Medicare Set-Asides (MSA's)

What are they and why are they important?

Under the MSP Manual. “[t]he only situation in which Medicare recognizes allocations of liability payments to nonmedical losses is when payment is based on a court order on the merits of the case.” (quoting MSP Manual, Ch. 7, § 50.4.4). If the “adjudicator of the merits specifically designate[s] amounts ... not related to medical services, Medicare will accept the Court's designation.” Id. “In deference to the court's substantive decision, ‘Medicare does not seek recovery from portions of the court awards that are designated as payment for losses other than medical services.’” Id.

A court order is “on the merits” when it is “delivered after the court has heard and evaluated the evidence and the parties' substantive arguments.” Black's Law Dictionary 1199 (9th ed.2009)… [S]tate proceedings occur “on the merits” “when a state court has made a decision that 1) finally resolves the claim, and 2) resolves the claim on the basis of its substance”. *Taransky v. Secy. of U.S. Dept. of Health & Human Services*, 760 F.3d 307, 318 (3d Cir.2014)

The scope of a primary plan's obligation to reimburse Medicare and thus the claimant's own obligation upon receipt of a settlement; is defined by the scope of an approved workers settlement backed by the Commission under ORC 4123.65 or court order "on the merits." See, *Hadden v. United States*, 661 F.3d 298, 302 (6th Cir.2011).

CMS will respect allocations of liability amounts to non-medical losses when the allocation is based on a court or administrative judgment. See, *Bio-Med. Applications of Tennessee, Inc. v. Cent. States Southeast & Southwest Areas Health & Welfare Fund*, 656 F.3d 277, 279 (6th Cir.2011).

CMS's Workers' Compensation Medicare Set-Aside Arrangement ("WCMSA") Reference Guide re-affirms this position and notes: Because the CMS prices based upon what is claimed, released, or released in effect, the CMS must have documentation as to why disputed cases settle future medical costs for less than the recommended pricing. **As a result, when a state WC judge or other binding party approves a WC settlement after a hearing on the merits, Medicare generally will accept the terms of the settlement**, unless the settlement does not adequately address Medicare's interests. This shall include all denied liability cases, whether in part or in full.

If Medicare's interests were not reasonably considered, Medicare will refuse to pay for services related to the WC injury (and otherwise reimbursable by Medicare) until such expenses have exhausted the entire dollar amount of the entire WC settlement. Medicare may also assert a recovery claim, if appropriate.

What does that mean for Attorneys?

Medicare can seek recovery from plaintiff's attorneys, injured workers, BWC and self-insuring employers if they determine that their interests were not adequately protected.

Medicare, as a federal agency, can be a very efficient collection agency.

BWC regards Medicare and any potential lien or right of recovery very seriously.

BWC Policy for Administrative Settlements

Medicare Set-Aside

1. Prior to approving a settlement agreement, BWC will require an IW/claimant to establish a Medicare Set-Aside and provide BWC a signed C-241 with the Medicare-Set-Aside section completed when:
    a. A full and final settlement is valued at $10,000 or greater and the IW/claimant is on Medicare or has a reasonable expectation of receiving Medicare within thirty (30) months because the IW:
        i. Is on Social Security Disability (SSD);
        ii. Is age 62 ½ or older;
        iii. Has applied for SSD;
        iv. Has an adverse decision regarding SSD but has appealed the denial; or
        v. Suffers from end-stage renal failure.

BWC Policy for Administrative Settlements

So far so good… But wait! This next part may come as a surprise:

A medicare set-aside is also required for:

A full and final settlement … valued at $100,000 or greater, even if the IW/claimant is <u>not</u> on Medicare and <u>does not</u> have a reasonable expectation of receiving Medicare within 30 months. (Emphasis added.)

BWC Policy for Administrative Settlements

Why is BWC requiring a Medicare set-aside (for settlements of $100,000 or greater) in situations where the injured worker is **not** on Medicare nor do they reasonably anticipate being eligible within the next 30 months?

BWC is requiring a Medicare set-aside to protect everyone involved.

Medicare changes the vendors who administrate the recovery efforts every few years. What may have been perfectly fine under one vendor may not be fine under a new vendor.

Diminished Capacity of an Injured Worker Seeking an Administrative Settlement

In situations where an injured worker may have diminished mental capabilities (for whatever reason) BWC may not approve a settlement if it appears it may not be in the best interest of the injured worker.

Diminished Capacity of an Injured Worker Seeking an Administrative Settlement

Best case scenario: guardian ad-litem

Other factors to consider: competent spouse and/or multiple close relatives who assist the injured worker with day to day handling of affairs.

There may be additional factors that may assist BWC in determining whether the settlement is in the injured worker's best interest.