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Working For You

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Florida

Considering MEDICARE'S Interest Is In Everyone's Best Interest

Over 30 years combined experience
in Workers' Compensation



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Federal law not only establishes that Medicare is a secondary payer to workers' compensation (WC), but provides that Medicare's interest must be considered in WC settlements when future medical expenses are a component of the settlement.

Because Medicare does not pay for WC related medical services when a claimant receives a settlement that includes funds for future medical expenses, it is in the best interest of both parties, the Employer / Carrier as well as the claimant, to consider Medicare at the time of the settlement. Frankly, consideration of Medicare's interest should begin long before the parties mediate, especially if the claimant is a Medicare beneficiary, or has a "reasonable expectation" of Medicare enrollment within thirty months of the anticipated settlement date. If Medicare's interests are not "reasonably considered", serious consequences may result. If CMS (Centers for Medicare & Medicaid Services) determines there is an intent to shift the responsibility of the WC injury medical

care to Medicare, double damages **from all parties involved** may be sought.

How does one go about reasonably considering, or protecting, Medicare's interests when resolving WC cases that include future medical expenses? The recommended method is an MSA, a Medicare Set-aside Arrangement, which allocates a portion of the WC settlement for future medical expenses. The amount of the set-aside is determined on a case-by-case basis and should be reviewed by CMS **when appropriate**.

MSA proposals cost Carriers money, and it is not in Medicare's best interest to review every WC settlement nationwide. So, how does one determine if an MSA is necessary and CMS review appropriate?

Submit an MSA to CMS if (1) the claimant is currently a Medicare beneficiary and the total settlement amount is greater than \$25,000; or (2) the claimant has a "reasonable expectation" of Medicare enrollment within thirty months of the settlement date and the total settle-

ment amount is greater than \$250,000.00. Remember, the total settlement amount includes wages, attorney fees, all future medical expenses (including prescription drugs), **and repayment of any Medicare conditional payments**. Any previously settled portion of the WC claim must also be included in computing the total settlement amount.

Sounds simple, right? No, not always. CMS has stressed again and again that the \$25,000 threshold is a CMS workload review threshold and not a substantive dollar or "safe harbor" threshold. **If the claimant is a Medicare beneficiary, Medicare's interests must** still be considered. Even if the total settlement amount is \$25,000 or less, the **parties** are still required to consider Medicare's interests. In these cases, CMS recommends an MSA, even though CMS will not review the proposal.

Visit the CMS website at www.cms.gov for the latest information on submissions of WCMSAs and WCMSA related topics.

- If you have a question about one of your claims, send an E-mail to us at:

maryann@youngandassociates.net

Please put "Legal Question" in the subject box. We will try to answer your question the same day.

- Let us save you money by defending your claims and preparing your washout settlement documents.

Newsletter Challenge

Did You Know . . .



We provide defense coverage in Ocala, Gainesville, Orlando, Lakeland, Tampa & St. Pete, Bradenton, Sarasota, Fort Myers & Naples. Need last-minute representation for a mediation or hearing? Just call us!

1) True or False? Awarding attorney fees is proper, even if the finding of compensability does not result in an award of benefits.

2) True or False? A claimant is entitled to recover an attorney's fee **from the carrier or employer** in any case in which the E/C files a response to petition denying benefits with DOAH and the injured worker has employed an attorney in the successful prosecution of the petition.

3) True or False? A claimant is entitled to recover an attorney's fee **from the carrier or employer** in a proceeding in which the E/C denies that an accident occurred for which compensation benefits are payable, and the claimant prevails on the issue of compensability.

4) True or False? Judges of Compensation Claims are not required to approve fees other than those fees payable to injured workers' attorneys under

Section 440.34.

5) True or False? A Judge of Compensation Claims must base the attorney fee award **only** on the benefits the lawyer secured.

Send your answers to:
maryann@youngandassociates.net

Two entries will be drawn from all correct submissions. Winners receive a \$25 gift card.

Attorney's Fees Again (Still) at Issue

As Yogi Berra once said, "It's déjà vu all over again." A claimant represented by the All Injuries Law Firm, Port Charlotte, had her case heard by the First District Court of Appeals and the issue was attorney fees. Jennifer Kauffman follows Emma Murray as the claimant whose name may become synonymous with so called "reasonable attorney fees."

The Florida Supreme Court's decision in Murray v. Mariner Health, 994 So.2d 1051 (Fla. 2008), was seen as having restored hourly attorney fees. Just months after the decision was issued, however, the Florida legislature passed House Bill 903 removing the word "reasonable" from Subsections (1) and (3) of

Section 440.34. HB 903 was seen as having restored the fee cap. And it did; sort of.

What HB 903 did do was create a statute that controls fee awards after its enactment. The passage of HB 903 altered the entitlement to hourly attorneys fees **only for the time period after July 1, 2009**, its effective date. "Hourly attorney fees" apply only to accident claims occurring between October 1, 2003 and June 30, 2009. Ms. Kauffman's date of accident: July 23, 2009.

In Kauffman v. Community Inclusions, OJCC# 09-019629, July 23, 2010, Judge of Compensation Claims Spangler, believing himself "constrained" to follow the legislatively mandated scheme (Final Order Footnote 1), entered an at-

torney fee order that awarded Claimant's counsel \$684.41 (an "hourly fee" of approximately \$6.84). "This is contrasted with the fee the Employer / Carrier is obligated to pay its own counsel of \$14,720.00" (Final Order Footnote 2). Based on the testimony presented, JCC Spangler would have found claimant's counsel due a reasonable fee of \$25,075.00 (Final Order Footnote 3).

This case proceeded to the First DCA and oral arguments were heard on January 13, 2011. And so we wait. . .



Congratulations to Jennifer Buecker of Bouchard Insurance, the winner of last month's contest. The correct (best) answers to the January Newsletter Challenge:
F, F, F, F, F



Get a free 2010 Russell H. Young & Associates mousepad imprinted with a quick-reference statute guide. Send your request to:

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