

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION NEWSLETTER

A Newsletter for Employers and Claims Professionals

April 2009

A WORD FROM THE PRACTICE GROUP CHAIR



Last month we launched our new monthly worker's compensation newsletter for your use. I suspect than more than one of you may have wondered where we came up with the name "Below The Red Line." Here is our explanation.

Several years ago, even before the appointment of former Illinois Workers' Compensation Commission Chair Dennis R. Ruth by former Governor Rod Blagojevich, a new Commission rule was implemented which was identified by arbitrators, practicing attorneys, and parties as the "Red Line Rule." This rule, which is still in effect, provides that when a workers' compensation claim becomes over three years old from the time of actual Commission filing, the claim is to be settled, tried, or dismissed and is not to be continued to the next status hearing date unless a party or the parties request a 60-day continuance with a showing of "good cause" as to

why the claim should be continued. The idea behind this rule was and is to eliminate old Commission claims if those claims have no good reason to still be pending. While the rule is a good one, it probably has not produced the intended impact of reducing the Commission's caseload as much as Commissioner Ruth had desired.

We chose the name "Below the Red Line" because it is our firm's goal to have your claims resolved well before they reach the status of being "above the red line."

We hope you find this month's newsletter useful and also look forward to seeing you at our 24th Annual Claims Handling seminar, which is scheduled for Thursday, May 21, 2009, starting at 1:00 p.m. Our presentations and materials will focus on winning workers' compensation strategies in hard economic times. This issue of our newsletter, which was prepared by Jim Voelker of our Peoria office, explores how Social Security and Medicare issues impact the defense and settlement of a workers' compensation claim. Jim focuses his practice on workers' compensation and Social Security/Medicare issues.

Kevin J. Luther
Chair, WC Practice Group
kluther@heyloyster.com

OUR PRACTICE GROUP OFFERS:

- EEOC, OSHA, and Department of Labor Representation
- Workers' Compensation Training for Supervisors
- In-House Seminars
- Employment and Harassment Training and Testing
- Risk Management of Workers' Compensation Liability
- Appellate Court Representation

THIS MONTH'S AUTHOR:

Jim Voelker is a partner in the firm's Peoria office and concentrates his practice in workers' compensation law. He is well-versed in Social Security and Medicare law as it affects workers' compensation claims. Jim is the author of numerous articles and presentations for business groups and employers. His writings include chapters on the Medicare Secondary Payer Statute and Social Security Disability Offsets for the Illinois Institute of Continuing Education's Workers' Compensation Handbook. Jim is the author of CompCalc, a software calculator that is used by insurance companies, employers, attorneys, and several Commission arbitrators to calculate workers' compensation benefits under Illinois law.



THE IMPACT OF SOCIAL SECURITY DISABILITY ON THE DEFENSE OF WORKERS' COMPENSATION CLAIMS

The petitioner's application for or receipt of Social Security Disability Insurance Benefits (SSDIB) should raise a red flag for anyone defending a claim under the Illinois Workers' Compensation Act. The existence of SSDIB can potentially increase the employer's exposure under the Illinois Workers' Compensation Act as a result of the Medicare Secondary Payer Statute. However, a lesser known fact is that SSDIB can also arm the employer with a significant bargaining chip that can be used to reduce the liability of the employer due to the Social Security offset provisions of the Social Security Act.

To claim SSDIB, the petitioner must allege that he or she is totally disabled from all meaningful employment. Therefore, claims involving SSDIB are usually high exposure cases which make these issues even more important to those defending the claims. Any time the petitioner is claiming permanent total disability or vocational rehabilitation, the petitioner's SSDIB status should be determined.

This newsletter provides an overview of the impact of SSDIB on issues related to the Medicare Secondary Payer Statute and the Social Security offset provisions of the Social Security Act. For a more detailed analysis of both issues, please see the two chapters on these topics from the *IICLE Workers' Compensation Handbook* (authored by Jim Voelker) available at www.heyloyster.com.

MEDICARE SECONDARY PAYER STATUTE

The intent of the Medicare Secondary Payer Statute, 42 U.S.C. §1395y(b)(2), is simple – Medicare must be protected from payments for medical bills and prescription expenses that should be paid as part of a workers' compensation claim. Medicare places an affirmative obligation on employers and insurers to protect Medicare from such expenses. Recent amendments to the Medicare Secondary Payer Statute will require employers and insurers to notify Medicare of the existence of a workers' compensation claim.

There are two classes of cases that give rise to obligations under the Medicare Secondary Payer Statute. The first class exists where the petitioner is currently eligible for Medicare. Social Security Disability is important to this class because 24 months after receiving SSDIB, a person is automatically

eligible for Medicare benefits. A person may also be eligible for Medicare if suffering from a qualifying end stage renal disease or is 65 years or older.

The second class exists where the petitioner is reasonably expected to be a Medicare beneficiary within 30 months. Social Security Disability is important to this class because the application for SSDIB is deemed by Medicare as sufficient evidence that a petitioner is reasonably likely to be a Medicare beneficiary within 30 months. While there are other ways for a petitioner to fall into this class, the application for SSDIB is by far the most common.

The purpose of the settlement approval process is to ensure that Medicare is protected from past and future medical bills and prescription expenses that should be paid under the workers' compensation claim. Medicare must approve settlements in the two classes above if certain dollar thresholds are met. The dollar thresholds are: (1) the settlement is \$25,000 or more and the petitioner is currently eligible for Medicare benefits, or (2) the settlement is greater than \$250,000 and the petitioner is likely to be a Medicare beneficiary within 30 months. Again, the application for or receipt of SSDIB is often determinative of these classes.

Many mistakenly believe that if the dollar thresholds are not met, there is no obligation to protect Medicare. Unfortunately, Medicare has made it very clear through several policy memos that the dollar thresholds are intended only for workload management. Thus, employers and insurers have the obligation to protect Medicare from past and future payment of medical bills regardless of the dollar amount of the settlement. If a claim involves either the application for or receipt of SSDIB but falls short of the dollar thresholds, Medicare's interests must be considered and analyzed as part of the settlement process.

CONDITIONAL PAYMENTS

If a petitioner is eligible for Medicare, additional steps must be taken to insure that Medicare has not previously paid bills that are compensable under the workers' compensation claim. Such payments are called conditional payments, and the employer/insurer has an affirmative obligation to reimburse Medicare for these payments upon receiving notice of the payments. Medicare handles conditional payments separately from set-asides, so a specific inquiry regarding conditional payments should be made. Do not assume that a letter from Medicare approving a proposed set-aside but not referencing conditional payments means that no conditional payments exist.

MEDICAL SET ASIDES (MSA)

When a case falls into one of the two classes mentioned above, an analysis should be done to determine whether a Medicare set-aside needs to be created. A Medicare set-aside is simply a fund of money to be used to pay medical bills and prescriptions related to the workers' compensation claim that are also payable under Medicare. Set-asides may take the form of an annuity. In many cases it is appropriate to take the position that a Medicare set-aside is not necessary because the petitioner is not likely to incur future medical bills or prescriptions related to the workers' compensation claim. Medicare set-asides are prepared by defense counsel or third-party contractors that specialize in Medicare set-asides. It is important to choose a set-aside specialist that will act as an advocate for the employer/insurer.

If the dollar threshold is also met, approval of the settlement by Medicare is required. Submission of the settlement to Medicare involves drafting a letter outlining the case and the basis for the proposed set-aside. In complicated matters, the submission of the settlement may require a life-care plan.

FAILURE TO GET MSA APPROVAL

The failure to consider Medicare's interests can result in additional liability exposure for the employer, its insurer, and their counsel. Medicare asserts the authority to claim reimbursement from employers, insurers, petitioner and their counsel for bills paid by Medicare that should have been paid under the workers' compensation claim. This right of reimbursement exists regardless of whether the petitioner waived payment of past and future medical as part of a settlement agreement. Medicare refuses to be bound by the terms of a settlement agreement even if it is approved by the Illinois Workers' Compensation Commission. In other words, the petitioner's waiver of the right to future medical under section 8(a) does not extinguish the employer's obligation to pay future medical bills if required to protect Medicare.

Practice Tip

The potential increased exposure due to the Medicare Secondary Payer Statute can be avoided entirely by trying the case or leaving medical open in the settlement contract.

The essential nugget to take away from this discussion is to understand that a petitioner's application for or receipt of

SSDIB is a red flag prompting consideration of the employer's and insurer's obligations under the Medicare Secondary Payer Statute. An evaluation of these issues should always include legal counsel.

SOCIAL SECURITY DISABILITY OFFSETS

Now for the good news! While the application for or receipt of SSDIB may increase the employer's liability under the Medicare Secondary Payer Statute, it provides a means to decrease liability as a result of the offset provisions of the Social Security Act when a case is settled.

Section 224 of the Social Security Act places a ceiling on an individual's combined Social Security disability insurance benefits and state workers' compensation benefits. 42 U.S.C. 424(a). The Act provides that where an individual is receiving both Social Security disability insurance benefits and state workers' compensation benefits, his or her Social Security benefits "shall be reduced" by the amount necessary to ensure that the sum of the state and federal benefits does not exceed 80 percent of the individual's pre-disability average current earnings.

If a petitioner is on SSDIB and is receiving workers' compensation benefits, there is a tremendous incentive to settle the case because the Social Security offset can be reduced or eliminated by using special language in the settlement contract. More importantly, the offset cannot be reduced unless the employer agrees to the necessary language in the settlement contract. Having control over whether the petitioner can reduce the offset gives the employer tremendous leverage in settling these types of claims depending on the degree to which the offset can be reduced.

The amount of the offset is a simple mathematical calculation. The inputs to the calculation are:

- (1) Monthly workers' compensation benefit (WC)
- (2) Monthly social security benefit (SSDIB), and
- (3) Average monthly current earnings (ACE) (usually the highest annual earnings during the past five years divided by 12).

The offset is calculated by subtracting 80 percent of ACE from the sum of the monthly workers' compensation benefit and monthly Social Security disability insurance benefit.

$$WC + SSDIB - (0.8 * ACE)$$

HEYL ROYSTER WORKERS' COMPENSATION NEWSLETTER

The following example illustrates the process to calculate the offset:

- (1) The monthly workers' compensation benefit is \$1,480.90.
- (2) The monthly Social Security disability benefit is \$970.
- (3) The monthly ACE is \$2,244.00.
- (4) 80 percent of the ACE is \$1,795.20.

To calculate the offset, simply calculate the sum of the monthly workers' compensation benefit and monthly Social Security disability insurance benefit and subtract 80% of the ACE ($\$1,480.90 + \$970 - \$1,795 = \655). In this case, the monthly Social Security disability benefit is thus reduced from \$970 to \$315 because of the workers' compensation benefit and the resulting offset. This offset takes place indefinitely unless the employer agrees to settle the case with certain settlement contract language.

USE OF "SPREAD LANGUAGE"

When a case is settled, the offset can be reduced or eliminated simply by placing language in the settlement contract that reduces the lump sum by past medical expenses and attorney fees and spreads the lump sum settlement over the life expectancy of the petitioner.

Here is an example of sample "spread language" that can be used to reduce or eliminate the social security offset:

The sum of \$_____, after attorney's fees of \$_____, a Medicare set-aside of \$_____, medical bills of \$_____, and expenses of \$_____, leaves a net recovery due to the Petitioner of \$_____. Based upon the Petitioner's anticipated life expectancy of ** months (from Vital Statistics of the United States, 1995 Life Tables, Vol. II, Section 6. 28 pp. (PHS) 98-1104), this settlement represents a monthly payment to Petitioner of \$_____. This settlement shall not be construed as a commutation of or a substitute for periodic payments, rather it represents a compromise of a disputed claim and this settlement has been effected to terminate litigation.

When the case is settled in this manner, Social Security will use the much smaller amount listed in the settlement contract rather than the workers' compensation benefit rate

to calculate the offset. To calculate the amount of money the petitioner saves with the spread language, simply perform two offset calculations, one using the workers' compensation disability rate and a second using the smaller amount listed in the spread language.

The amount of the savings to the petitioner will vary depending on the various inputs used in the calculation: life expectancy, workers' compensation benefit, social security disability benefit and ACE. It is not unusual for the offset to exceed 30 percent of the total settlement.

In addition to the raw value of the offset reduction, there is a significant tax consequence to the offset calculation that is also important to the petitioner. The IRS taxes the petitioner at the full value of the monthly Social Security Benefit *before* the offset. If the Social Security disability benefit is reduced as a result of a workers' compensation payment, the IRS taxes the petitioner on the full amount of the Social Security disability payment before the offset. The net result is that part of the workers' compensation payment becomes taxable after the offset is taken.

Those defending workers' compensation claims must understand the importance of this issue and take advantage of it during settlement negotiations. We have found that many lawyers who represent petitioners do not fully understand the importance of the offset to a petitioner and sometimes need to be educated by those of us representing the employer.

For a more detailed discussion of the actual calculations, please view the chapters from the *IICLE Workers' Compensation Handbook* available at www.heyloyroyster.com.

CONCLUSION

In larger cases in particular, it is important determine whether the petitioner is receiving or has applied for SSDIB. If so, be sure to consult legal counsel in your consideration of the employer's/insurer's duty to protect Medicare. In addition, be sure to use your knowledge of the Social Security offset provisions to obtain a more favorable settlement for the employer.

We invite you to call or contact us for assistance with any issues concerning how the Social Security Act and Medicare might impact your Illinois Workers' Compensation case.

HEYL ROYSTER'S 24TH ANNUAL CLAIMS HANDLING SEMINAR

Thursday afternoon, May 21, 2009 – Bloomington, Illinois
More information at www.heyloyroyster.com

FOR MORE INFORMATION

If you have questions about this newsletter, please contact:

Kevin J. Luther

Heyl, Royster, Voelker & Allen
Second Floor
National City Bank Building
120 West State Street
P.O. Box 1288
Rockford, Illinois 61105
(815) 963-4454
Fax (815) 963-0399
E-mail: kluther@heyloyroyster.com

Please feel free to contact any of our workers' compensation lawyers in the following offices:

PEORIA, ILLINOIS 61602

Chase Bldg., Suite 600
124 S.W. Adams Street
(309) 676-0400
Fax (309) 676-3374

Bradford B. Ingram - bingram@heyloyroyster.com

Craig S. Young - cyoung@heyloyroyster.com

James M. Voelker - jvoelker@heyloyroyster.com

James J. Manning - jmanning@heyloyroyster.com

Stacie K. Linder - slinder@heyloyroyster.com

SPRINGFIELD, ILLINOIS 62705

National City Center, Suite 575
1 N. Old State Capitol Plaza
P.O. Box 1687
(217) 522-8822
Fax (217) 523-3902

Gary L. Borah - gborah@heyloyroyster.com

Daniel R. Simmons - dsimmons@heyloyroyster.com

Sarah L. Pratt - spratt@heyloyroyster.com

John O. Langfelder - jlangfelder@heyloyroyster.com

URBANA, ILLINOIS 61803

102 East Main Street, Suite 300
P.O. Box 129
(217) 344-0060
Fax (217) 344-9295

Bruce L. Bonds - bbonds@heyloyroyster.com

John D. Flodstrom - jflodstrom@heyloyroyster.com

Bradford J. Peterson - bpeterson@heyloyroyster.com

Toney J. Tomaso - ttomaso@heyloyroyster.com

Joseph K. Guyette - jguyette@heyloyroyster.com

ROCKFORD, ILLINOIS 61105

Second Floor
National City Bank Building
120 West State Street
P.O. Box 1288
(815) 963-4454
Fax (815) 963-0399

Kevin J. Luther - kluther@heyloyroyster.com

Brad A. Antonacci - bantonacci@heyloyroyster.com

Thomas P. Crowley - tcrowley@heyloyroyster.com

Lynsey A. Welch - lwelch@heyloyroyster.com

Dana J. Hughes - dhughes@heyloyroyster.com

Bhavika D. Amin - bamin@heyloyroyster.com

EDWARDSVILLE, ILLINOIS 62025

Mark Twain Plaza III, Suite 100
105 West Vandalia Street
P.O. Box 467
(618) 656-4646
Fax (618) 656-7940

James A. Telthorst - jteltorst@heyloyroyster.com

APPELLATE STATEWIDE:

Brad A. Elward - belward@heyloyroyster.com
Peoria Office

www.heyloyroyster.com

The cases or statutes discussed in this newsletter are in summary form. To be certain of their applicability and use for specific situations, we recommend that the entire opinion be read and that an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.

Does this Workers' Compensation Settlement Require Medicare Approval and/or a Set-Aside?

