



October 26, 2011

CMS Declines Review of a Medicare Set-Aside (MSA) which exceeds Review Threshold

The recent trend of settlement parties seeking a court's determination on whether Medicare's interests have been protected as part of a settlement continues. Even in cases which clearly meet the Center for Medicare & Medicaid (CMS) review thresholds, sometimes CMS will not review the proposed MSA for undetermined reasons and the parties have to then look to the courts for guidance.

In *Billy Smith v. Marine Terminals of Arkansas*, a case out of the United States District Court for the Eastern District of Arkansas, Billy Smith (Smith) filed both a Longshore and Jones Act claim for his injuries. Smith sued Marine Terminals of Arkansas, Inc. (Marine Terminals) for damages associated with a permanent and disabling injury to his right hand while working as a truck driver aboard a floating barge owned and operated by his employer. Smith originally asserted a Jones Act claim against his employer; however, that claim was dismissed based upon Smith's alleged status as a seaman on defendant's Motion for Summary Judgment. Smith had also filed an alternative claim based on vessel negligence under the Longshore and Harbor Workers' Compensation Act, which survived summary judgment. Therefore, only Smith's Longshore and liability claims survived.

As an aside, maritime cases can be a confusing matter when it comes to MSAs. A Longshore and Harbor Workers' Compensation Act claim is considered to be a workers' compensation claim. A Jones Act case is considered to be a liability claim by CMS. This distinction is important for CMS submission purposes. The water can become even muddier when an injured worker files both a Longshore and a Jones Act claim and is Medicare eligible; thus, resulting in the need for an MSA to be included as part of the settlement, and possibly have the MSA reviewed and approved by CMS.

Because Smith was a recipient of Social Security disability benefits, and was also Medicare eligible, the court concluded that Medicare's interests must be protected. Smith, through his counsel, hired an MSP compliance provider to determine a proposed MSA and to submit the MSA to CMS for consideration of settlement. The MSP provider determined that \$14,647.00 was a reasonable allocation to cover the projected lifetime cost that was expected to be incurred by Smith for treatment of his accident-related injuries that would otherwise be covered by Medicare.



Because Smith's remaining claim was a Longshore claim, a workers' compensation MSA was appropriate and CMS' workers' compensation review thresholds would have applied. It is not clear whether the \$25,000 review threshold (current Medicare beneficiary) or the \$250,000 threshold (reasonable expectation of Medicare eligibility within 30 months) should have applied, since the opinion states that Smith was currently Medicare eligible, and it is not clear whether Smith was an actual Medicare beneficiary at the time of settlement. Regardless, because Marine Terminals settled with Smith in the amount of \$1 million dollars, the settlement far exceeded both review thresholds and CMS should have reviewed the proposed MSA.

When the parties submitted the MSA to CMS, CMS decided not to review the MSA submission, citing the \$25,000 review threshold. This was likely a mistake on the part of the reviewer at CMS. It appears the reviewer may have noted the MSA of \$14,647.00 and decided the MSA did not meet the review threshold without calculating the "total settlement amount"¹ as the basis for whether the MSA should be reviewed. Or, the reviewer may have noted the prior Jones Act claim which was included as part of the settlement, and deemed the MSA to be liability instead of workers' compensation, therefore declining to review the MSA. One will never know the true reason why the MSA was not reviewed; however, because the CMS submission process is voluntary, and CMS does not guarantee review and approval of any MSA, CMS may decline to review an MSA if their workloads so dictate.

Despite the fact that CMS would not review the MSA, the court determined that the MSP provider's determination of the MSA was reasonable and competent and ordered that amount to be set aside for Smith's future care that would otherwise be reimbursable by Medicare. Though Smith represented that Medicare had not made any conditional payments, the court ordered that Smith be responsible to reimburse Medicare if any conditional payments had been made. Between establishing the MSP provider's MSA and considering any possible conditional payments made by Medicare, the court found that Medicare's interests were reasonably considered and protected in the settlement of the matter.

This case is yet another example of how achieving full MSP compliance may not always be clear, and in the absence of CMS' blessing on a settlement, where parties will look to the courts to adjudicate whether Medicare's interests have been properly considered.

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¹ See CMS Memo April 25, 2006 to note CMS' policy on computation of the "total settlement amount."



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