State of New Jersey

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MEMORANDUM

August 18, 2005

To: All Judges

From: Peter J. Calderone, Director and Chief Judge

Subject: Workers' Compensation Medicare Set-Aside Arrangements (WCMSA)

This memorandum updates my January 10, 2005 memorandum, Medicare Secondary Payer Statute (MSPS) Issues and Information. A recent policy decision by the Centers for Medicare and Medicaid Services (CMS), which has been posted on the Division of Workers' Compensation website and Judicial Information System, generally states that Medicare will no longer review new WCMSA proposals for Medicare beneficiaries in cases resolved by lump-sum settlements that total less than $10,000.

However, CMS also stresses that this new $10,000 threshold is not a "safe-harbor" or "substantive-dollar" threshold and is only a "workload-review" threshold. Therefore, Medicare's interest must still be considered in all cases involving Medicare entitled petitioners.

As a result of this CMS policy change and in discussion with CMS officials, we believe it now is unnecessary for parties to submit a new WCMSA proposal to CMS for prior review and approval when a Section 20 totals less than $10,000. However, it is strongly suggested that judges require the parties to nevertheless put information on the record to show that Medicare's interest was considered for Section 20 settlements less than $10,000 involving Medicare entitled petitioners and explain what, if any, set-aside arrangement is being established. For instance, if there are no set-aside monies as part of the settlement (i.e., a zero-dollar set-aside arrangement), then the reasons for the zero-dollar arrangement should be put on the record. The reasons for the set-aside amount, or no amount, will essentially be the same as the parties would have provided to CMS in seeking set-aside review and approval prior to the Section 20 settlement when such approval was required under the previous CMS policy. In this way, pursuant to the new CMS policy directive, it can be established that Medicare's interest was considered in determining what, if any, set-aside amount was appropriate.

At the present time, all cases involving Medicare-entitled individuals still require CMS conditional payment approval as outlined in my January 10, 2005 memorandum for any medical bills paid by Medicare for disabilities alleged in a claim petition. This process should be started as early as possible, so all judges should inquire at the first listing of a case whether the petitioner is Medicare entitled to help ensure that the conditional payment review process has been timely initiated. Since the new CMS policy only concerns lump sum settlements under $10,000, where a Section 20 settlement totals $10,000 or more there continues to be judicial oversight required to ensure that the CMS/Medicare set-aside review and approval steps have been taken.

The CMS/Medicare process, which affects all workers' compensation programs in the country, emphasizes that Medicare's interest must be considered in all cases involving Medicare entitled petitioners. As previously discussed, there are various and successful methods for concluding trials and settlements involving Medicare entitled petitioners that include amendments to the claim petition and/or trial of only non-settled issues. It is necessary to include in the trial record a reasonable explanation why such actions were taken and how Medicare's interest was considered in the decisions or agreements where certain claims were dismissed or where Section 20 settlements less than $10,000 are approved.

Please contact Thomas Daly, Esq. of my staff (at 609-777-4924) or me should you have any questions or need additional information about CMS policy and procedures.