



25th Annual Claims Handling Seminars

FIGHTING THE STRATEGIC BATTLE TO WIN THE WAR

Thursday, May 20, 2010 – Bloomington, Illinois

# THE ONGOING MSA BATTLE: STRATEGIES TO CLOSE FILES WITH MSA POTENTIAL

*Presented and Prepared by:*

**Bradford J. Peterson**

[bpeterson@heyloyster.com](mailto:bpeterson@heyloyster.com)

Urbana, Illinois • 217.344.0060

**Heyl, Royster, Voelker & Allen**

PEORIA • SPRINGFIELD • URBANA • ROCKFORD • EDWARDSVILLE

**THE ONGOING MSA BATTLE:  
STRATEGIES TO CLOSE FILES WITH MSA POTENTIAL**

<b>I.</b>	INTRODUCTION.....	B-3
<b>II.</b>	PROPERLY EVALUATING CASES FOR AN MSA ISSUE .....	B-3
<b>III.</b>	SETTLEMENT STRATEGIES.....	B-4
<b>A.</b>	Future Medical Treatment Not Reasonably Anticipated.....	B-4
<b>B.</b>	Settlement Where Multiple Claims Are Involved .....	B-6
<b>C.</b>	Zero Allocation.....	B-6
<b>D.</b>	Settlement Below MSA Thresholds .....	B-7
<b>E.</b>	Evaluate Prescription Expenses.....	B-7
<b>F.</b>	Await Denial of Social Security Appeal .....	B-7
<b>G.</b>	MSA Second Opinion? .....	B-8
<b>H.</b>	Stipulated Arbitration .....	B-8

# **THE ONGOING MSA BATTLE: STRATEGIES TO CLOSE FILES WITH MSA POTENTIAL**

## **I. INTRODUCTION**

Compliance with the Medicare Secondary Payer Act, 42 U.S.C. § 1395(y)(b)(2), has evolved substantially since the publication of the Patel Memo in July 2001. In the succeeding nine years, the Center for Medicare and Medicaid Services has produced many Memoranda clarifying the compliance standards under the Act. Many of the CMS Memoranda that have been published are intended to provide guidance with regard to the CMS approval process and to further limit the number of Set-Aside proposals submitted to CMS by virtue of the settlement review thresholds. In addition, however, several provisions of the Memoranda were also intended to close loopholes and tighten the noose of the Medicare Secondary Payer Act around workers' compensation claims.

Just as the Medicare approval process has evolved over time, so have strategies developed to address MSA issues in the handling of workers' compensation claims. Some strategies can successfully avoid the necessity of creating an MSA while others are used to avoid the need to submit a Medicare Set-Aside proposal to CMS for approval.

Set forth herein are strategies for effectively closing workers' compensation claims involving Medicare Set-Aside issues. In addition, this article and presentation will address the various means employed in preparing settlement contract language to address the myriad Medicare Set-Aside issues that arise in particular cases. Also, we look at recent developments and their potential effect on the handling of workers' compensation claims with MSA issues.

## **II. PROPERLY EVALUATING CASES FOR AN MSA ISSUE**

The first issue to address when you have a potential Medicare Set-Aside issue is to identify whether the facts trigger the Medicare Secondary Payer Act thereby requiring a creation of a Medicare Set-Aside account.

The first determination is made by addressing whether the petitioner is eligible for Medicare. Eligibility can be based on three different criteria:

1. 65 or older;
2. On Social Security Disability for 24 months or longer;
3. Suffering from a qualifying end stage renal disorder.

Such claimants are commonly referred to as class 1 beneficiaries for purposes of CMS review thresholds.

Secondly, the claim must be evaluated for whether the petitioner has a reasonable expectation of Medicare enrollment within 30 months of the settlement. Factors to be analyzed with regard to the reasonable expectation standard are:

1. The individual has applied for Social Security Disability benefits;
2. The individual has been denied Social Security Disability benefits, but anticipates appealing that decision;
3. The individual is in the process of appealing and/or refiling for Social Security Disability benefits;
4. The individual is 62 years and 6 months of age, i.e., may be eligible for Medicare based on his or her age within 30 months or;
5. The individual has an end stage renal disease condition but does not yet qualify for Medicare based thereon.

Beneficiaries who meet the reasonable expectation standard are commonly referred to as class 2 beneficiaries for purposes of the CMS review thresholds.

Application of the above criteria to the facts of your case will establish whether you need to further consider an MSA as a part of closure of your claim. Another factor that will be addressed below is whether the petitioner, in fact, will have future medical expense, thereby requiring an MSA.

### **III. SETTLEMENT STRATEGIES**

Several strategies have evolved over the last nine years with regard to the settlement of claims that present issues with regard to Medicare Set-Aside allocations. Different strategies can carry different degrees of risk as to whether they could potentially be viewed as an attempt to intentionally shift liability for medical expenses to Medicare in violation of 42 C.F.R. § 411.24(c)(2) (2006). Therefore, each strategy has to be carefully assessed with regard to its potential application to a pending claim and whether the strategy can be successfully implemented without violating 42 C.F.R. § 411.24(c)(2)(2006).

#### **A. Future Medical Treatment Not Reasonably Anticipated**

Perhaps one of the most frustrating situations that arises in handling workers' compensation claims with MSA issues are those cases in which the medical condition is such that an average person would not expect the petitioner to undertake future medical treatment. In such situations, vendors who prepare MSA proposals oftentimes create proposals that, in fact, contain a substantial amount of future treatment. Such claims include claims of back strain, carpal tunnel syndrome, concussion, epicondylitis and fractures. The need for a Medicare Set-Aside arrangement is premised upon a fundamental proposition that future medical treatment is reasonably anticipated. Therefore, in cases where a substantial question exists as to whether future medical treatment is, in fact, necessary, litigants should consider acquiring a statement

from the treating physician that future treatment is not reasonably anticipated for the petitioner. Such a statement would need to be acquired from a treating physician as opposed to an examining physician. Where such a statement is acquired, the parties must then decide whether a zero allocation is going to be prepared based thereon and submitted to Medicare for approval, or whether the claim is going to be settled and concluded without further consideration of the MSA issue. The safest route would be to use the physician's statement as a means to acquire a zero MSA and submit that MSA to CMS for approval (if the total settlement meets the appropriate threshold amount). The parties may consider settling cases with a physician's statement and withhold submission to CMS even if the amounts exceed the thresholds, although such a procedure does involve a slight risk.

In its April 22, 2003 policy Memoranda, CMS set forth the following question and answers:

**20) If the settling parties of a WC case contend that a WC settlement is not intended to compensate an injured individual for future medical expenses, does CMS still require that a Medicare set-aside arrangement be established?**

**ANSWER:** It is unnecessary for the individual to establish a set-aside arrangement for Medicare if all of the following are true:

- a. The facts of the case demonstrate that the injured individual is only being compensated for past medical expenses, (i.e., for services furnished prior to the settlement);
- b. There is no evidence that the individual is attempting to maximize the other aspects of the settlement (e.g., the lost wages and disability portions of the settlement) to Medicare's detriment; and
- c. The individual's treating physicians conclude (in writing) that to a reasonable degree of medical certainty the individual will no longer require any Medicare-covered treatments related to the WC injury.

*Memo, April 22, 2003 to all Regional Administrators from CMS Director, Thomas L. Grissom with answers to frequently answered questions.*

<http://www.cms.gov/WorkersCompAgencyServices/Downloads/42203Memo.pdf>

The aforementioned question and answer suggests that Medicare may require more than simply a physician statement in order to avoid a Medicare Set-Aside allocation. Such an interpretation by CMS of the Medicare Secondary Payer Act, however, is fundamentally unsound. It is the author's position that medical documentation that future medical treatment is not reasonably anticipated alone should be sufficient evidence that the parties are not attempting to improperly shift liability to Medicare in violation of the Medicare Secondary Payer Act. CMS would have a very difficult time proving that the parties, in fact, "intended" to shift responsibility to Medicare. The reliance upon such a physician statement is itself inherently reasonable. One must keep in mind that the standard is whether future medical treatment is "reasonably anticipated." The

standard is not whether the petitioner “might” need future medical treatment or whether the petitioner “could” need future medical treatment. This standard should also be used in the communication with the treating physician when soliciting such an opinion. The question should be presented as to whether future medical treatment is “reasonably anticipated” for the petitioner.

## **B. Settlement Where Multiple Claims Are Involved**

Oftentimes we face petitioners who have filed multiple claims for different accidents and resulting injuries. Many such instances may involve some claims that were clearly compensable while others are highly disputed. Furthermore, some of the claims may involve a likelihood of future medical treatment whereas others may not. When presented with such situations, consideration should be given to settling the claims on the case(s) where future medical treatment is not reasonably anticipated. This can be successful where these are the clearly compensable claims. Where the claims involving future medical expense are highly disputed, attempts can be made to negotiate dismissal of those claims. Such claims would not trigger the need for a Medicare Set-Aside account if no permanency or future medical is paid on those claims. Once again, care must be taken to avoid the appearance that the parties are improperly attempting to shift responsibility to Medicare. As such, this strategy is generally limited to where disputed claims are being dismissed without any previous payment of medical or TTD benefits. In addition, the compensable claim that is accepted and settled on contracts cannot appear to be for a materially inflated amount that might suggest that the parties are improperly co-mingling settlement of both claims on a single contract.

## **C. Zero Allocation**

In claims where a substantial dispute exists as to compensability, one may consider a zero allocation Set-Aside. This strategy may prove successful in those cases where substantial evidence exists in support of a defense of non-compensability. It is most likely to be successful where evidence contradicts a causal connection between the alleged injury and the workplace. In such instances, care should be taken to insure that the vendor preparing the Medicare Set-Aside allocation is acutely aware of the disputed nature of the claim and the basis of that dispute. They also need to be acutely aware that the claim is being submitted for a “zero allocation” proposal. When thresholds are met, the zero allocation will be submitted to Medicare for their approval. It will be incumbent upon the vendor to highlight for CMS the disputed nature of the claim as well as the evidence in support of non-compensability or lack of causal connection.

It is unlikely that CMS will approve a zero allocation where the facts present a “close case” as to compensability or the settlement sum is sizable. This strategy will be most successful when employed in those cases in which there is a clear case for non-compensability or causal connection and the settlement amount objectively appears to be a substantial compromise of the full value of the claim.

#### **D. Settlement Below MSA Thresholds**

When the need for a Medicare Set-Aside account has been determined, it must then be evaluated as to whether the Medicare Set-Aside will need to be approved by CMS. Settlement thresholds are established at \$25,000 for claims involving current beneficiaries and \$250,000 for petitioners who meet the standard for future beneficiaries. If the settlement value of the claim (including the settlement amount) is near one of these thresholds, an effort should be undertaken to get the petitioner to accept an amount below the applicable threshold. The benefit to the petitioner is that he will not have to wait receipt of settlement funds pending CMS approval for the Set-Aside. Of course, the benefit for the respondent is a lower overall settlement amount.

#### **E. Evaluate Prescription Expenses**

CMS has recently changed the methodology in which future prescription expenses are calculated. The result has been a very substantial increase in the funding that CMS requires for future prescription expenses. Prior to this change, prescription drug expenses constituted on average 26 percent of the total Medicare Set-Aside allocation. It was anticipated that this percentage would increase to 40 percent or greater based on the new CMS standard. Instances have arisen within the last six months where MSA proposals have been rejected and the CMS recommended amount has been catastrophically higher. Instances include occasions where the CMS recommended amount was five times the amount of the MSA proposal. One of the key driving forces to these increases is the prescription drug expense.

Insurance adjusters and defense attorneys need to scrutinize Medicare Set-Aside proposals with regard to future prescription expenses. Future prescription expenses are commonly included for medications that the petitioner has not taken in many months or many years. In such instances efforts should be made to require the vendor to redraft the MSA proposal. The MSA vendor should be provided information, including medical documentation illustrating why the future prescription drug expense is not reasonably anticipated. In addition, treating medical personnel can be enlisted, if necessary, to specifically address what medications may, in fact, be required in the future.

#### **F. Await Denial of Social Security Appeal**

As previously indicated, one of the factors that CMS uses to identify class 2 beneficiaries is if the petitioner has applied for and been denied Social Security Disability but has appealed that denial. In instances where your petitioner has a previously denied Social Security claim on appeal, you may wish to consider awaiting the outcome of that appeal before proceeding with settlement negotiations. In a large percentage of cases, such denials will be affirmed on appeal. If the appeal is denied by the Social Security Administration, the petitioner would no longer qualify for class 2 beneficiary status and a Medicare Set-Aside account would not be necessary. This, of course, presumes that the petitioner does not otherwise qualify as a class 1 or class 2 beneficiary. Generally, petitioner's attorneys are willing to delay settlement if it is a reasonable

possibility that an MSA issue can be eliminated by simply awaiting the Social Security appeal decision. Clearly, if the appeal is denied and you are able to avoid an MSA, there can be substantial savings to the insurer with regard to the cost of that claim.

#### **G. MSA Second Opinion?**

Vendors who prepare Medicare Set-Aside accounts are essentially consultants to the insurance carrier and defense counsel. The preparation of the MSA proposal itself does not trigger contact with the petitioner or the petitioner's attorney. As such, the proposal that is initially generated should be deemed privileged as between the vendor, the insurer and defense counsel. In instances where the vendor produces an unacceptably high MSA amount, consideration should be given to securing a "second MSA opinion." The results of the first MSA need not be disclosed.

#### **H. Stipulated Arbitration**

Stipulated arbitration can be employed as a strategy to avoid a Medicare Set-Aside in limited circumstances. Generally, Medicare acknowledges that they will honor the administrative law decisions of state workers' compensation arbitrators providing there was not an intent to shift liability to Medicare for future medical expenses. If you have a case in which the petitioner is claiming multiple injuries/conditions but one injury/condition that would require future medical treatment is disputed, you may wish to consider a stipulated arbitration. Essentially, the petitioner's attorney agrees that the overwhelming evidence illustrates that a particular injury/condition is unrelated to the accident. Unfortunately, the petitioner may have reported to physicians by history that they believe the claim is related or there may be some other nominal evidence suggesting that compensation has certainly been sought for this particular claim. That raises concerns with regard to whether Medicare may ultimately honor a settlement contract if an MSA is not done. In such a situation, the parties can proceed with a stipulated arbitration and the arbitrator would enter an award based on a finding that that particular condition is not related. It is also, of course, incumbent that the arbitrator's decision would further reflect that the petitioner is not being compensated for that particular injury/condition. The award would be written solely on conditions (or claims) that do not involve future medical expense. The arbitration award will further specify that any future medical care on the compensable claim is not causally related.



## **Bradford J. Peterson**

- Partner

Brad has spent his entire career with Heyl Royster beginning in 1987 in the Urbana office. He became a partner with the firm in 1997. Brad concentrates his practice in the defense of workers' compensation, construction litigation, auto liability, premises liability and insurance coverage issues. In recent years, Brad has become a leader in the field on issues of Medicare Set-Aside trusts and workers' compensation claims. He has written and spoken frequently on the issue. He was one of the first attorneys in the State of Illinois to publish an article regarding the application of the Medicare Secondary Payer Act to workers' compensation claims "Medicare, Workers' Compensation and Set-Aside Trusts," *Southern Illinois University Law Journal* (2002).

Brad is a member of the Champaign County, Illinois State, and American Bar Associations. He currently serves on the Illinois State Bar Association Assembly and has also served several previous terms. He has also been a member of the ISBA Bench and Bar Section Council and served as its chairman 2000-2001. Currently, he serves as a member of the ISBA Workers' Compensation Council and is past editor of the Workers' Compensation Section Newsletter.

### **Significant Cases**

- *West v. Kirkham*, 207 Ill. App. 3d 954 (4th Dist. 1991) Recognized that trial court may find plaintiff contributorily negligent as a matter of law.
- *Propst v. Weir*, 937 F. 2d 338 (7th Cir. 1991) Application of qualified immunity for university officials in First Amendment Retaliatory Transfer claim.

### **Publications**

- "Medicare, Workers' Compensation and Set-Aside Trusts," *Southern Illinois University Law Journal* (2002)
- "Survey of Illinois Law-Workers' Compensation," *Southern Illinois University Law Journal* (1991)

### **Public Speaking**

- "Medicare Set-Asides and the SCHIP Extension Act"  
Illinois State Bar Association Advanced Workers' Compensation Seminar 2008
- "Medicare Set-Aside Issues and Update"  
22nd Annual HRVA Claims Handling Seminar 2007
- "Workers' Compensation and Medicare Set-Aside Proposals"  
Illinois State Bar Association Hot Topics and Workers' Compensation 2005
- "Aggressive and Successful Workers' Compensation Defense Strategies for Today's Industrial Commission"  
19th Annual HRVA Claims Handling Seminar 2004

### **Professional Associations**

- Champaign County Bar Association
- Illinois State Bar Association
- American Bar Association
- Illinois Association of Defense Trial Counsel

### **Court Admissions**

- State Courts of Illinois
- United States District Court, Central District of Illinois
- United States Court of Appeals, Seventh Circuit
- United States Supreme Court

### **Education**

- Juris Doctor, Southern Illinois University, 1987
- Bachelor of Science (with honors), Illinois State University, 1984

