

**Maryland
Workers'
Compensation
Commission**

Introduction

Medicare Secondary Payer Act

&

Workers' Compensation
Settlement Process

What this is not . . .

This presentation is not a tutorial on how to create and fund a formal set-aside allocation or Medicare Set-Aside

So, what is this?

This is a roadmap for ensuring that your settlements can be approved by the Commission.

This is an explanation of the regulations designed to ensure compliance with the requirement that Medicare's interests are adequately considered in settlements.

Medicare Secondary Payer Act ("MSPA")

- Medicare acts as a secondary payer in the context of workers' compensation ("workers' comp pays first")
- Regulations set forth in 42 CFR § 411

MSPA

- Medicare is authorized to make "Conditional Payments" if primary plan does not promptly pay
- MSPA creates a private cause of action against primary plan that fails to reimburse Medicare

Medicare Medicaid And SCHIP Extension Act Of 2007 ("MMSEA")

- Aimed at enforcing MSPA by creating settlement reporting requirements
- Workers' compensation insurers must report workers' compensation settlements to CMS

Bottom Line:

All parties in a workers' compensation case have responsibility to protect Medicare's interests when settling a case that involves future medical expenses.

In some cases, protecting Medicare's interests requires getting CMS approval of the amount allocated for future medical expenses (Medicare Set-Aside) in the settlement

Why You Should Care:

CMS may impose harsh sanctions on claimants who do not obtain CMS approval of a settlement when required under CMS thresholds and may:

1. Deny claimant future medical care
2. Designate its own allocation which may be the entire settlement
3. Sue for re-payment from everyone involved including the claimant's attorney

United States v. Stricker, et al.,
2009cv02423, U.S. District Court of
Alabama, filed December 1, 2009

- Plaintiffs' settled liability case against defendant corporations for \$300 million
- CMS sued to recover conditional payments – defendant corporations, insurers, and plaintiffs' counsel

What Now?

The Commission promulgated emergency regulations, effective 1/4/10, to ensure adequate consideration of Medicare's interests in Commission-approved settlements.

Regulations now require:

1. If your settlement falls within CMS review thresholds, you must obtain CMS approval before the Commission will approve your settlement.

2. If your settlement falls outside the CMS review thresholds, the settlement must:

- Contain a statement that Medicare's interests have been considered

AND

- Identify the amount of the proposed settlement apportioned to future medical expenses

OR

- Identify the amount of the proposed settlement that is set-aside for future medical expenses through a formal set-aside allocation

How to protect Medicare's Interests

There are three methods for protecting Medicare's interests:

- Formal Set-Aside Allocation or MSA
- Apportionment of the amount associated with future medicals
- Language confirming that Medicare's interests have been considered

Medicare Set-Aside (“MSA”)

Account created in the settlement of an individual's workers' compensation claim that is used to pay for future medical expenses that are attributable to the work-related injury/disease

Formal Set-Aside Allocation

Document created in the settlement of an individual's workers' compensation claim reflecting a comprehensive analysis and projection of future injury-related medical needs & associated costs

COMAR 14.09.01.01B(3)

When is CMS approval required?

- When settling a workers' compensation claim

AND

- Future medical benefits are being settled

AND

Either of the following two thresholds are met:

- Total Settlement is worth more than \$25,000 and claimant is current Medicare beneficiary

OR

- Total Settlement is worth more than \$250,000 with “reasonable expectation” of Medicare within 30 months

Total Settlement Includes:

- All future Indemnity payments
- All future medical expenses (including prescriptions)
- Repayment of any Medicare conditional payments

AND

Total Settlement (cont'd.)

- Attorneys' fees
- Any previously settled portion of the workers' compensation claim
- The gross total of all future payments to be paid pursuant to an annuity (not the present value)

“Reasonable Expectation” defined:

- Claimant is 62.5 years old

OR

- Claimant is current recipient of SSDI

OR

Reasonable Expectation (cont'd.)

- Claimant has applied for SSDI or unfavorable SSDI ruling is on appeal

OR

- Claimant suffers from end-stage renal disease (ESRD) but has not yet qualified for Medicare

Medicare Thresholds

For settlements within the Medicare thresholds, CMS approval must be obtained **BEFORE** the Commission will approve the settlement

Attorneys should use the newly revised Settlement worksheet (H-07) to assist in determining whether the settlement falls within the CMS review thresholds

COMAR 14.09.01.19B(2)

Settlements Outside Medicare Thresholds

For settlements outside Medicare thresholds, the settlement agreement must contain:

1. A statement that Medicare's interests have been considered
AND EITHER

COMAR 14.09.01.19B(3)

Settlements Outside Medicare Thresholds (cont'd)

2(a) A statement identifying the amount of the proposed settlement apportioned to future medical costs supported by a medical opinion or evaluation

OR

Settlements Outside Medicare Thresholds (cont'd)

- 2(b) A statement identifying the amount of the proposed settlement that is set-aside for future medical expenses through a formal set-aside allocation

Apportionment

Apportionment of the amount of the settlement associated with future medical expenses must be supported by medical evidence such as a medical opinion or evaluation

COMAR 14.09.01.19B(4)

Formal Set-Aside Allocation

Formal Set-Aside Allocation shall comply with the guidelines established by Medicare for set-aside allocations

COMAR 14.09.01.19B(5)

ALL Settlement Agreements Must Now Also Include:

Specific language confirming that the
interests of Medicare have been
considered

AND

A statement that the Insurer shall reimburse Medicare for any provisional payments made by Medicare which were ultimately determined to be the responsibility of the employer/insurer

AND

If the insurer makes an assignment of any of its obligations to a third party, the agreement must contain affirmative language confirming that the Employer/Insurer shall resume its obligation for all remaining payments in the event of a default by the third party

AND

Total value of all indemnity benefits
previously paid to the claimant

AND

Gross total of all future payments to be paid
pursuant to an annuity (not present value)

AND

Payment sheet identifying the precise
distribution of all settlement proceeds

AND

Claimant's average weekly wage

AND

Claimant's date of birth and age in
years and months

Remember:

The existing requirements of COMAR 14.09.01.19A still apply.

Settlement Must include:

- (1) Total amount of settlement
- (2) Inclusive dates of TTD
- (3) Date on which payments are to begin

- (4) If compensation was previously awarded or paid, a statement indicating whether the settlement includes, is in addition to, or is in place of all or part of that compensation

- (5) A statement indicating the rate of payment and whether settlement is to be paid as a lump sum

Q & A . . .

Question 1:

Do I need to comply with this regulation if the claimant has no future medical expenses?

Answer 1:

Yes, you will need to include the mandatory elements in the settlement agreement set forth in COMAR 14.09.01.19A.

You will also need to include medical evidence establishing that there are no future medical expenses. Section B of this regulation does not apply to a settlement in which there are no future medicals.

Question 2:

What if I don't know whether my client currently receives Medicare?

Answer 2:

FIND OUT.

Question 3:

Do different rules apply if this is a structured settlement?

Answer 3:

No.

Question 4:

How do I find out if the CMS review thresholds have changed?

Answer 4:

Go to

www.cms.hhs.gov/WorkersCompAgencyServices for changes to the thresholds or changes in CMS' policy and procedure.

Question 5:

Are the CMS review thresholds a safe harbor?

Answer 5:

No, the thresholds do not create a safe harbor. The thresholds create a workload review standard for CMS.

Question 6:

What should an attorney do when the attorney's client seeks to ignore Medicare's interest in the settlement of a workers' compensation case?

Answer 6:

In its April 21, 2003 memorandum, CMS advises “the attorney should consult their national, state, and local bar association for information regarding their ethical and legal obligations. Additionally, attorneys should review applicable statutes and regulations, including, but not limited to, 42 CFR 411.24(e) and 411.26.”

Question 7:

Will the Commission make a new settlement template available on the website?

Answer 7

No.

Question 8:

Will the Commission approve settlements in which the medicals are left open?

Answer 8:

Yes. Medicare's interests are protected when medicals are left open because the employer/insurer will continue to pay future medicals associated with the accidental injury or occupational disease.

Where to Get More Information

- http://www.wcc.state.md.us/Adjud_Claims/Reg_Changes.html
- <http://www.cms.hhs.gov/MandatoryInsRep>
- www.cms.hhs.gov/WorkersCompAgencyServices