

Claimant's Perspective on Workers' Compensation Settlements and MSA's

and

Update on MSP Legislation Pending in Congress - H.R. 2641 and H.R. 4796

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Claimant's Perspective

We have often find as claimant's counsel that our perspective varies in a number of respects from defense counsel and insurance companies in regards to MSA's in workers' compensation settlements. Obviously, our motivations are different, but also there are a number of details that we need to be concerned about for our clients interest that the defense and insurance carrier do not have in mind. I'll mention just a few of those:

- 1.** The value of the case involving an MSA should include not just cost of the MSA, but the cost of administering same and the cost of other items not covered by Medicare. Those are also co-pays, donuts, concerns regarding formalities, the cost of Medicare supplemental coverage, etc.
- 2.** Except in unusual cases, even where a settlement involves an MSA, settlement should be looked at well before the end of 500 weeks of temporary total, if at all.

- 3.** In order for a settlement involving an MSA to be successful there either must be language in the petition and order that protects the claimant from possible problems in the future involving the MSA, or the petition may need to be submitted to CMS in advance.
- 4.** There are cases where even though the parties may have an agreement on the MSA and the professional administration of same, a settlement cannot occur without protecting all of the claimants benefits including not just Medicare and SSDI, but Medicaid and SSI, including the possible use of a special needs trust.
- 5.** The need for an MSA or the size of the MSA can be appropriately impacted or prorated when there has been a third party settlement. In other words, it may well be that the MSA should be reduced or multiplied by the recovery ratio (See attached Exhibit 1 hereto).

6. In regards to conditional payments, that is payments by Medicare predating a workers' compensation settlement with a possibility of future payments, attorneys for both the claimant and defense have a compelling ethical obligation to reconsider the extent to which CMS has a lien against a workers' compensation settlement or the viability of the current CMS guidelines in regards to future medical needs related to a claimants work injury. (Hart, *The Myth of the Superlien; Medicare Secondary Payer Law Clarified*, NAELA Journal(Volume V, 2009))

7. The MSA guidelines do not prevent claimant and defense counsel from exercising reasonable lawyering skills. Ultimately, there are many circumstances where instead of the need for an MSA, only "consideration, of CMS's interests" is the rule.

8. Evaluation of the need for an MSA is done on a case by case basis. CMS has issued more than a dozen “policy” memorandums. In some specified cases, the most accepted compliance method is to calculate the need for and fund an MSA. However, under any analysis, an MSA may not be needed if the claim lacks the requisite entitlement (for MSA submission) status or the treating physician concludes in writing that no future medical needs exist related to the work injury. See, memorandum from Thomas L. Grissom, Director, Center for Medicare Management, to All Regional Administrators, “Medicare Secondary Payer – Workers’ Compensation (WC) Frequently Asked Questions,” questions & answers No. 20 (April 22,2003) *available* at <http://www.cms.hhs.gov/WorkersCompAgencyServices/> (last visited February 4, 2010) when it states:

“It is unnecessary for the individual to establish a set-aside arrangement for Medicare if all of the following are true: a) The facts of the case demonstrate that the injured individual is only being compensated for past medical expenses (i.e., for services furnished prior to the settlement); b) There is no evidence that the individual is attempting to maximize the

other aspects of the settlement (e.g., the lost wages and disability portions of the settlement) to Medicare's detriment; and c) The individual's treating physicians conclude (in writing) that to a reasonable degree of medical certainty the individual will no longer require any Medicare-covered treatments related to the WC injury."

Pending MSP Legislation

9. Given the difficulty and complexity of dealing with MSA's and workmen's compensation settlements, is not surprising that two separate bills are pending in Congress which are designed reduce the delays and the roadblocks caused by the current CMS policy guidelines. (See attached exhibit 2 hereto). These bills have a broad based coalition support of claimant and insurance interests.

Exhibits to MSA Talk

Exhibit 1: 5/29/2000 research memo regarding the impact of third party settlements on MSA's.

Exhibit 2: September 23, 2010 article by Hank Patterson on pending MSP legislation.