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The MSA Blind Spot

Driving a car can be dangerous. Driving a tractor trailer can be even more dangerous. Vehicles have blind spots, those areas around the vehicle as you drive where you fail to see other vehicles, bikers or pedestrians because your view is obstructed. The larger the vehicle, the larger the blind spots. Mirrors can only go so far to remedy the blind spots. In the end, a driver must be aware that the blind spot exists and take precautions against danger originating from the blind spot.

The Workers' Compensation (WC) industry has a Medicare Set-Aside (MSA) blind spot. The mirrors provided by MSA vendors to protect their clients fail to account for the MSA blind spot. Current WC industry practices do not align with CMS expectations. CMS clearly discusses its expectations in its WCMSA Reference Guide. Until the danger posed by the MSA blind spot is remedied, parties resolving WC claims will continue to possess an exposure for future medicals which it fails to account for today. The MSA blind spot should be remedied by a lawyer well-versed in MSA obligations under the Medicare Secondary Payer (MSP) Act.

In Section 8.1, CMS shares the situations under which it is willing to review a WCMSA proposal. Those are:

- The claimant is a Medicare beneficiary and the total settlement amount is greater than $25,000.00; or
- The claimant has a reasonable expectation of Medicare enrollment within 30 months of the settlement date and the anticipated total settlement amount for future medical expenses and disability or lost wages over the life or duration of the settlement agreement is expected to be greater than $250,000.00.

https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/WCMSA-Reference-Guide-Version-2_6.pdf (last visited November 2, 2017).

These thresholds are well-known and cited often by WC industry stakeholders. Most WC industry stakeholders, however, interpret these to be the only situations where a WCMSA might be warranted. If you believe CMS on this point, the WC industry is dead wrong in its safe harbor interpretation. This incorrect interpretation has created huge MSA blind spots for parties resolving WC claims.

Section 8.1 explains in great detail that the workload review thresholds provide no safe harbor.

> "These thresholds are created based on CMS' workload, and are not intended to indicate that claimants may settle below the threshold with impunity. Claimants must still consider Medicare's interests in all WC cases and ensure that Medicare pays secondary to WC in such cases."

https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/WCMSA-Reference-Guide-Version-2_6.pdf (last visited November 2, 2017).

CMS is very clear here and always has been. In fact, one can go as far back as at least 2005 to witness CMS' position that these workload review thresholds do not equal safe harbors for parties resolving WC claims. In a 2005 policy memorandum, CMS said:

> "Q2. Low Dollar Threshold for Medicare Beneficiaries – Has Medicare considered a low dollar threshold for review of WCMSA proposals for Medicare beneficiaries?
>
> A2. Effective with the issuance of this memorandum, CMS will no longer review new WCMSA proposals for Medicare beneficiaries where the total settlement amount is less than $10,000. In order to increase efficiencies in our process, and based on available statistics, CMS is instituting this workload review threshold. However, CMS wishes to stress that this is a CMS workload review threshold and not a substantive dollar or "safe harbor" threshold. Medicare beneficiaries must still consider Medicare's interests in all WC cases and ensure that Medicare is secondary to WC in such cases."

Memorandum issued by Gerald Waters, Director, Financial Services Group, Office of Financial Management, to All Regional Administrators on July 11, 2005, available at https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Memorandums/Memorandums.html (last visited November 2, 2017). Note that all WCMSA guidance issued by CMS has been incorporated into its WCMSA Reference Guide as of March 2013.

As early as 2005, CMS has been saying that its WCMSA workload review thresholds do not equal safe harbors. For at least twelve (12) years, parties have been resolving WC claims and largely ignoring this MSA blind spot. How has the WC industry's interpretation missed the mark here so widely?

Here's one example to help establish the boundaries of the MSA blind spot. Parties are settling a WC case involving a Medicare beneficiary and closing future medicals. They agree to settle for $24,999. In so doing, they believe they do not have to worry about an MSA issue. Have you seen that? Have you been a party to that? You do realize that ignoring the MSA issue because you settled just under threshold does not mean CMS grants you safe harbor, right? Who told you it was OK to ignore the MSA issue under those circumstances?

Here's another example. Parties are settling a WC case and closing future medicals. The claimant is not yet on Medicare but meets Medicare's definition of "reasonable expectation" of being on Medicare within thirty (30) months of settlement. The parties agree to settle for $245,000 and therefore believe they can ignore the MSA issue. Really? Because look at Section 8.1 of the WCMSA Reference Guide. It says the complete opposite. CMS says parties settling under the threshold are not granted safe harbor on the MSA issue under those circumstances. I ask these parties, "What is your justification for ignoring the MSA issue? What's in your file right now which told you it was OK to ignore the MSA issue here?"

For too long, parties have ignored the MSP Act when it involves future medicals. The MSP Act says Medicare won't pay where payment has been made under a workers' compensation policy or plan. *42 U.S.C. Sec. 1395y(b)(2)(A)(ii)*. Previously, I have written how the MSP Act applies to non-beneficiaries. CMS itself says, "Claimants must still consider Medicare's interests in all WC cases and ensure that Medicare pays secondary to WC in such cases." https://www.cms.gov/Medicare/Coordination-of-

Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/WCMSA-Reference-Guide-Version-2_6.pdf (last visited November 2, 2017).

There's plenty of blame to go around. The cottage industry of MSA vendors that sprung up after CMS issued the Patel Memo in 2001 is a culprit. Insurance carriers and self-insureds who panel these MSA vendors and mistake their advice for MSA legal advice are guilty. Attorneys representing injured workers who blindly rely on opposing party's MSA expert to provide advice about protecting the worker's future Medicare benefits also have dirty hands. State WC commissioners who use review thresholds as benchmarks for what's in the best interest of the worker can also share some blame. Everyone is on autopilot, ignoring the MSA blind spot. The WC industry has worn out the cruise control on this issue.

You might think this article's goal is to point fingers. It's not. Consider this your wake-up call. You have a MSA blind spot that endangers yourself and many others. The size of the blind spot corresponds to the number of WC claims you are resolving each year. Your current protocols fail to meet CMS expectations. CMS expects the MSA issue to be addressed in WC claims which fail to meet its workload review thresholds.

I highly encourage you to reassess your current MSA protocols. Question the vendors you trust about this issue. They should be able to explain why they believe MSAs are a non-issue for cases under threshold. What's the justification for the explanation? From a risk perspective, if that risk is acceptable to you, by all means, maintain status quo. If their explanation is not acceptable to you, you should consider a legal review of your current MSA protocols from a lawyer well-versed in MSA legal obligations. Empower your claims examiners to hire a lawyer to review MSA obligations and provide legal advice about your MSA exposure.

For claimants' counsel, the questioning does not end there. It's your client, the injured worker, who accepts responsibility for future medicals in a WC settlement. It's your client who CMS says must consider and protect its interest. It's your client who CMS says it will pursue on the issue. It's your client who will call you years after the case settles to say Medicare sent a letter saying it paid a bill by mistake and now the client owes '$x'. How would you handle that phone call? Does it make sense to remain on auto pilot and not put independent thought and analysis into the issue?

The MSA blind spot is real. CMS WCMSA review thresholds do not provide parties safe harbor on cases failing to meet threshold. Industry status quo falls short of CMS expectation. The MSA issue needs to be examined in every WC case where future medicals are in play. Anything less than that needlessly exposes stakeholders to potential CMS recovery actions. And we can all agree that no one wants to see that.