WHEN IS IT THE IDEAL TIME TO SETTLE THE CAT AND NON-CAT, MEDICARE NON- MEDICARE CLAIMS IN 2010

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Settlement of workers' compensation cases is beneficial for a wide variety of reasons for all parties and has traditionally been accomplished over the phone after an exchange of analysis, demands, offers and determination of "the" figure. Financial changes in our world economy resulted in a more careful analysis of exposure and a "tightening" of the belt. Alternatively, claimants are feeling the financial pinch and wish to settle their files to obtain the money for the car payment, the house mortgage, the non-work related medicals—even the grocery bills. The desire to settle remains for all but the "common ground" found in a few telephone calls between opposing parties is not now as easily reached. Thus, the parties are turning to neutrals who have extensive experience in handling workers' compensation claims and who can provide an independent analysis to help everyone recognize the common ground and exposure and risks for each. The parties remain the decision makers but an honest confidential dialogue now may need to be exchanged so the appropriate compromise is reached.

According to the National Council on Compensation Insurance (NCCI), permanent total cases are up in the last four years. These cases have traditionally been the most difficult to evaluate, reserve, and settle. But workers' compensation benefits are statutory in design and experts could still provide reasonable analysis of medical costs related to work injuries, lost wages and permanency for the loss of use of a portion of the body.

In Georgia, the highest cost driver in the system is medical expenses. Medical expenses available in 2010 were never even options in years past. The creation of a whole new category of brand specific drugs and surgical procedures such (pain management specialists and spinal cord stimulators for example) presented options for claimants that had not heretofore been routine options. Even a simple carpal tunnel release can result in a prescription for oxycotin –a highly effective highly additive drug. Thus, all parties found themselves second guessing the physician's recommendations for injections, long term use of narcotics, stimulators, etc. in even the simple cases.

Most workers' compensation claims do not involve catastrophic injuries and are excellent candidates for settlement. I believe that all parties acknowledge that the compensation rate for Georgia's injured workers is hardly a wage a claimant can live on long term without suffering financial consequences. Thus, settlements of the non-cat claims have occurred when all parties are of the opinion that the employee's treatment and physical restrictions are stable. In those instances, an experienced attorney and experienced adjuster can usually reach a settlement figure that is acceptable to all. However,even in non-cat cases there are occasions when an independent third party is a valuable "set of eyes" to review, analyze and recommend a range of acceptable figures. This neutral has

no financial interest in the resolution of the claim but rather has the goal of helping the parties find the common value given the totality of the circumstances. Whether it is a claimant who is getting a "second opinion" or an adjuster who needs to consider the long term picture, a neutral can identify the impediments to settlement of claims. With patience and a true analysis of exposure even the most difficult cat case can be analyzed and settled to the satisfaction of all.

It is the Medicare or soon to be Medicare eligible claimant that now requires thoughtful, specific analysis and a careful consideration of the timing of the settlement and procurement of the Medicare Set Aside (MSA).

Whether settlement is quickly pending or not, the Medicare beneficiary status of a workers' compensation claimant needs to be determined as quickly as possible. Releases should be obtained (and given) so all parties know the Medicare status of the claimant and know if there are any conditional payments that have been made by Medicare and reimbursement may be a future issue. If the claimant is on Medicare (Class I) or is reasonably expected to be enrolled in Medicare (NOT SSDI) within 30 months (Class II) a MSA or CSA comes into play.

In short, if you have a Class I claimant and the settlement is greater than $25,000 a MSA needs CMS approval. If the settlement of a Class I claimant is less than $25,000 a CSA or MSA is needed but is not submitted to CMS as they will not review the Medical Set Aside.

If the Claimant falls under Class II, and does NOT have a reasonable expectation of Medicare enrollment within 30 months NO MSA is needed. If yes, this claimant DOES have a reasonable expectation of enrollment in Medicare within 30 months then if the settlement is $250,000 or less no CMS approval is needed but a Medical Set Aside is needed to protect Medicare's interests. If the Class II settlement is greater than $250,000 the MSA must be approved by CMS. Reasonable expectation for Class II claimants usually means has applied for, on appeal for, or is receiving SSDI, is 62.5 years old or older, or has an end stage renal disease.

Even in Cat cases, the parties DO NOT have to consider Medicare's interests unless the cat claimant is Class I or Class II. In these non- Medicare cat cases the standard cat analysis applies and the negotiation of needed future medical treatment is a part of the settlement process. Often a mediator can assist in reaching a consensus and compromise of the value of the future expenses for settlement purposes.

Yet some cat cases are also Class I or Class II and settlement is still the desire of all parties. Fortunately, CMS has given us distinct guidelines to follow to ensure that we "take into consideration the interests of Medicare." Remember, the MSA is a document that is based on past medical history, diagnoses codes, and standards of care to be used in determining reasonable consideration of Medicare's interests for the future treatment of the workers' compensation claimant. CMS allows certain discounting factors like rated age, wholesale drug prices, generic drugs where appropriate. There are vendors who

specialize in obtaining this MSA cost and I strongly recommend that you retain an expert in this MSA analysis. CMS is returning MSA's that are significantly higher than those submitted. Therefore, an expert's assistance in the reconsideration process is available should this occur in your claim.

After obtaining the MSA, the parties need to determine what, if any, non- Medicare covered expenses exist and need to be taken into consideration in the settlement. CMS does not address non Medicare covered drugs, transportation or mileage, non-covered costs such as home attendant care, certain durable medical equipment, dental and vision care. Workers' compensation is required to pay this expense as "medical", IF , and ONLY IF it is prescribed or reasonably expected to be prescribed and related to the work injury. Workers'compensation is NOT required to "pre-pay" medical expenses unless as as a compromise which is part of a settlement or under a CMS guideline. Hence, the need for "timing" of the settlement and the possible need for an experienced mediator who understands the complexities of your claim and non MSA expenses. What is or is not determined as a non- MSA reasonable "pre-payment" and why the insurance company should consider pre-payment in settlement is one of the common "sticking points" and obstructions to settlement.

Even with Medicare or no Medicare requirements it is clear that <u>expensive drug or procedural prescriptions for a work injury are key to the driving costs</u> of a MSA or non-MSA claim so the timing of the settlement is imperative to ALL parties IF THERE IS GOING TO BE A REASONABLE SETTLEMENT OF THE CLAIM. Failure to recognize the appropriate time to settle can result in a carrier's financial inability to settle the claim – it is just too expensive to "pre-pay".

Federal law requires stiff sanctions to those who fail to "take into consideration" Medicare's interests. See *United States vs. Stricker* and *United States vs. Harris*. – parties are being sued for their failure to take into consideration Medicare's interests. Medicare's interests cannot, and should not be avoided. However, given that settlement of a workers' compensation claim is voluntary in Georgia for all parties, the facts and medical stability of a claim is critical if the claimant attorney is confident the employee's future needs are going to be met and if the insurance company is willing to pre-pay for anticipated medical treatment that may or may not come to pass.

Claimant's attorneys must understand that generally the claimant must manage the Medicare Set Aside account and be prepared to be questioned by federal authorities as to the use of these funds. These funds, as agreed upon by CMS, must be exhausted before Medicare will step in and pay for its required portion of medical expenses. CMS can require professional administration of the MSA in certain cases. This is another expense to the insurance company that may benefit the claimant but that the claimant does not have the authority to spend as he or she wishes.

Bottom line, monitor you claims closely to determine the optimum time to settle the file.

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