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: 04 May 2018

In the Matter of
ERIC STEFANI
Complainant

v. Case No **2017 STA 00084**

BYNUM TRANSPORT, INC.
Respondent

DECISION AND ORDER
APPROVAL OF SETTLEMENT
and
DISMISSAL OF CLAIM

This Surface Transportation Assistance Act case was scheduled for a calendar call in Tampa, Florida, March 12, 2016. On February 12, 2018, the parties advised that both sides requested a continuance and I granted their request. On May 2, 2018, I received a copy of the parties' settlement agreement.

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 expressed in Paragraph 13. 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.

I also note that the parties invoke a Medicare release in Paragraph 5. 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. The parties allege as to the MSP Act and as to certain medical claims asserted:

> If Medicare's interests are not properly considered, Stefani understands that the Centers for Medicare and Medicaid Services ("CMS") may be entitled to recover its interests from Stefani, and recovery of its interests may include, but are not limited to, the following: payment directly to CMS out of the settlement proceeds in this matter and/or revoking Stefani's Medicare benefits, if any, for a certain amount of time to be determined by CMS in its sole discretion. Stefani knowingly acknowledges and recognizes that the warranties and representations in this section are material and significant provisions of this Agreement and General Release. Stefani has made an inquiry to determine the amount of any claim related to Medicare conditional payment being asserted by Medicare relating to any injuries or illness claimed by Stefani which relate to the claims set forth in the Complaint, and Stefani has independently determined and agree that Medicare has not paid any claims on behalf of Stefani related to the claims set forth in the Complaint.

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.

This "hold harmless" provision is most probably unenforceable as it violates the MSP Act as it shifts the onus to Claimant and is therefore contrary to public policy. I accept that the parties do not have to file an MSP. However, permanent medical impairments may be lifelong. I do not have jurisdiction and authority to bind CMS, the Center for Medicare and Medicaid, another agency. Although this claimant is currently not entitled to Medicare, the possibility that in the future Medicare could exert an inchoate lien cannot be precluded. I find that the parties have not proven that they can ensure further liability for a potential springing Medicare recovery. 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.

Taylor & Associates, Ltd. in the gross amount of $8,833.33 for claimed attorney's fees and expenses

After considering all the relevant factors, I find that the agreed-upon attorney's fee is "reasonably commensurate with the necessary work done" and takes into account the quality of the representation, the complexity of the legal issues involved, and the amount of the benefits awarded.

After having been fully advised I enter the following:

1. The Motion to Approve Settlement Agreement is **GRANTED**.

2. In approving this settlement, the undersigned is in no way determining Medicare's interests in this matter.

3. The attorney's fee is **GRANTED**.

4. The claim is hereby **DISMISSED**.

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE