



Maximizing the Retention of Proceeds from a Workers' Compensation Settlement

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Nurenberg, Paris, Heller & McCarthy

- Historical Perspective & Current Status
 - Federal programs (Social Security & Medicare) form foundation for all other benefits
 - Workers' compensation & private disability benefits account for Social Security
 - Medical & private health insurers set fee schedules off of Medicare/Medicaid reimbursement rates
- SSD, Medicare Eligibility & Benefit Levels
 - Requirements
 - SSD
 - Medicare
 - Section 111 Reporting
 - Conditional Payments
 - Medicare Set-Aside (MSA)
- How to Protect SSD & Medical Benefits
 - SSD presentation
 - Indemnity only settlement
 - Medicare specific issues
 - Medical settlement dependent on MSA evaluation
- Medical/Health Insurance/STD/LTD
 - Subrogation to become a bigger issue
 - LTD policies could become more costly
 - Special Needs Trust/ Stable Account
- Putting It All Together
 - Sample settlements
 - Sample MSA



Agenda

A. Trust Funds

1. OASI – Old-Age and Survivors Insurance
2. DI – Disability Insurance
3. HI – Hospital Insurance (Part A)
4. SMI – Supplemental Medical Insurance (Part B & D)

B. Sources of Funding

1. Payroll Taxes (FICA)
 - A. 15.3% tax – 7.65% employer 7.65% employee
 - Soc. Sec. 6.2% on wages up to \$147,000.00 (2022)
 - Medicare 1.45% on first \$200,000
 - 2.35% on all amounts in excess of \$200,000
2. Income Taxes on individual SSR/SSD benefits
3. Interest Income (Government Treasuries)

C. Program Expenditures

1. Benefit Payments
2. Administrative overhead

Historical Perspective & Current Status

- A. Must have a medical condition that interferes with basic work-related activities, making claimant unable to engage in any substantial, gainful employment.
- B. For disability insured status, a claimant must have earned:
 - 1. At least 20 quarters of coverage in the preceding 40-quarter period.
 - 2. A worker is credited with a quarter of coverage if he has earned at least \$1,510 each quarter.
 - 3. Four quarters of coverage are obtained if the claimant has earned at least \$6,040.
- C. Apply if condition/disability is expected to result in death or last for a continuous period of no less than 12 months.
- D. “Compassionate Allowance”
 - 1. List of medical conditions that automatically qualify as soon as diagnosis confirmed.
 - 2. Acute leukemia, Lou Gehrig’s disease (ALS), pancreatic cancer, etc.
- E. Medicare eligibility after two years of disability.
- F. Payable until claimant returns to work or Full Retirement Age (moving target—not automatically age 65 anymore).
 - 1. Disabled claimant can earn up to \$1,350 per month during 2022



Background & Eligibility for Social Security Disability

Calculation of SSD Benefits & Determination of Average Current Earnings (ACE)

- A. Primary Insurance Amount is the amount an individual would receive benefits at retirement.
- B. Average Current Earnings (ACE) is a calculation of benefit levels for individuals who have qualified for SSD.
- C. ACE is calculated as the highest of three possible calculations:
 - C. Average monthly wage determined by dividing total wages by the number of months within that period. (35 yrs.)
 - D. Average monthly earning from employment and self-employment during the five highest consecutive earning years after 1950 (**total earnings/60 months**).
 - E. Average monthly earnings based upon the first calendar year of the highest earnings during a period consisting of the year in which the disability began and the five years immediately preceding the year of onset (**total earnings/12 months**).
- D. Combination of SSD & WC benefits cannot exceed 80% of the ACE or total monthly family SSD benefit (FAM MAX)
 - 1. Offset of SSD benefits applies to any amount of combined benefits that exceeds 80% of ACE or FAM MAX
 - 2. WC benefits include all disability/loss of income/indemnity
 - A. TTD, PTD, PPD, LOSS OF USE, VSSR
 - 3. Historically, the offset ended at age 65, regardless of the individuals Full Retirement Age (FRA).
 - 4. Congress passed HR5771, The Tax Increase Prevention Act of 2014 on December 19, 2014.
 - A. After 12/19/2015, SSA's right to offset SSD benefits due to receipt of workers' compensation benefits will no longer cease at age 65, but rather continue to FRA.
- E. There are currently 15 "reverse offset" states for WC benefits.

- A. Incorporate language into the settlement agreement/compromise and release that allocates a lump sum settlement amount at a prorated monthly amount over the disabled worker's life expectancy (from effective date of settlement)
 - 1. Gross amount of Settlement
 - 2. LS start/effective date
 - 3. Rate at which settlement is prorated
 - 4. Excludable expenses
- B. SSA will first apply the rate allocated in the settlement document assuring it is reasonably allocated over the disabled worker's life expectancy.
- C. Absent language providing an allocation of the settlement proceeds, SSA will determine allocation rate based upon the following options:
 - 1. Periodic rate paid prior to the lump sum if no rate is specified in the settlement documents.
 - 2. If no rate is specified in the settlement documents and the injured worker was not being paid benefits prior to the settlement, the allocation shall be based upon the State maximum WC rate in effect for the year of the claim.

How To Benefit From a Settlement

How To Benefit From A Settlement (Cont'd)

D. Proration of excludable expenses (Legal & Medical)

1. Method A:

- A. Allows for front-loading of the excludable expenses to delay imposition of any offset until some point in the future.
- B. Advantageous if the disabled worker is nearing retirement age or there is only a closed period of DIB payable.
- C. Prorated by dividing total excludable expenses by previously determined monthly rate, resulting in the number of months before any offset is imposed.

2. Method B:

- A. Allocates the excludable expenses over the life of the award/settlement as a percentage of the total award/settlement.
- B. Prorated by subtracting the excludable expenses from the lump sum amount and dividing the result by the total lump sum. Multiply that percentage by the previously determined monthly rate resulting in a reduced monthly rate for offset.

3. Method C:

- A. Applies excludable expenses from the end date of last periodic benefits received by the disabled worker.
 - B. Most advantageous when the disabled worker last received periodic benefits long before being awarded SSD benefits so proration can potentially expire prior to the first possible month of offset.
 - C. Prorate the lump sum amount less excludable expenses divided by monthly allocation amount to determine number of months of proration.
- E. SSA in determining offset will utilize the method that is most advantageous to the disabled worker.

A. Social Security Disability Benefits (DIB)

1. No Impact on TTD
2. PTD Benefits are reduced to 66 2/3% of SAWW if the PTD rate is greater than 66 2/3% of SAWW and the claimant is receiving SSD.

B. Social Security Retirement Benefits (RIB)


1. No impact on PTD
2. TTD benefits are reduced to 66 2/3% of SAWW if the TTS rate is greater than 66 2/3% of the SAWW and the claimant is receiving SSR benefits.

C. RIB/DIB Options

1. SSD Beneficiaries can elect for early SSR benefits at any time once they have reached age 62.
 - A. Can result in increased PTD benefits as there is no offset for receipt of SSR benefits.
 - B. Calculation of reduced SSR benefits:
 1. PIA is reduced by 5/9 of 1% for each of the first 36 months prior to FRA (total reduction for 36 months is 20% of PIA)
 2. PIA is reduced 5/12 of 1% for each month in excess of 36 months (total reduction for 60 months is 30%)
 - C. At FRA, reduced RIB benefit amount reverts to full DIB benefit rate prior to reduction for early retirement.

D. DWRF Benefits

1. 2022 entry level rate is \$425.67
2. If combined PTD + SSD benefits do not total or exceed DWRF entry level, claimant is eligible for DWRF benefits.
3. If eligible, DWRF rate paid to claimant at the difference between either the DWRF entry level rate and PTD rate, or DWRF entry level rate and SSD rate, whichever results in the lower DWRF payment.



SSD vs. SSR Options with WC Benefits

Medicare Questions When Settling

Conditional Payments: Pre-Settlement Issue

- Payments made by Medicare for claim-related treatment prior to settlement of the claim.
- Must be reimbursed at time of settlement.
- Alleged payment amounts can be challenged/negotiated.
- Potential double damages for payments not reimbursed.

Medicare Set-Aside: Post-Settlement Issue

- Required to consider Medicare's interests at time of settlement.
- No specific requirement for MSA.
- No specific requirement for submission of MSA evaluation to CMS for approval.

1. CMS review thresholds:

- Is the claimant a Medicare Beneficiary or likely to be within the next 30 months?
 - \$25,000.00 if current Beneficiary
 - \$250,000.00 if not a current Beneficiary but likely to be within 30 months

Only review thresholds for CMS

- Not safe-harbor
- Must consider Medicare's interests in all settlements.

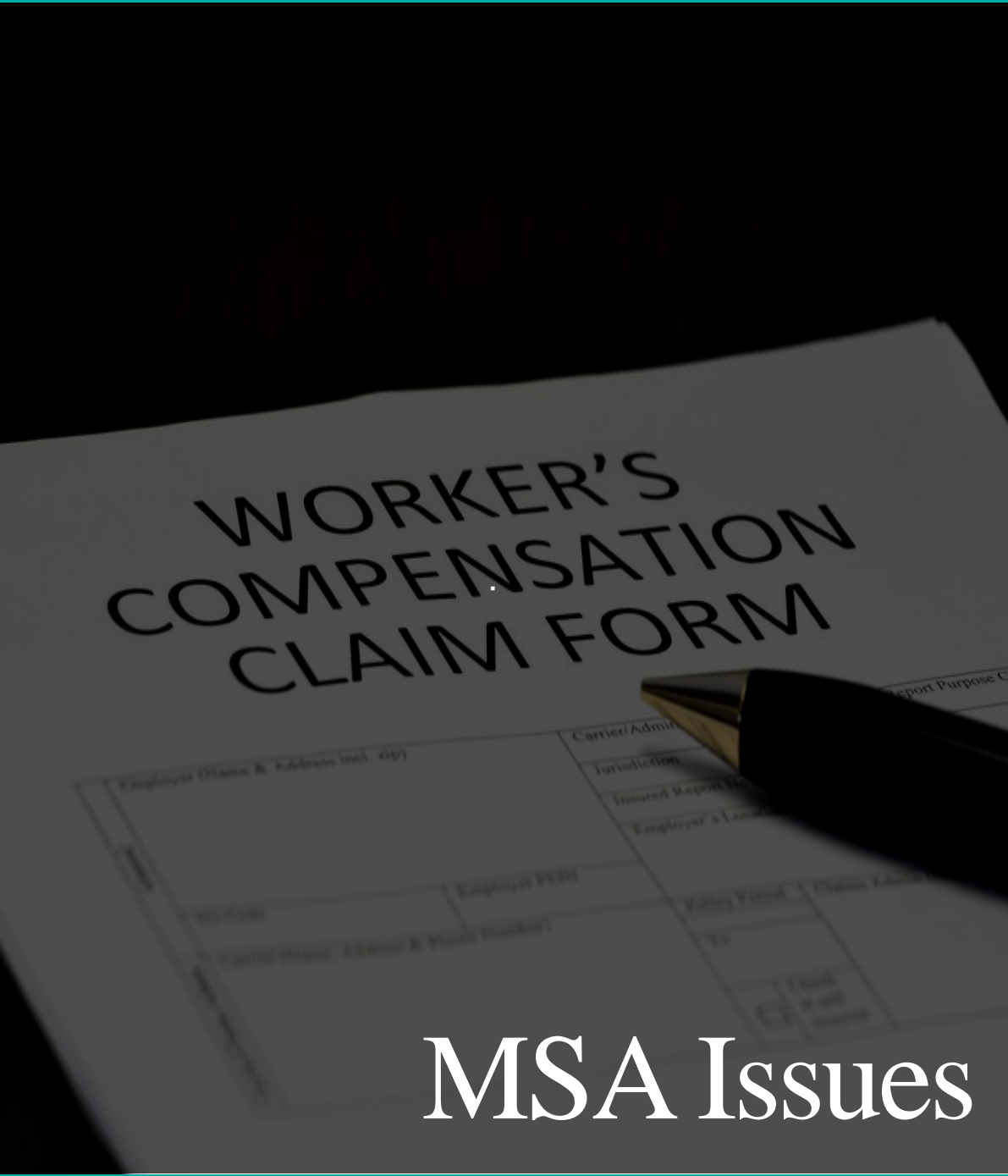
2. What is Medicare Set-Aside?

- Report a vendor puts together estimating future medical payments.
- Vehicle funded for making future medical payment
 - Account setup with professional administration
 - Account setup and self-administered by the injured worker
 - Annuity payments provided by life insurance company
 - Lump sum of cash the injured worker keeps under their mattress

All are/can be components of MSA

3. Vendor Review

- Submit for CMS approval or not.



WORKER'S COMPENSATION CLAIM FORM

MSA Issues

MSA Issues

4. MSA Analysis now involves traditional Medical analysis/evaluation but also Legal analysis/evaluation

- Traditional MSA Medical Evaluation
 - Commutation of Benefits—Accepted WC Claim where claimant is not represented
 - Evaluate treatment history
 - Claimant demographics
 - Estimate anticipated future medical treatment and prescription needs based upon allowed conditions/treatment history/rated age etc.
 - Industry has gotten more sophisticated
 - Vendors compile and analyze data from thousands of prior CMS approvals and using similar fact patterns and algorithms produce model MSA
 - Using this statistical outcome as basis for MSA without submitting for approval.

MSA Review based upon Legal interpretation of current MSP statute

- Compromise of Benefits
 - Relies on legal interpretation of current MSP statute and regulation to arrive at conclusions
 - Establish attorney/client relationship
 - All communication is privileged
 - Client has recourse for relying on legal advice
 - Client can avoid seeking CMS review/approval
 - Rely on legal advice to the extent it is wrong
 - Complete Risk Transfer
 - MSA submission for approval to CMS
 - Legal MSA to lawyer

5. MSA Vehicle Options

- No requirement in the law for MSA or funding MSA
- Have plan in place for paying for any injury-related medical treatment post-settlement
 - Traditional MSA
 - Setup own medical savings account
 - No specific restrictions as established with MSA per WCMSA reference guide No reporting requirements and funds can be used for other purposes.
 - No reporting requirements and funds can be used for other purposes.
 - Use of other insurance (private insurance, Medicaid, VA)
 - MAP (part C) caveat
 - Pay out of pocket

6. MSA Funding Options

- Lump sum payment
- Annuity
 - Seed money (2x Annual Amount)
 - Annual Payment
 - Life Annuity
 - Temporary Life Annuity
 - Period Certain
 - Period Certain With Life

7. MSA Administration Options

- Self-administration
- Professional administration
 - Paying for Medicare covered service at appropriate amount
 - Reporting requirements

- **Injured Worker:** D.O.I 7/24/2006
- **Allowed Conditions:** Open wound right forearm with tendon; Right ulnar nerve injury; Ankylosis right hand; Ulnar nerve palsy right hand; Major depressive disorder; Post traumatic stress disorder; Ankylosis right arm
- **D.O.B.:** 1/23/1965 (50 y.o.)
- **Life Expectancy:** 31.4 years (376.8 mths.)
- **Regular Retirement Age:** 66 y.o.
- **PTD Weekly Benefit Rate:** \$426.36 (\$1,847.56/mths.)
- **SSD Average Current Earnings:** \$3,200.00 (80% Max Rate \$2,560.00)
- **SSD Monthly Benefit Rate:** \$2,000.00
- **Gross Settlement Amount:** \$330,000.00
 - \$300,000.00 Indemnity
 - \$30,000.00 MSA
 - \$60,000.00 Legal Fees & Expenses

Sample Calculations of Settlement Affecting SSD Offset

Sample Calculations of Settlement Affecting SSD Offset (cont'd)

Current SSD Offset While PTD Benefits Paid

Max SSD Rate (80% of ACE)	\$2,560.00
-BWC PTD RATE	<u>-\$1,847.56</u>
Monthly SSD Rate with PTD	\$712.44

After Settlement of WC Claim

$$\frac{\$300,000.00}{376.8 \text{ mos.}} = \$796.18/\text{mo}$$

Allowance for Legal Fees/Expenses

Method A:

$$\frac{\$60,000.00}{\$796.18} = 75.4 \text{ mths.} = 6.3 \text{ years}$$

- No offset to age 56 (6.3 years) then offset \$796.18 to early retirement or FRA

Method B:

$$\frac{\$300,000.00 - \$60,000.00}{\$300,000.00} = 80\% \times \$796.18 = \$611.62$$

- New offset amount of \$611.62 from time of settlement to early retirement or FRA.

Method C:

Would not apply in this example as SSD benefits were being paid at time of settlement.

- **Injured Worker:** D.O.I. 11/14/2007
- **Allowed Conditions:** Right Achilles tendon tear; Sprain left knee; Lumbar strain; Bilateral foot contusions; Substantial aggravation of L3-4 disc herniation; Post-operative infection/deep L3-4 spine abscess; Depressive disorder NOS; Major depressive disorder and pain disorder with psychological factors.
- **D.O.B.:** 9/30/1951 (age 64 at settlement in 2015)
- **Full Retirement Age:** 66 y.o.
- **PTD Rate with SSR:** \$730.00
PTD Rate with SSD: \$486.67
- **SSD Rate:** \$1,968.00
SSR Rate (FRA): \$2,165.00
SSR Rate (@age 64): \$1,876.00
- **Take SSR at age 64:** \$1,876.00 SSR
\$3,163.33 PTD
\$5,039.33 Mthly
- **On SSD at age 64:** \$1,968.00 SSD
\$2,108.90 PTD
\$4,076.90 Mthly
Difference = \$962.43 per month

Sample Calculations of RIB/DIB Options

Injured Worker: Rosemary W. **D.O.I.:**05/08/2015

PTD Granted: 12/2019

D.O.B.: 8/20/1960

F.R.A. 67

Age 62 8/20/2022

Age 67 8/20/2027

SSD Rate: \$321.27/wk.

PTD Rate: \$269.97/wk. (\$247.78/wk. after statutory atty. fee)

2022 Weekly DWRF Eligibility Level: \$425.67

Current Combined Benefits: \$247.78 PTD

\$321.27 SSD

\$569.05/wk.

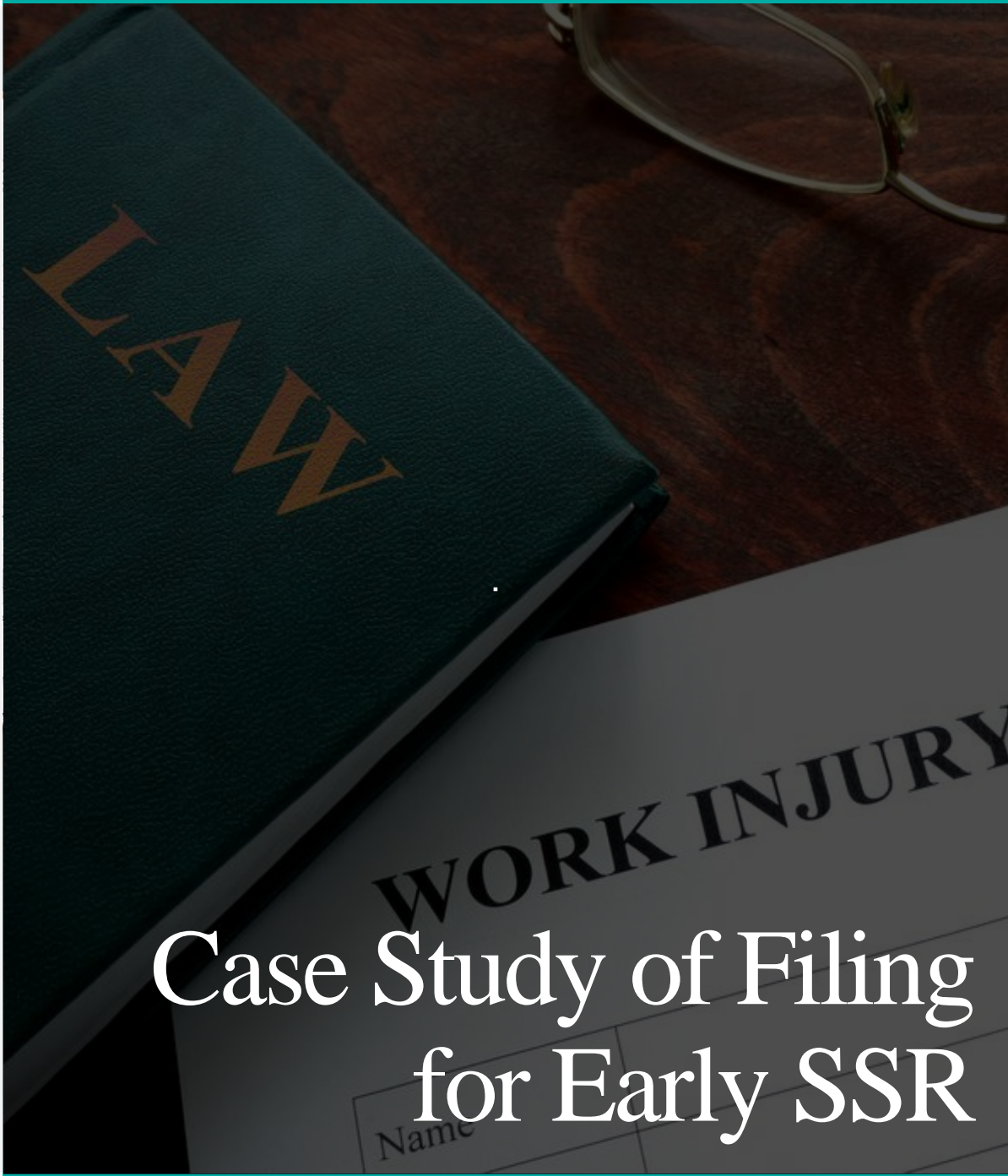
Combined Weekly Benefit After Filing for Early SSR:

SSR @ age 62 \$224.89

PTD @ age 62 \$247.78

DWRF @ age 62 \$155.70

\$628.37/wk.

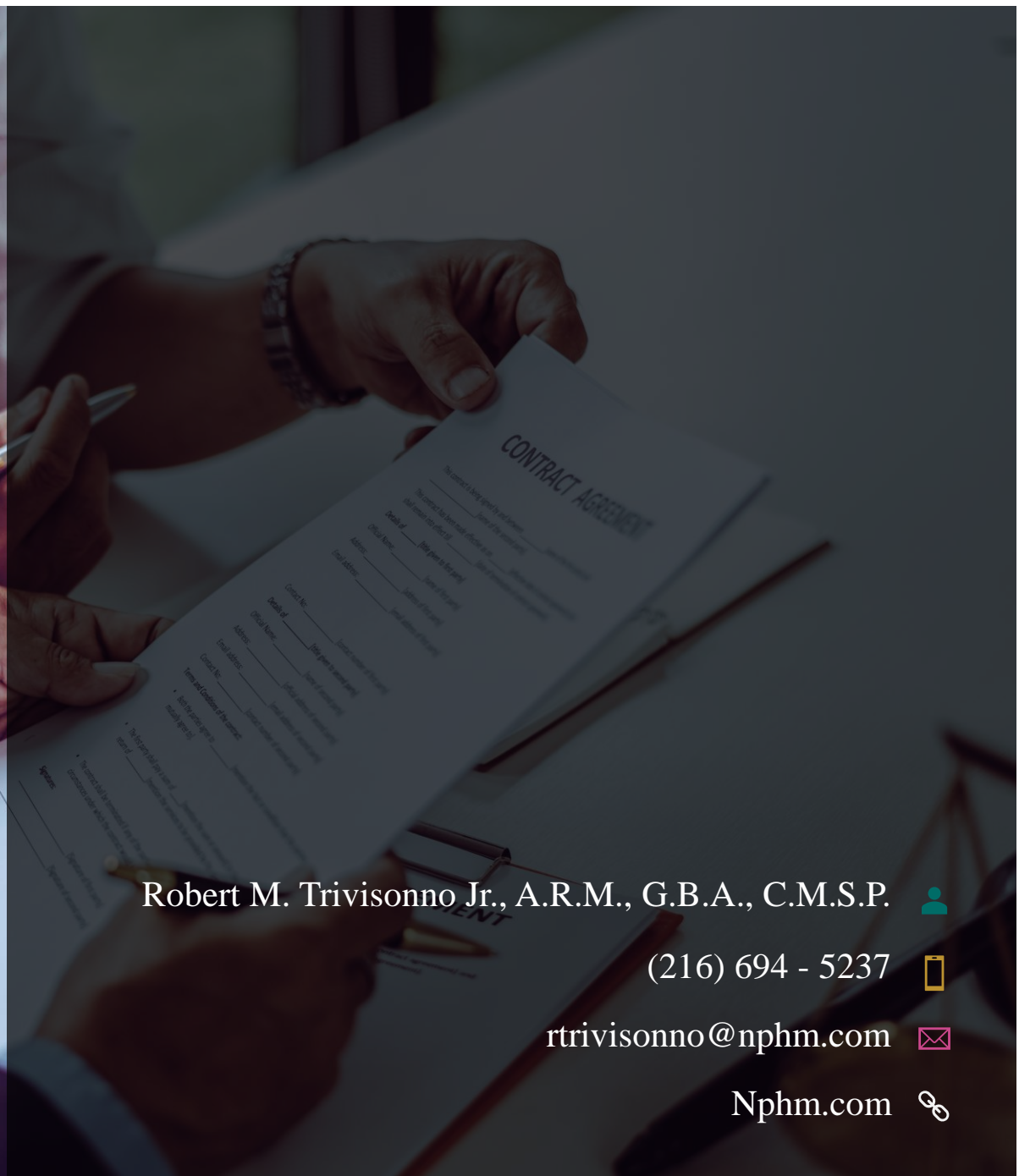



Case Study of Filing for Early SSR

<https://documentcloud.adobe.com/link/review?uri=urn:aaid:scds:US:0128bca9-dc50-4403-b860-0e619fde902b>



Resources



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