INTRODUCTION TO THE MOCK PRETRIAL CONFERENCE
FOR THE CASES OF ROBERT SMITH

The Mock Pre-Trial Conference seeks to reach a Global Settlement of all issues involving the two claim petitions filed on behalf of Robert Smith. There is an Application for Review or Modification of an Award of Compensation for his bilateral knees [CP 2021-22500] where he had first been represented by attorney Alan Barnes and now by Jennifer Stone who represents him in the Application for Review or Modification that was initially filed by Alan Barnes after having represented the petitioner in his original claim. Mr. Barnes was discharged shortly after the reopener was filed. Jennifer Stone also filed an occupational exposure claim [CP 23-45123] involving the petitioner's bilateral knees and his low back.

Participants in the Mock Global Settlement include the Petitioner, both attorneys [as Alan Barnes filed a lien for services in connection with his representation on the Application for Review or Modification before he was discharged by the Petitioner], two attorneys for the Respondents' separate workers' compensation insurance carriers [James Boxman for first carrier (Premier Insurance) and Theresa Betts for the second carrier (Total Compensation Insurance)]. The Judge of Compensation presiding over the global settlement conference is the Hon. Ivy Spiers. Similar to our previous Mock Conferences, this Mock Conference should attempt to resolve all issues in connection with the pending claims inclusive of what, if any, counsel fees should be paid to Alan Barnes; overall claim(s) outcome designed to bring all claims to a conclusion which could potentially involve any type of disposition including award[s] of permanency and/or Section 20. The focus should also address the relative strength of the positions of the parties and overall realistic value of the petitioner's claims. You may assume that all factual assertions are accurate.

Because this undertaking is designed to be accomplished in one group meeting, the general medical materials have been summarized to represent "bottom line" assessments and conclusions fully recognizing that in "real life" their significant additional details would be highly relevant.

In addition to the actual Mock presentation, there will be some additional questions and issues to be addressed at the end of these materials.

HYPOTHETICAL FACTS:

Participants

The Petitioner: Robert Smith
First Attorney: Alan Barnes
Second Attorney: Jennifer Stone
Respondent's two Attorneys: James Boxman for the first carrier (Premier Insurance). Theresa Betts for the second carrier (Total Compensation Insurance).
Judge: Ivy Spiers, JWC

Additional Information

Total Temporary Disability Paid per motion: $29,120.00
Total Medical Paid per motion: $105,000.00

Robert Smith born January 2, 1965 and is 60 years of age. He is 5'9", 290 pounds. Married 35 years. Two adult children. High School graduate 1983. US Army Service: Private two years.

Prior medical background includes: Morbid obesity; diabetes mellitus Type II [10 years] (insulin dependent [last 5 years]); unoperated chronic low back pain [15 years] with chiropractic weekly adjustments over the past 5 years; prior compensable right shoulder repair (x2).

Two prior low back MRI studies: 01/02/2015 showing degenerative disc disease at L3-S1 with no definitive disc pathology other than desiccation at the L4-S1 levels; 02/01/2019 MRI demonstrating bulging discs at L2-4 with right sided protrusion at L4-5 with small herniation right sided L5-S1. The petitioner never had any type of injection modalities nor has he been treated by a spinal surgeon. No prior documentation of any radiculopathy. As petitioner aged he relied more on chiropractic management to address his back issues as he stopped participating in any significant sporting activities including bowling and golfing. He felt that his full- time employment as a carpet installer for the past 25 years was "exercise enough".

He only had one prior workers' compensation award which was an accident of March 2, 2000, resulting in two right shoulder/biceps repairs with a 35% permanent partial total recovery on May 5, 2002, at which time the petitioner was 37 years of age. He never reopened that claim.

His employment history following his discharge from the military began with three years as a non-union construction laborer. He always considered himself a very strong individual. When he was in High School he enjoyed playing football. He had a Varsity letter. His team had gone to the State Championships. He was a lineman and played every minute of every game. He then became a union construction laborer where he worked for a 10 year period with between the ages of approximately 25 and 35.

When he had his compensable injury to his right shoulder (dominant arm) he did not feel that he was ever going to be able to do the type of significant overhead work required to work as a Union construction laborer. He thereafter had an opportunity to work in his uncle's carpet business [ABC Carpets] where he

worked from April 20, 2001 until June 1, 2016 when it was sold to DEF Carpets following his uncle's death. He has been employed at DEF until the present time.

It was in the above context that he suffered his compensable accident of August 1, 2021 [CP 2021-22500] when he tripped over a roll of carpets and fell immediately forward in an extremely awkward fashion crashing into a co-worker who was pushing a large stack of cinder blocks by way of a hand truck which was angled in a strange way striking the petitioner on an angle hitting both of his knees from the front which in turn caused the petitioner to fall onto the linoleum floor striking primarily his right side with multiple cinder blocks falling onto his knees.

At the time of the accident the petitioner was earning $25.00 per hour. He normally worked 8 hours a day, 5 days per week for all of the years that he had worked for both ABC Carpets and DEF Carpets, except for the last 9 months before the August 1, 2021 accident because the petitioner was diagnosed with pancreatic cancer which required him to have various modalities of medical management which caused him to miss approximately 20% of his employment days. His employer was very understanding and supportive, especially because he was an extremely loyal and competent employee. He was well-liked by everyone and he had a very strong work ethic. By the time the accident occurred he had been discharged from active cancer care for 2 weeks for which he had worked 40 hours each week.

The workers' compensation carrier "averaged" his last 26 weeks of earnings and it resulted in a "average weekly wage" of $800.00 which in turn resulted in a temporary disability rate of $560.00. He was paid at such a rate for his period of lost time (1 year). He ended up undergoing a patellectomy, a medial meniscectomy and anterior cruciate ligament repair of his right knee. Both knees had radiographic evidence of "mild osteoarthritis". He also underwent a left leg lateral meniscal repair. He was also diagnosed as having a "low back strain with contusion and radiculitis" and had a two-month period of physical therapy for his low back. There was never an MRI study performed regarding his low back. His bilateral knees were considered his main injuries.

Alan Barnes was his attorney. When he was retained, Mr. Barnes was a 5 year solo general practitioner concentrating in personal injury and workers' compensation. A co-worker had recommended Mr. Barnes who was considered "a nice guy". He settled CP 2021-22500 on March 1, 2023 for 23.5% permanent partial disability apportioned approximately 25% for the right leg and 20% for the left leg. His low back claim was settled on a Section 20 basis for $5,000.00 notwithstanding that following the accident of August 21, 2021, he was now experiencing bilateral radiation pain into his lower extremities which had not been there previously. Mr. Barnes explained that "minor strains are not permanent injuries" and that he had a "preexisting condition" which was also "not compensable". He said the $5,000.00 Section 20 was "icing on the cake" as his back really had "no value" and that an MRI "wasn't even recommended". His evaluating physician had found a 35% disability for a compensable "strain, contusion and radiculitis" with overall disability greater due to prior MRI findings with "chronic axial low back pain". Respondent's evaluating physician found "no compensable disability". The award was paid at rates based upon a "wage of $800.00/temporary disability benefit rate of $560.00". This award was not immediately reopened.

Once the petitioner returned to work on August 1, 2022, he was released with "no restrictions." He had developed a good rapport with Dr. G. Greene [the authorized treating surgeon] who advised him "not to overdo it or you will be back to see me". The petitioner heeded Dr. Greene's advice. He was careful about placing any significant or sustained pressure on either of his knees. He was fortunate because he was one of the Supervisors and could assign the most of the more strenuous jobs to other employees and/or generally get assistance when needed. He continued his pre-accident work ethic as he was always very "hands on". 50% of a typical day's work was doing moderately physically demanding employment duties including lifting, bending, squatting, pushing, pulling, kneeling, cutting and doing the essential functions of a carpet installer.

As time progressed he noticed that he was experiencing increased swelling, pain and stiffness in both of his knees. His low back pain was also becoming more constant with radiation of pain increasing in severity and frequency emanating from his low back traveling into his buttocks and down both of his legs into his feet and toes. The pain was relatively symmetric relative to each leg. He was continuing with his chiropractor, Dr. Benson, who was aware of his deterioration. By August of 2023 he was seeing Dr. Benson bi-weekly. He was taking increased over the counter medications including Advil, Tylenol to address the increasing pain in both of his knees and low back. He had no new accidents or injuries of any type. He was loathe to take any narcotic medications.

On September 1, 2023 Dr. Benson suggested that he see an orthopedist for his knees and that he should obtain an MRI study of his low back in view of the doctor's concern regarding the increasing radiation of pain down both legs. Petitioner had also seen his primary care physician, Dr. Tom Fields, for a general check up on September 5, 2023. Dr. Fields agreed with Dr. Benson and issued a prescription for a low back MRI study which was performed on September 20, 2023 finding disc herniations at every level between L3 and S1 with bilateral nerve root compression at the L3-S1 levels. Dr. Fields referred the petitioner to a spinal neurosurgeon [Dr. John Porter] who was considered one of the best if not the best spinal reconstruction specialists. Dr. Porter evaluated the petitioner on October 3, 2023 and suggested that he likely needed an anterior/posterior three-level instrumented fusion but he wanted to first start with injection modalities to see if they made any impact on his symptoms. He advised that the petitioner should limit placing "too much stress" on his low back which should be "as tolerated" at work. He emphasized the petitioner should avoid all the significant physical aspects of his job duties that he had been routinely performing including but not limited to the heavier lifting, bending, squatting, kneeling and the like.

This recommendation greatly concerned the petitioner because he wanted to "pull his weight" at work but at the same time he didn't want to jeopardize his health. He decided to contact his former attorney Alan Barnes to determine what he should do. He had made an appointment with Mr. Barnes for October 15, 2023 at which time he explained the situation to him and also provided him a copy of the low back MRI report. Mr. Barnes explained to him that he was within time to file an Application for Review or Modification of his permanency award and that he would immediately file such an application on his behalf because he needed to make a formal request for medical treatment to allow the workers' compensation insurance carrier the opportunity to authorize appropriate medical treatment. He advised that he thought that it would be likely that the insurance company would refer him back to Dr. Greene. This was fine with the petitioner as he really liked Dr. Greene and felt that Dr. Greene had his best interests at heart. The petitioner asked Mr. Barnes what he should do about his low back. Mr. Barnes

explained that since his low back condition was dismissed under the Section 20 settlement, he was free to treat using his regular health insurance for whatever treatment he needed. He felt this would be good since the petitioner could be in control of his medical treatment "unlike workers' compensation where the carrier controls everything". Mr. Barnes explained that the recent MRI study did suggest he had a problem with his low back that was much worse than his previous MRI reports. He advised the petitioner to be guided by "whatever your doctor says". He further advised that if he had to go out of work to have surgery on his back that he would be entitled to State Temporary Disability Benefits which he recovered.

Mr. Barnes advised the petitioner that hopefully they would have a response from the carrier regarding sending the petitioner back to the previous authorized surgeon "within 30 days or so". This was okay with the petitioner even though he thought this could be accomplished more quickly. He decided he was not going to do anything with his low back until he saw Dr. Greene for his knees. He did not know how he should prioritize anything. He had discussed this with his chiropractor who felt that waiting was a reasonable approach. The petitioner also strongly felt that Dr. Greene would know how to resolve everything so he was worth waiting for.

Instead of the petitioner being sent back to the original authorized doctor, the carrier sent him to the evaluating permanency physician on November 15, 2023. Mr. Barne's office told him to keep that appointment as the carrier had the "right to select any physician of their choice". This was alarming to the petitioner especially since the evaluating physician had only seen him for 2 minutes (in the original assessment) and wasn't a surgeon. The "need for treatment" report came back and stated that there was no change in the petitioner's clinical condition and that he did not need any additional compensable treatment. The carrier therefore "denied" any further medical treatment. This was very upsetting to the petitioner. Mr. Barnes' office had the report emailed to the petitioner on December 10, 2023, simply stating that they were forwarding a copy of the report and a copy of the denial letter, both of which had been sent to Mr. Barnes by the Respondent's attorney on December 1, 2023. The petitioner had tried to make an appointment with Mr. Barnes on three separate occasions without success. He wanted an explanation why he was sent to the permanency doctor rather than getting an orthopedic surgeon to evaluate him. He became very frustrated and angry. He wanted to know what action needed to be taken. A friend told him he should contact the local Bar Association to find a Workers' Compensation specialist which is probably what he needed. Ultimately, he made an appointment with Jennifer Stone, Esquire who was recommended by the County Bar Association. Jennifer Stone was certified by the NJ Supreme Court as a Workers' Compensation Law attorney and was an attorney with 15 years experience. He had brought in all of his paperwork for the first appointment which was scheduled on December 20, 2023. She was aware that he was presently represented by Mr. Barnes. She knew Mr. Barnes. She felt that the petitioner needed a more experienced attorney because his working career was potentially in jeopardy. He needed to know what he needed to do about his knees so that he could also figure out what he needed to do with his back since that was apparently no longer a compensable condition.

Ms. Stone personally took a very detailed history and was aware that the petitioner actually had medical treatment for his back in the original compensable accident but that he had never undergone a compensable MRI study but that there had been some significant preexisting MRI findings. The petitioner actually had brought his previous MRI studies of January 2, 2015 and February 1, 2019. She said she was frankly "surprised" that his Section 20 was "only" $5,000.00 given that his back was actually injured in the original claim and that without the MRI study one could not really confidently state

what the severity of the injury was at least diagnostically. She stated that to the petitioner. She also stated that if he had a timely more positive MRI study then his recovery probably would have been much greater. She explained to the petitioner that he had the right to do whatever he wanted to do in terms of selecting any lawyer. She advised that she could call Mr. Barnes and advise him that Mr. Barnes needed to take further immediate action on behalf of the petitioner. The petitioner advised Ms. Stone that he had a great deal of confidence in her, that she had excellent credentials and that he needed to be in a more experienced attorney's hands. He also stated if Ms. Stone did not want to take his case he would try to find someone else.

Ms. Stone then advised the petitioner that in addition to pursuing a motion for medical treatment with respect to the petitioner's knees, she felt that he may very well have another basis for workers' compensation [i.e. an occupational exposure claim for the low back]. She didn't "guarantee" any result but she felt "it was worth a shot." She also included his knees in the low back occupational claim. She advised that she would need to develop significant medical proofs. She fully explained the occupational petition and why she felt this additional petition was necessary, in addition to taking over the reopened pending bilateral knee claim. She further advised that she would obtain an orthopedic surgical assessment to determine need for treatment so she could file an appropriate motion for medical and temporary disability benefits within the Division of Workers' Compensation. She explained the first step was filing the occupational exposure claim which was CP 2023-45123 alleging that the petitioner's continued occupational exposure from DEF was a material contributing factor to either the causation, aggravation, acceleration and/or exacerbation of petitioner's low back and/or bilateral knees. The occupational claim petitioner named the carriers, Premier Insurance which provided coverage from July 1, 2015 through July 1, 2022 and Total Compensation Insurance from July 2, 2022 to date. She advised the petitioner she would notify Mr. Barnes of his discharge but the petitioner advised that he would communicate directly with Mr. Barnes and advise him that he was terminated and that his file should be transferred to Ms. Stone's office. He did this by email in Ms. Stone's office and copied Ms. Stone.

The petitioner's email resulted in Mr. Barnes contacting Ms. Stone the following day. He was very angry over "her unauthorized involvement" without her having the "courtesy" of giving him a "heads up". Ms. Stone basically advised Mr. Barnes that her contact was solely the petitioner's decision. She explained that she offered him the option of sending him back to Mr. Barnes. She advised that the petitioner was referred to him by the County Bar Association. It was clear that the petitioner had contacted other counsel. She did not discuss any aspect of the adequacy of Mr. Barnes' representation with him. She advised that he should submit an Affidavit of services and costs (if any) and that she would "protect" his attorney's lien. Mr. Barnes signed a Substitution of Attorney for CP 2021-22500 and submitted an Affidavit indicating 5 hours of compensable billing.

Ultimately Ms. Stone had the petitioner seen by Dr. Tom Dryer who was an orthopedic specialist concentrating with knee reconstruction surgeries. He was held in high esteem by most of the Petitioners' and Respondents' Bar and as importantly the Compensation Judges in the County where he practiced. Dr. Dryer's report indicated that the petitioner needed x-rays and MRI studies but that the clinical presentation of the knees was such that the initial in-house x-rays had indicated significant internal derangement that it would be "likely" that the petitioner would require bilateral knee replacement surgeries. He felt the definitive determination as to need for treatment would be dependent upon all of the diagnostic findings. He also opined that based upon the accuracy of the history provided by the petitioner

and his review of all medical records, that because of the degenerative component of his bilateral knees, especially with the obesity playing a part, the cumulative impact of his many years of carpet installation was also a contributing factor of overall clinical presentation and certainly to the probable worsening of the overall osteoarthritic presentation but the appropriate diagnostic studies would need to be reviewed. He confined his opinions solely to the bilateral knees. He did not address any issue as to whether petitioner's back had any impact on his knees or vice versa.

Both claim petitions (CP 2021-22500 and CP 2023-45123) were now filed and a consolidated motion for medical and temporary disability benefits was also filed seeking treatment recommended by Dr. Dryer. Upon receipt of the motion the first carrier sent the petitioner back to Dr. Greene. Dr. Greene indicated that the petitioner was "much worse" than he was when he was previously discharged. He advised that his office notes had reflected that he had advised the petitioner to limit his exertional activities at work which the petitioner had done to a modest extent but not to a sufficient extent and that the combination of the continued exposure from the original compensable diagnoses required diagnostic studies as recommended by Dr. Dryer and he was in "complete agreement". The attorney for Total Compensation Insurance [Theresa Betts] had the petitioner evaluated by a general orthopedic permanency evaluator, Dr. I. Khan who concluded that the petitioner had successfully undergone bilateral knee treatment and had a "textbook" presentation of end stage osteoarthritis "likely primarily the result of genetics and obesity".

When the medical and temporary disability motion was filed, all examinations were obtained. The compensation Judge advised that she was exercising her discretion under the provisions of NJAC 12:235-3.7(f) and finding that preliminarily Premier Insurance carrier should provide the compensable bilateral knee medical treatment with Dr. T. Dryer without prejudice together with temporary disability benefits at the original rate which would abide further Order of the Court with all final liability to be determined after the conclusion of treatment. This was acceptable to all the attorneys and even the petitioner himself. The petitioner's knee issues were serious and there probably would be no better physician available to perform the bilateral knee reconstruction which was necessary. Ultimately this is what did occur. Petitioner underwent bilateral knee replacement surgeries.

However, this was deferred until the completion of medical treatment for the bilateral knees. The petitioner went out of work for the knees on February 1, 2024. Dr. Dryer felt the petitioner should avoid all kneeling and otherwise limit any significant lifting. Consequently he was given a completely sedentary Supervisory position with the same rate and hours per week after completing treatment June 1, 2024 at which time he resumed employment. Dr. Dryer was impressed how quickly the petitioner progressed. However, by that time he was anxious to resume employment even though he was very symptomatic with respect to his low back.

He had been re-evaluated by D. J. Polcer (under his health carrier's coverage) who concluded that he needed anterior/posterior L3-S1 surgery as the definitive surgical result which would be "elective surgery". His opinion on causality was that there was clearly a degenerative disc disease osteoarthritic component to the overall presentation but "without question" the trauma of March 1, 2021 and the "overall" occupational exposure were at least additional material contributing considerations which contributed to, aggravated, accelerated and/or exacerbated the overall symptomatology, spinal presentation and need for surgery. He also felt that the bilateral knee gait alteration post the initial trauma and especially post the bilateral knee replacement surgery rehabilitation were of "etiologic significance"

on an “aggravation basis.” The petitioner decided to defer any such spinal surgical intervention because he wanted to get back to work and therefore he obtained overall permanency evaluations.

His evaluating permanency physician found an overall increased disability of 66 2/3% of each leg and an overall disability of 50% permanent partial total for the unoperated low back, most of which was associated with the compensable trauma of August 1, 2021 and/or the continuing occupational exposure through the last date of employment prior to undergoing the bilateral knee repair. His original report at the time of the first settlement was disability of 40% of the right leg, 35% of the left leg and 10% overall for the low back apportioned 5% compensable and 5% pre-existing.

The evaluating physician for Premier Insurance found increased disabilities of 15% of each leg “regardless of cause”. The doctor felt that the primary cause was the compensable accident with the aftermath of the surgical residuals representing a “natural deterioration” of that condition but that the petitioner’s continued occupational exposure was “more likely than not” a “contributing factor” to the need for bilateral surgeries. His original assessments were 10% of the right leg and 7 ½% of the left leg. He also found while the petitioner had a “serious” low back condition, it did not “prevent him from sedentary employment” which he was “routinely doing”. Consequently he found the overall disability “regardless of cause” was 20% permanent partial total. He had originally found no compensable disability due to the compensable diagnosis representing a “minor strain”. He conceded in his report that the petitioner was an appropriate candidate for the surgery recommended by Dr. Porter but that this was “completely elective” in nature and the petitioner should try to avoid the same as long as possible so that he could continue with his employment which is “clearly a significant consideration for the petitioner”.

Dr. I. Khan (for Total Compensation Insurance) concluded that the Total Compensation Insurance exposure “at most” “may” have contributed to an “exacerbation of symptoms” re: the petitioner’s knees and low back, and that most of the presentation was due to the “normal aging degenerative process” and petitioner’s obesity. The underlying pathology of the low back was more likely than not a “natural progression” of the deterioration of the MRI findings on 2015 and 2019 as to the low back and that was similarly true with respect to the occupational exposure as being “primarily” a preexisting condition associated primarily with the bilateral knee trauma of August 1, 2021 with “at most” an “exacerbation of symptomatology” resulting from the occupational exposure with overall disability as being 10% of each leg and 5% permanent partial total for the back “regardless of cause.”

The petitioner has significant present residuals concerning his bilateral knees. He actually lost weight in an effort to put as little stress as possible on both of his knees and his low back. He is now 220 pounds. He continues to have chronic pain in his low back which he rates 7/10 most days. He has learned how to work “around” the pain most of time. He is far more sedentary now as compared to when his Order Approving Settlement was last entered. As to his back, not only is the pain much more severe [although it is relatively stable] there is still daily radiation of pain down both legs, numbness and tingling in both of his feet. He is significantly limited in all spheres of motion in the low back. He can only sit for about one hour before he has to get up and stretch. He can only stand in one location for about a half an hour. He basically does no lifting at all. He does no kneeling. He walks with a slow gait but does not walk with a cane. He does virtually no lifting and no sports. He feels “fortunate” to be back to work. His sleep is disrupted every night due to both his low back pain and his bilateral knees. He also has developed

insomnia in part because he worries about supporting his family and when he may have to undergo spine surgery. He did not pursue psychiatric disability.

He does not wear a brace. He is still taking significant Aleve and Advil. He has developed some gastric issues. This has not been assessed. He does not want to go on any type of narcotics. He does light strengthening regimen every morning and every evening. His gait has been significantly impacted because of his low back and his knees. He does no kneeling at all. He uses hand rails when available for climbing and descending steps. The bilateral pain in his knees are less than what it was before he had surgery. He feels the surgery was somewhat successful relative to the increased stability in both of his knee joints. His goal is work another 5 years and then retire. He is not sure that he will make it. He feels that he is now using his experience and his knowledge to making a meaningful contribution to his employer's business. He is hopeful that he will be able to permanently avoid having to undergo the surgery but he realizes he may have no choice but to undergo surgery. He is deferring the same for as long as he can. He feels the knees "are what they are" but he is concerned every day about avoiding anything that might "put him over the edge" regarding his spine. He feels he's on "borrowed time".

Additional Questions

In addition to the specific considerations necessary to reach a Global settlement please consider the following issues:

1. What should be the wage/rate for permanency in connection with any award for increased stability in connection with the reopened claim petition whereby "wage and rate" was stated as $800/$560.
2. Did Alan Barnes commit malpractice in connection with handling of the first claim. What, if anything, should Alan Barnes have done differently in connection with his representation of the petitioner in terms of dealing with the low back condition and the overall value of the claim. What was the settlement value of his first claim if the low back was considered a compensable aggravation of "preexisting permanency."
3. Should Jennifer Stone have done anything differently in terms of her initial interview with the petitioner and accepting him as a client regarding communicating with Alan Barnes. Did she commit any ethical violation regarding her meeting with the Petitioner who she knew was represented?
4. What are the criteria for assessing an attorney's fee Lien? What, if any, payment should Barnes receive for his 5 hours of services?
5. What is the viability of the petitioner's low back claim regarding compensable occupational exposure and impact of the Section 20 settlement. Did Jennifer Stone adequately address the appropriate period of compensable occupational exposure?
6. Assuming the petitioner is unwilling to accept any disposition that eliminates his ability to reopen his low back claim in view of his significant concern over the need for a major surgical intervention, how would this concern be best incorporated into a Global settlement.