

Additional Q& A Regarding Implementation of the Emergency Settlement Regulations Maryland Workers' Compensation Commission - (02/2010)

Are indemnity payments that have already been made included in the calculation of the total value of the settlement for the purpose of determining whether the settlement falls within the CMS review thresholds?

Only prior settlements are included in the calculation of the total value of a settlement when determining whether the settlement is within the thresholds. Any previously settled portion of the workers' compensation claim, all future indemnity payments, all future medical expenses (including prescriptions), repayment of any Medicare conditional payments, attorneys' fees, and the gross total of all future payments to be paid pursuant to an annuity (not the present value).

See CMS memo dated July 11, 2005, Question 4.

May an insurer/employer place language in the settlement agreement that limits its contractual obligation to pay conditional payments to conditional payments that were made prior to the date of the settlement agreement?

Yes, an insurer/employer may limit their contractual obligation to reimburse CMS for conditional payments to payments made prior to the date of settlement. This does not, of course, foreclose further review or recovery by CMS.

How do I handle a compromise settlement?

Make sure that the text of the settlement agreement clearly indicates that the settlement is a compromise case and whether compensability and/or causation is contested.

How can I get a settlement approved involving the compromise of a workers' compensation lien and a third party insurer?

Because it is unclear how CMS will treat liability cases involving a compromise (the same review thresholds do not apply to liability cases) and a third party insurer, the Commission will not apply the requirements of § B (allocation and apportionment of future medicals) to third party settlements where the third party settlement is a compromise case involving the release of the workers' compensation lien, or the case is a policy limits case involving the release of the workers' compensation lien. In order to get this kind of case approved by the Commission, you must include the allocation of third party funds, the amount of the workers' compensation lien being compromised, and an explanation of why settlement was necessary (i.e., policy limits, poor liability, etc).

However, you and the third party insurer/attorney should be aware of CMS's position with respect to cases involving both a workers' compensation claim and a third party liability claim:

Third party liability insurance proceeds are also primary to Medicare. To the extent that a liability settlement is made that relieves a WC carrier from any future medical expenses, a CMS approved Medicare set-aside arrangement is appropriate. This set-aside would need sufficient funds to cover future medical expenses incurred once the total third party liability settlement is exhausted. The only exception to establishing a Medicare set-aside arrangement would be if it can be documented that the beneficiary does not require any further WC claim related medical services. A Medicare Set-aside arrangement is also unnecessary if the medical portion of the WC claim remains open, and WC continues to be responsible for related services once the liability settlement is exhausted.

See CMS memo dated April 22, 2003, Question 19.

You should also be aware that CMS has successfully recovered conditional payments from attorneys in liability cases. See *United States v. Harris*, 2009 WL 891931 (N.D. W. Va. 2009).

How do I handle a settlement in a case that is on appeal?

Make sure that the text of the settlement agreement clearly indicates that the case is currently on appeal and identify the issues in dispute.

Will the Commission approve settlements in which the parties seek to settle the entire case and agree to pay whatever "number" CMS determines to be the appropriate amount of future medicals?

No. The Commission will not approve a settlement that is subject to the CMS thresholds for which the parties have not obtained prior CMS approval. If the parties are concerned that the pending CMS approval will take too long, or the parties seek to stop paying indemnity during the pending review, the parties may essentially bifurcate the settlement by settling the indemnity portion of the case and leaving medicals open. Once CMS approval has been obtained, the parties should submit the settlement to close the medicals.

See CMS memo dated July 11, 2005, Question 4.

Do I need to complete a settlement worksheet if we are leaving medicals open or there are no future medicals?

Yes, you still need to complete a worksheet but you should include in the comments section of the worksheet and in the body of the settlement a statement that medicals will be left open or that there are no future medicals. If there are no future medicals this alleged fact must be supported by medical documentation.