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The MSA Blind Spot

UPDATE : Originally written in November 2017, Cattie, P.L.L.C. updated this article in March 2019 to account for recent changes announced by Medicare at the Centers for Medicare & Medicaid Services (CMS). In Version 2.9 of its Workers' Compensation Medicare Set-aside Arrangement (WCMSA) Reference Guide, Medicare officials added clarity to Section 8.1 (Review Thresholds). Specifically, it added examples of cases/claims that failed to meet its WCMSA workload review thresholds. The article below has been updated to share those examples and explain how they apply to resolving a workers' compensation (WC) insurance claim.

Despite not meeting long-established workload review thresholds, CMS emphasizes the fact that even these situations warrant action be taken to protect its future interests. That action may involve funding a WCMSA or may involve other steps to ensure that Medicare is not asked to pay a medical bill that is someone else's responsibility (*i.e.*, the injured worker). The addition of these examples demonstrates the need to address future medical exposure under the Medicare Secondary Payer (MSP) Act on all WC cases, not just those meeting CMS workload review thresholds. For more information, see the CMS WCMSA Reference Guide.

For those needing assistance in this area, who seek legal advice about their WCMSA exposure, or who wish to obtain a second opinion about a WCMSA issue, Cattie is here to help. Please see our website at www.cattielaw.com, call us at (844) 546-3500 or Tweet us @MSALawyer. Our mission is to minimize/extinguish our client's future medical exposure under the MSP Act, and we'd appreciate the chance to do that for you and your clients.

Introduction.

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.

For years, the Workers' Compensation (WC) industry has suffered from a Medicare Set-Aside (MSA) blind spot. The mirrors provided by MSA vendors to protect their clients have failed 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.

Medicare's WCMSA Workload Review Thresholds.

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_9.pdf (last visited March 19, 2019).

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_9.pdf (last visited March 19, 2019)

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.

Workload Review Thresholds Do Not Equal Safe Harbors.

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?" Maybe you relied on one of those MSA flow charts that became so prevalent years ago.

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_9.pdf (last visited March 19, 2019).

Who's to Blame for the Bad Advice?

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 has been 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.

CMS doubled down on this point in January 2019. In version 2.9 of its WCMSA Reference Guide, CMS added case specific examples to the workload review thresholds. Those new examples do not advise what to do when a case/claim meets the threshold. Instead, they contemplate situations where the case/claim does not meet the threshold. Those examples are:

"Example 1: A recent retiree aged 67 and eligible for Medicare benefits under Parts A, B, and D files a WC claim against their former employer for the back injury sustained shortly before retirement that requires future medical care. The claim is offered settlement for a total of $17,000.00. However, this retiree will require the use of an anti-inflammatory drug for the balance of their life. The settling parties must consider CMS' future interests even though the case would not be eligible for review. Failure to do so could leave settling parties subject to future recoveries for payments related to the injury up to the total value of the settlement ($17,000.00).

Example 2: A 47 year old steelworker breaks their ankle in such a manner that leaves the individual permanently disabled. As a result, the worker should become eligible for Medicare benefits in the next 30 months based upon eligibility for Social Security Disability benefits. The steelworker is offered a total settlement of $225,000.00, inclusive of future care. Again, there is a likely need for no less than pain management for this future beneficiary. The case would be ineligible for review under the non-CMS-

beneficiary standard requiring a case total settlement to be greater than $250,000.00 for review. Not establishing some plan for future care places settling parties at risk for recovery from care related to the WC injury up to the full value of the settlement."

https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/WCMSA-Reference-Guide-Version-2_9.pdf (last visited March 19, 2019)

In both examples, the WCMSA review process is not available to the settling parties as the fact pattern fails to meet the workload review threshold. However, CMS says in no uncertain terms that it expects steps to be taken to ensure that Medicare is not asked to pay a bill in the future that someone else's responsibility. Today, it is this lawyer's observation that parties resolving WC cases under threshold do not take the steps necessary to protect themselves on this issue. To continue to do so will jeopardize the injured worker, counsel representing the injured worker and (potentially) the insurance carrier/self-insured employer.

Immediate Action Should Be Taken to Remedy the MSA Blind Spot.

The MSA status quo is broken, and it must change to protect all stakeholders. I highly encourage you to reassess your current MSA protocols. Question the MSA vendors you trust about this issue. They should be able to explain why they believe MSAs have been and may continue to be 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. Add a law firm that provides MSA legal opinions to your panel.

For counsel representing injured workers, 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? Maybe you should be more critical of that MSA report you receive from the other side, and conduct your own independent analysis.

Conclusion.

The MSA blind spot is real. CMS WCMSA review thresholds do not provide parties safe harbor on cases failing to meet threshold. They never have. Industry status quo falls short of CMS expectation. In January 2019, CMS officials emphasized that fact, going as far as adding specific examples to its WCMSA Reference Guide for stakeholders to follow.

The MSA issue needs to be examined in every WC case where future medicals are in play. Attorneys representing stakeholders need to be more active in their analysis and assessment of this issue. Anything less than that needlessly exposes stakeholders to potential CMS recovery actions. And we can all agree that no one wants to see that.