TIPS FROM WORKERS' COMPENSATION LAWYERS WITH EXPERIENCE IN CMS/MEDICARE SET ASIDES

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I. Introduction

The purpose of this article is to share our experiences with CMS (The Center for Medicare/Medicaid Services) from the standpoint of Workers' Compensation Claimant Attorneys for the benefit of personal injury attorneys who are about to embark on a new journey. Toward that end, we would like to comment on the historical perspective of how it is that workers' compensation claimants and their counsel became involved with the Medicare Set-Aside process. We will comment on various changes we have seen over the course of the Medicare Set-Aside journey that started in July of 2001 and which has continued evolving to the present time. We will also comment on attempts made by the Workers' Compensation Claimants' Bar and others to propose legislative changes to this process or litigate the legality of the CMS Medicare Set-Asides Guidelines. We will discuss the concerns of both attorneys and their clients about potential liability in the future after settling cases. In the course of discussing these matters, hopefully others can glean some useful information that might be applicable and helpful to the Personal Injury Plaintiff Bar.

II. Historical Perspective

Before 2001, it has been said that injured workers and their attorneys routinely settled workers' compensation cases with impunity and lack of concern about whether or not claimants, subsequent to the settlement, used Medicare benefits to pay for healthcare related to work injuries. This may have been true in spite of the fact that the Medicare Secondary Payer statute

specifically provides that this would not be appropriate. The Medicare Secondary Payer statute provides as follows regarding Medicare payments and primary payers:

> (2) Medicare Secondary Payer
>
> (A) In general. **Payment under this title may not be made**, except as provided in subparagraph (B), with respect to any item or service to the extent that-
>
> (i) Payment has been made, or can reasonably be expected to be made, with respect to the item or service as required under paragraph (1), or
>
> (ii) Payment has been made or can reasonably be expected to be made under a **workmen's compensation law** or plan of the United States or a State or **under an automobile or liability insurance policy** or plan (including a self-insured plan) or under no fault insurance.

42 U.S.C. §1395(y) as amended by Public Law No. 108-13 (December 8, 2003)**(emphasis added).** Despite the existence of this law, Medicare often paid for medical expenses when another party should have been responsible.

All of this started to change when on July 23, 2001, a deputy director of CMS issued a memo discussing the implications of settling workers' compensation cases which included settlement of future medical benefits. This memo has been subsequently referred to as the "Patel Memo" after it's author, Parashar B. Patel. In the memo, he clarified CMS policy regarding a number of questions including raising the concept of both "considering Medicare's best interest" and the use of an administrative mechanisms called "set-aside arrangements". The memo discussed the distinctions between a "commutation" of compensable future benefits and a "compromise" of a disputed claim. The memo went on to explain that it is not in Medicare's best interest to review every workers' comp settlement and that CMS would only consider Medicare's interest "**when**

the injured individual 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/loss wages over the life or duration of the settlement is expected to be greater than $250,000.00". It was also indicated that whenever individuals are already Medicare beneficiaries, that Medicare's interests must be considered. It was contemplated by the memo that while the Medicare Set-Aside process and submission to CMS for approval of same was not mandatory, that this was a preferred procedure for determining that Medicare's interest had been properly considered. Up front cash settlements in lieu of Medicare Set-Asides (MSA) were stated to be appropriate only for past "conditional payments" that had been made by Medicare that should be reimbursed.

The Code of Federal Regulations provides that a settlement will not be recognized if it "appears to represent an attempt to shift to Medicare the responsibility for payment of medical expenses…" 42 C.F.R. 411.46 (b). MSA's were designed to ensure that no such "burden shifting" takes place.

The next CMS memo did not arrive until April 22, 2003, which was aimed at answering questions that had been unanswered and had arisen since the "Patel memo". Among the notable was a statement that "**CMS has no formal appeals process for rejection of a Medicare Set-Aside arrangement**" and that to the extent that a third party "**liability settlement is made that relieves the WC carrier from any future medical expenses, a CMS approved Medicare Set-Aside arrangement is appropriate unless it can be documented that the beneficiary does not require any further WC claim related to medical services or if the medical portion of**

the WC claim remains open and WC continues to be responsible for related services once the liability settlement is exhausted". CMS issued additional memorandums relating to workers' compensation settlement on May 23, 2003, May 7, 2004, October 15, 2004, July 11, 2005, December 30, 2005, April 25, 2006, July 24, 2006, May 20, 2008 and April 25, 2008.

Among the significant highlights of the subsequent CMS memos was a recognition that claimants could self-administer their Medicare Set-Aside, that after January 1, 2006 all set-asides would need to consider and protect Medicare's interest when the future treatment included prescription drugs and the creation of a new "safe harbor" for Medicare beneficiaries where the total settlement is $25,000.00 or less. Nonetheless, in various statements thereafter, CMS has stated that with all settlements CMS interests need to be considered.

III. Practical Problems Imposed Involving CMS Which May Impact Personal Injury Settlements

One of the biggest problems that personal injury lawyers and their clients should expect to see in the future is that whenever CMS's interests needs to be considered in a personal injury settlement a number of things will take place. The settlement documents will be more complicated. The settlement negotiations will take significantly more time. New legal issues will be raised. When application is made to CMS for approval of a particular set aside, the process always seems to take longer than the parties anticipated. CMS may require more information than they have initially been provided. There will be much more additional time and effort expended by the parties. Even though there are no actual appeal procedures,

correspondence with CMS to reconsider or take into consideration new or additional facts may be required. Even if a previous CMS approval has been obtained or previous analysis has been done by a Medicare specialist, significant delay may require the entire process being redone.

If those problems are not daunting enough, the biggest single concern we have often had is the question of whether or not the Medicare set aside required by CMS will take up such a large portion of the settlement that it makes settlement practically impossible or at least much more complicated or less desirable. It would certainly seem reasonable that when a personal injury settlement is a compromise or where the coverage is not sufficient to warrant a large settlement (even though future medical needs of a personal injury plaintiff might be large) that CMS would recognize the need to significantly reduce the set aside accordingly. However, our experience with workers' compensation cases suggest that CMS has not been willing to factor into their analysis the likelihood of success or recovery. The rational that CMS puts forward has to do very simply with their own regulations. They define a commutation as a settlement of a compensable covered workers' compensation claim. They define a compromise as a settlement of a disputed claim. Yet CMS treats those settlements as very similar in so far as the set aside that is required. The pertinent regulation that CMS has pointed to in our cases is 42 C.F.R. 411.46 and 411.47. See **Exhibit 1** hereto.

In addition, we have even found that when the law and guidelines favor some reasonable reduction of a normal set aside number, that CMS does not necessarily see things our way. More specifically, one of the problems that often comes up in settling a workers' compensation case is that when there is a combined workers' compensation settlement and third party settlement all

future workers' compensation benefits are reduced to the same ratio that attorneys fees and expenses bear to the total third party recovery; usually in the neighborhood of 35%. What that means is that subsequent to the third party settlement future workers' compensation benefits are payable at a 35% ratio. This is tantamount to a co-pay rather than a pay. One would then think that necessarily the Medicare set aside would be reduced by the same ratio. And in fact, the CMS guidelines appear to suggest that it is true. Our analysis of the CMS guidelines clarifies this point. See **Exhibit 2** hereto. Unfortunately, CMS' own representatives do not always understand this or agree with us and have sometimes indicated that without a commission or court order in place, the set aside will not be reduced. As a result, we have had orders entered to attempt to convince CMS that the set aside should be reduced in accordance with the commission order as well as the law. See **Exhibit 3** hereto. One can only wonder how these issues will be treated with personal injury settlements once the new CMS regulations are in place. We suspect that much like the guidelines relating to workers' compensation that there will be some provisions that allow for reduction of set asides given either limited coverage or difficulty with liability. But our own experience is that logic and fairness do not always rule the day.

Among the reasons that settlements involving CMS are often complicated and often delayed includes additional legal issues, the need to involve CMS professionals and the complexity of coordinating all parties and the issues. A review of some of the paperwork we often see related to Medicare set-aside, might be helpful. See **Exhibit 4** hereto.

IV. Attempts at Legislative Change

So troublesome has the Medicare Set-Aside process been and cumbersome to settlements in the workers' compensation industry that a number of groups on both the claimant and insurance side have attempted to have legislation passed at the Federal level which revises the CMS guidelines. The proposals seek to increase the safe harbor threshold and added a fair and expeditious appeal procedure. A summary of one proposal is attached to **Exhibit 5** hereto. Unfortunately this process has been greatly hindered by CMS itself. Before any legislation could be advanced, the Congressional Budget Office has required a statement from CMS with calculations, as to whether or not the proposed legislation would be budget neutral. CMS reportedly has been unable to come up with numbers to evaluate the impact of any proposal on the federal budget. The possibility of some legislative revision reportedly is still in the works. But, it appears that CMS is becoming a larger and more powerful agency. One may well conclude, that like all government agencies and Federal statutes, any proposals for streamlining procedures or adding procedures with fairness in mind can easily lead to yet greater complications.

V.

Challenges to the CMS regulatory scheme itself are understandable. Arguments have regularly been made that CMS does not even have authority to issue their regulatory advisories and that certainly it could not be constitutional that there would be no appeal from the set-aside

determination. As of yet, we are not aware of the satisfactory resolution of any of these issues in the courts. See **Exhibit 6** hereto.

VI. Liability to CMS

All the while, it should be noted that claimant's counsel have often been concerned about how to properly advise injured, disabled and sometimes, elderly, feeble or uneducated claimants about how to self-administer a Medicare Set-Aside. Is it even possible to self-administer properly? Is any advice or guidance from our office ever enough? How do claimants' counsel protect themselves? Would CMS, in appropriate instances, seek a recovery from a workers' comp insurance company or claimant's counsel or both when an injured worker, whose workers' compensation case was settled, subsequently utilizes his Medicare benefits to pay for treatment related to his work injuries? What if claimants ignored the Medicare Set-Aside process? These are all difficulty questions that lead to complicated settlement papers whenever all sides attempt to pass on liability to the other.

As workers' compensation claimant's counsel, we have taken some solace in knowing that we almost never actually hold funds that will be paid to our clients. Rather, when a workers' compensation case is settled, our fees and expense reimbursements are sent directly to us from the workers' compensation insurance company pursuant to a Commission Order. By the same token, the claimants' balance after our fees and expenses is sent directly to them pursuant to that same Order. There may be greater exposure when the monies paid to the injured worker first go through the attorney's trust account. In some states, that procedure is customary. We suspect that may be the case in West Virginia because there were at least one situation that we are aware

of that led to an attorney in West Virginia being sued by CMS in regards to this. See **Exhibit 7** hereto. With that in mind, perhaps the potential exposure of a personal injury plaintiff attorney is heightened by the fact that the settlement money goes through the attorney trust account prior to disbursement.

VII. Hire Set-Aside Experts or Become One

Among our conclusions of nearly 8 years dealing with CMS on workers' compensation settlements is that you can't fight the government; you have to learn the process. In the course of doing that, our office has submitted dozens and dozens of workers' compensation settlements to CMS for a set-aside approval on our own. We ultimately decided that we would engage independent contractors to perform this function. This is partly because the process has become more and more specialized over time but also because our energies were better left to handling workers' compensation cases. Perhaps it was also because we were not able to be paid any additional monies to do this work. Each law firm will have to decide how they handle this issue. Keep in mind that even when you hire experts, you still need in-house personnel with expertise in this process.

VIII. New Opportunities

Also in this process, we have learned that with every difficulty, there is a new opportunity. A number of years ago, many bankruptcy practitioners were weeded out of the bankruptcy law

field when local Federal courts indicated that they would no longer accept paper filings. All future filings would be electronic. That certainly will be the case in the not too distance future with all of the courts and government agencies that we lawyers deal with. As a result, those that are not sufficiently knowledgeable and electronically equipped will be left behind. Much like this change, we expect that there are many personal injury and workers' compensation firms that have been or will be weeded out so to speak, as a result of their inability to adapt to change. These changes present great difficulty, but they also present an opportunity. Aligning yourselves with the most capable, knowledgeable, efficient, fairly priced contractors will be of great assistance. You will also need some of your lawyers to become experts in the process.

IX. Conclusions

There is no question that our workers comp practice has been through many difficult changes since the "Patel memo" of 2001. On the other hand, we believe that we now have greater expertise in the workers' comp field and that of necessity have also developed some expertise and knowledge in the Medicare/Medicaid, Social Security Disability/SSI and related issues that we never expected to have to master. We think of our expertise as including not just personal injury and workers' compensation matters, but most every type of issue that might come up to the extent that those clients we represent also need protection of government benefits as they relate to their injuries, disabilities and medical needs. It will become necessary for personal injury plaintiff lawyers to have this same capability and/or hire the assistance of other lawyers or contractors who can provide this help.

X. Summarizing Our Key Thoughts

- The Workers' Compensation Industry changed in July of 2001 with the Patel Memo.
- The changes have been continuing and more complex with each new guideline
- The practical problems imposed by CMS' involvement with settlements can be daunting
- Attempts to date for legislative help have been unsuccessful
- Litigation to resolve battles with CMS have also been unfruitful to date
- Concern about liability to CMS and our own unsophisticated clients will be an equal concern for personal injury attorneys
- More complex settlement papers and client advisories will become part of the personal injury practice
- All personal injury practitioners will need to become experts and/or hire experts in the set-aside process.

BIOS

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A graduate of St. Lawrence University and Syracuse University Law School, Mr. Reinhardt specializes in handling workers' compensation, social security disability and personal injury cases. A member of the D.C., Maryland and Virginia Bars, he is a board member of the Virginia Trial Lawyers Association (VTLA), a board member and officer of the Workers Injury Law & Advocacy Group (WILG), a national group of lawyers who specializes in workers' compensation claimant's work, and a member of the National Organization of Social Security Claimant's Representatives (NOSSCR), the Richmond Bar Association and the American Association for Justice (AAJ). He is a past chairman of VTLA's Workers Compensation Section. Mr. Reinhardt has regularly written articles and taught seminars on topics relating to his areas of specialty.

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A partner with Kerns, Kastenbaum and Reinhardt, Mr. Harper joined the firm in 1999. He is a graduate of the University of North Carolina Chapel Hill and the University of Richmond Law School, Mr. Harper has been practicing since 1995. He specializes in personal injury, workers' compensation, criminal and traffic matters. He is an active member of the Virginia Trial Lawyers Association, including the Virginia Trial Lawyer's Workers' Compensation Section. He is also a board member of the WILG and a member of AAJ and the Richmond Bar Association. He lectures frequently on topics related to his area or specialty.

XI. Summary of Exhibits