—dismissing permanent partial disability and lump-summing it, while preserving future medical payments--I have never been party to such an agreement in 31 years of practice on both sides. It is fraught with problems.	Richard B. Rubenstein Rothenberg, Rubenstein, Berliner & Shinrod, LLC Livingston, NJ (973) 535-3388 rrubenstein@rrbslawnj.com
NJ	In New Jersey, the usual method of resolving a claim once MMI is reached is to enter in to an Order Approving Settlement, in which the injured worker receives an award as set forth in the "schedule of disabilities", which is based on the percentage of loss of function to the part of the body involved. Along with that monetary award, the worker is automatically given the right to reopen the claim for a period of two years from the date of the last payment of the award. The right to reopen includes the right to seek additional medical treatment. In contested claims, the parties can enter in to a lump sum dismissal with prejudice, which involves the payment of a lump sum of money in exchange for giving up the right to a trial and also giving up the right to reopen. This precludes the injured worker from seeking any further benefits (including medical treatment) from the employer.	Gary E. Adams Pellettieri, Rabstein & Altman Princeton, New Jersey (609) 520-0900 gadams@pralaw.com
NY	With regard to the example you set, such settlements are reached routinely in New York. WCL §32 permits full and final settlement of the claim. Settlement should be broken down between indemnity, the attorney's fee, and coverage of future medical. Frequently, a Medical Set-Aside allocation is specified in agreements, even if the claimant is not Medicare eligible. If the claimant is Medicare eligible, formal MSAs are calculated and incorporated into the §32 settlement agreement. In New York such agreements must be approved by Workers' Compensation Law Judges unless found unfair, unconscionable or improper as a matter of law.	Ronald E. Weiss Hamberger & Weiss Rochester, New York 585-262-6391 rweiss@hwcomp.com
NC	The short answer is "relatively easy" for North Carolina, assuming both parties agree to negotiate.	Vernon Sumwalt The Sumwalt Law Firm

	North Carolina is an "actual" wage loss state. In other words, if your actual wage loss is greater than the presumptive wage loss set by the PPD rating, you get the better of the two. MMI just marks the point where you compare them to each other. Otherwise, MMI doesn't mean much in North Carolina. Normally, parties agree to PPD and enter into form agreements. If this doesn't happen, payment of PPD can be forced (against an unwilling opponent, employee or employer) through litigation. PPD payments carry with them a 2-year window after the last payment of medical or indemnity compensation for additional medical treatment. On the other hand, you cannot force a settlement of actual wage loss that continues past MMI. To qualify for this, you at least need medical restrictions to establish some degree of ongoing disability. The restrictions do not have to hold the employee completely out of work, but must limit them in some way. Until a settlement happens, the claim remains open, so does the right to additional medical treatment. To settle cases with this future exposure on a final basis, both parties must agree to the settlement. The negotiations are voluntary, as are the terms of settlement. However, the value of the settlement must be greater than the amount of PPD owed or else the settlement can be set aside. 99.9% of the time, but not always, final settlements close out the right to future medical treatment.	Charlotte, North Carolina (704) 377-3770 Vernon@sumwaltlaw.com
OK	In Oklahoma you can settle the PPD amount and leave medical open on an Appendix with restrictions.	Jacque Brawner Dean Law, PLLC Edmond, Oklahoma 405-285-2369 jacque@jbdeanlaw.com
PA	In Pennsylvania, the ability for the parties to settle a WC claim is not contingent upon anything other than the following three things: 1) The parties agreement as to the terms of the settlement; 2) That the agreement is approved by a workers' compensation judge who finds, in reliance upon the claimant's testimony, that the claimant understands the "legal significance" of the terms of the settlement agreement, not defined by statute, nor ever litigated as to its literal meaning to my knowledge, upon the claimant's rights concerning his/her injuries under the Workers' Compensation Act; and, 3) That the WCJ approves the agreement in a decision which is circulated by the Bureau of WC and which becomes a final and non-appealable decision 20 days thereafter. MMI is not required, although the WC forms that are now utilized by the parties to recite the settlement agreement terms, which forms are made part of the claim record by the WCJ, do require the parties to agree that Medicare's interests have been protected as to future medical expenses and care. Employability is also not a requirement or pre-condition to settle a WC claim.	Kevin Connors ConnorsO'Dell LLP Exton, Pennsylvania (610) 524-2100 x112 KConnors@connorslawllp.com
PA	Re PA law, I agree with Kevin. PA is a loss of earnings state so in the scenario described, the value of the case for settlement is almost entirely in the future medical. So, I think federal law, specifically the MSP Act, is potentially more of an obstacle than most of us wish to acknowledge,	Chuck Katz Charles S. Katz, Jr., and Associates, LLC Glen Mills, Pennsylvania 610-361-4571

	in all states, but particularly in loss of earnings states. The MSP Act requires that Medicare's interest in future medical expenses must be considered in all cases where there is ongoing medical expense involved. "Considered" must mean something more than the parties thought about the subject for a moment or two. So we need to know the Claimant's age and the likely course of medical treatment before we can jump the MSP Act hurdle. As an example, if the Claimant you describe is 55 and has had a serious knee injury which will require replacement of her knee joint within 15 years, is it truly compliant for the parties to ignore the question of Medicare's potential interest or is an MSA allocation in order? It is, of course, irrelevant whether or not CMS would review the allocation under its workload guidelines. I view this as the most misunderstood topic in PA settlements and is likely widely misunderstood nationally. Where there is potential Medicare liability in the future, it is safest to allocate. CMS has all the data and will likely start using it.	chuck@ckatzlaw.com
RI	Pursuant to RI law claims can be settled at any time as long as the employee is medically eligible for light duty work. MMI need not specifically be determined. Medical rights traditionally terminate upon settlement, however, the parties can agree to leave the right to treatment open. MSA with or without CMS approval is needed should the employee be on or eligible for Medicare pursuant to CMS requirements. There is no specific time frame within which to settle claims. TPD benefits are available for a maximum of 6 years.	Deborah G. Kohl Law Offices of Deborah G. Kohl Fall River, Massachusetts 508-677-4900 Dkohl@dgklaw.com
TX	Texas law prohibits parties from compromising future medical treatment in exchange for a lump sum payment. The claimant can request a lump sum of future Impairment Income Benefits (IIBs) if the claimant has returned to work for 90 days earning at least 80% of AWW. Previously, parties could request DWC approval for a settlement of future Supplemental Income Benefits (SIBs) by agreeing to pay some quarters (SIBs are paid quarterly) and not others in the future. However, based on a position DWC took in a case completely unrelated to SIBs settlement, DWC now refuses to approve future SIBS settlements despite a statute allowing settlement of income benefits and a practice of approving these settlements since the law passed in 1991.	Stuart Colburn Downs Stanford West Lake Hills, Texas 512.891.7771 scolburn@downsstanford.com
VT	VT is relatively easy to settle out future meds, need approval and ability to show future meds will be covered by settlement. Anyone on Medicare will need an MSA.	Keith J. Kasper McCormick, Fitzpatrick, Kasper & Burchard, P.C. (802) 863-3494 kjk@mc-fitz.com
WV	In West Virginia, you can have a lump sum settlement of any type of claim. You can settle indemnity-only or you can settle indemnity and future medical benefits in a lump sum. The only limitation is a claimant must be represented by counsel in the settlement of medical benefits in **nonorthopedic occupational disease claims.** W. Va. Code 23-5-7(a). Settlement agreement must have required language in it as set forth in Code. (State bar telephone number and 5 days to revoke). Insurance commissioner may void agreements with unrepresented claimants which are determined to be unconscionable.	H Dill Battle III Spilman Thomas & Battle, PLLC Charleston, West Virginia 304.340.3823 HDBattle@spilmanlaw.com
Longshore and Harbor	Longshore, pursuant to Sec 8(I), allows settlement of the Sec 7 future (and past) medical benefit. The amount	Roger A. Levy Levy Mediations

Workers' Compensation Act	allocated specifically has to be adequate and supportable. In fact, it is required that the document show what has been paid in the previous few years on account of medical (assuming claim was accepted). Same caution applies for MSA and CMS approval if circumstances warrant. Many carriers will work up an MSA even where CMS approval is not necessary in order to be on the safe side re: protecting the interests of the Social Security Administration.	mediatelevy@gmail.com