U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 24 July 2017

In the Matter of
JOHN GIFFORD
Complainant

v. Case No **2017 STA 00005**

PLATH ENTERPRISES
Respondent

ORDER

APPROVAL OF SETTLEMENT
and
DISMISSAL OF CLAIM

This proceeding arises under Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter "STAA"), 49 U.S.C. § 31105 (formerly 49 U.S.C. App. § 2305); 29 C.F.R. Part 1978, implementing regulations found at 29 C.F.R. Part 24; and the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 C.F.R. Part 18. This case was scheduled for a hearing in Orlando the week of March 13, 2017. On February 21, 2017, the Respondent filed an unopposed Motion to Continue the case. I granted the Motion, cancelled the hearing and Ordered the parties to file a joint report by April 3, 2017. After I ordered the parties to show cause why the claim should not be dismissed, I received a copy of the parties' joint stipulations on July 24, 2017.

Under the STAA and implementing regulations, a proceeding may be terminated on a basis of a settlement provided either the Secretary or the administrative law judge approves the agreement. 49 U.S.C. app. § 2305 (c)(2)(A); 29 C.F.R. § 1978.111(d)(2). The parties must submit for review an entire agreement to which each party has consented. ***Tankersley v. Triple Crown Services, Inc.,*** 92-STA-8 (Sec'y Feb. 18, 1993). The agreement must be reviewed to determine whether the terms are a fair, adequate and reasonable settlement of the complaint. ***Macktal v. Secretary of Labor,*** 923 F.2d 1150 (5th Cir. 1991); ***Thompson v. U.S. Department of Labor,*** 885 F.2d 551 (9th Cir. 1989); ***Fuchko and Yunker v. Georgia Power Co.,*** Case Nos. 89-ERA-9, 89-ERA-10, Sec'y Ord. Mar. 23, 1989, slip op. at 1-2.

I find the overall settlement terms to be reasonable, but some clarification is necessary. I note that the Settlement Agreement incorporates certain confidentiality provisions binding upon the parties in a nondisclosure provision. (Paragraph H). I find that the provisions are acceptable. *See generally* ***Connecticut Light & Power Co. v. Secretary of the U.S. Department of Labor,*** 85 F.3d 89 (2nd Cir. 1996). However, the parties are advised that records in whistleblower cases are agency records which the agency must make available for public inspection and copying under the Freedom of Information Act (FOIA), 5 U.S.C. ' 552. It has been held in a number of cases with respect to confidentiality provisions in Settlement Agreements that the FOIA requires federal agencies to disclose requested

documents unless they are exempt from disclosure. ***Faust v. Chemical Leaman Tank Lines,*** Case Nos. 92-SWD-2 and 93-STA-15, ARB Final Order Approving Settlement and Dismissing Complaint, March 31, 1998. The records in this case are agency records which must be made available for public inspection and copying under the Freedom of Information Act.

The parties assert that they have considered the provisions of the Medicare Secondary Payer Act (MSP) found at 42 U.S.C. § 1395y(b)(2) and its implementing regulations at 42 C.F.R. § 411.

I do not have jurisdiction and authority to bind CMS, the Center for Medicare and Medicaid, another agency. Although this claimant is not of advanced age and is not entitled to Medicare, the possibility that in the future Medicare could exert an inchoate lien can not be precluded. I find that the parties have not proven that they can ensure further liability for a potential springing Medicare recovery.[1] Under the Medicare MSP Act, the parties may not shift the onus to the Claimant. However, as the probability of the advent of a springing Medicare recovery may be remote, I find this language is not material and does not void the agreement.

Although the MSP sections may violate the intent of the MSP statute, they are not material to whether or not I find the terms are adequate under the STAA.

After a review of the record, I find that the Settlement Agreement is fair, adequate and reasonable, and accordingly, I Order:

1. **APPROVAL** of the settlement terms and DISMISSAL of the complaint with prejudice as requested by the parties.

2. In no way do I render a decision that implicates Medicare.

SO ORDERED

Digitally signed by Daniel Solomon
DN: CN=Daniel Solomon, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

[1] Please note that CMS' Medicare Secondary Payer (MSP) recovery claim (under its direct right of recovery as well as its subrogation right) has sometimes been referred to as a Medicare "lien", but the proper term is Medicare or MSP "recovery claim." Pursuant to 42 U.S.C. 1395y(b)(2)(B)(ii)/Section 1862(b)(2)(B)(ii) of the Act) and 42 C.F.R. 411.24(e) & (g), CMS may recover from a primary plan or any entity, including a beneficiary, provider, supplier, physician, attorney, state agency or private insurer that has received a primary payment.