

United States Senate

133 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510-2204

January 11, 2010

The Honorable Kathleen Sebelius
Office of the Secretary
Health and Human Services Department
200 Independence Ave., S.W.
Washington, D.C. 20201

Dear Secretary Sebelius:

I write today to express concerns about a long-standing issue affecting Michigan and other states relating to the Workers' Compensation Medicare Set-Aside Arrangements (WCMSAs) and related conditional payment recovery under the Medicare Secondary Payer. My colleagues and I had written the prior Administration previously about this issue, but it was not resolved.

As noted by both the Michigan Workers Compensation Agency (MWCA) and a coalition of legal professionals, the WCMSA process has had a significant impact on injured workers in my state and the finality of their cases. The MWCA director also has noted there is a dispute between MWCA and CMS about the number of open cases: the state of Michigan reports there are over 900 "pending" cases awaiting response, but CMS indicated there are less than 900 pending cases in the entire nation. I am concerned that these delays not only prevent injured workers from getting their relief but also prevent them from getting finality in their cases.

I know that there is legislation being considered on the WCMSA process, but I believe that CMS can remedy these concerns in a fair, transparent process such as rule-making that allows for public input and comment. Such a process would help ensure that workers in states such as mine receive their settlements in a timely, fair manner. I hope that you can work with these and other interested stakeholders to find a solution.

Thank you for your prompt attention to this matter. I hope that we can work with you to reach a solution that protects both injured workers and Medicare's fiscal sustainability. Please contact Oliver Kim with my staff if you have further questions or need additional information.

Sincerely,



Debbie Stabenow

Cc: Ms. Charlene Frizzera, Acting Administrator, Centers for Medicare and Medicaid Services

Attachment

The Honorable Debbie Stabenow
Room 133 Hart Office Building – SH-133
United States Senate
Washington, DC 20510

November 20, 2009

Dear Senator Stabenow:

Thank you for meeting with our coalition of stakeholders interested in the Workers' Compensation Medicare Set-Aside Arrangements (WCMSAs) and related conditional payment recovery under the Medicare Secondary Payer provisions of federal law.

The procedures used for approval of WCMSAs submitted to the Centers for Medicare and Medicaid Services (CMS) and its contractor in conjunction with settlements under the applicable state workers' compensation law continue to delay final workers' compensation decisions. This delay results in extended periods during which settlement proceeds may not be distributed and creates hardships for injured workers. The current process also creates uncertainty for workers' compensation agencies and representatives of injured workers, employers and insurers.

The CMS procedures used to identify those cases in which payment has been made by Medicare for medical services and the determination of amounts to be reimbursed further complicates the workers' compensation decision making process. There is a lack of certainty of definitions of items and services for which reimbursement is required from injured workers and third party payers and a lack of finality of the determination of amounts to be reimbursed. The WCMSA submission and determination process is currently being administered based on a series of administrative memos, web site instructions, and the standard operating procedures incorporated by CMS in its agreement with the contractor responsible for processing submissions. Many of the provisions of the standard operating procedure used to render WCMSA submission determinations are not available to the public and considered to be proprietary by the contractor and CMS.

There are no statutory or regulatory standards upon which parties may rely as a matter of law and no appeal process available to the parties in the normal course of administration of the determination of WCMSA submissions. Additionally, the standards currently being applied do not address important issues such as: proportional recovery by Medicare when a disputed case has to be compromised; and,

the provision of a safe harbor that would enable parties to avoid the significant cost of Medicare set aside analyses in appropriate cases. Finally, there is currently no procedure allowing claimants, who are too often bewildered by CMS' procedural requirements, the option of directly paying set aside amounts to Medicare.

The CMS processes and procedures have caused delays in workers' compensation decisions in Michigan and throughout the country, particularly in the many states that provide for settlement of workers' compensation claims. In Michigan, the CMS procedure and process has significantly impacted the entire litigation system. At this time, over 900 pending workers' compensation litigation cases are being delayed awaiting the approval of a set-aside amount and determination of conditional payments. Delays in excess of 6 months are common, and some extend to a year or more. In all of these cases the economic conditions of injured workers gets worse by the day. Agreement may have been reached on a settlement amount but the lack of CMS review delays the settlement payment to the injured workers and increases costs to the employer. In 2008, over \$14.5 million dollars was paid into set-aside accounts and for conditional payment reimbursements. In 2009, through 11/12/09, \$11.6 million had been paid. There is a continuing problem with the lack of finality in the requests for conditional payments. Even when a letter is received indicating the amount required for reimbursement, it always contains caveats that it is not a final figure. It is not unusual for a case to be resolved in good faith only to have a problem develop when additional reimbursements are demanded. Under the Michigan Workers' Compensation Act, settlements can only be approved if the magistrate finds that the settlement is in the best interest of the injured worker. The lack of certainty in the reimbursement amount often makes that determination difficult.

From the Michigan employers' and their workers' compensation insurance carriers' perspective, the problems with delay and lack of certainty have not been adequately addressed by CMS. That CMS has reduced the delay from as much as 4 years, down to 6 to 12 months is not an accomplishment that addresses the problem. Six to twelve months is neither speedy in the business world nor for workers' compensation claimants who suffer without the benefit of settlement. Certainty is not provided by a conditional payment letter that does not close out the case even if settled on the same day that CMS authored the letter. Employers and insurance carriers need speed and certainty in order to successfully compete in today's world economy.

Our coalition has been working for years to improve the current process and has supported reform legislation. HR 2641 was recently introduced in the House of Representatives by Representative John Tanner to address these issues. Although there has been improvement recently in day to day interaction with CMS and its contractor, we continue to experience delays and uncertainties in processes and procedures that impact all of the parties involved in workers' compensation claims settlements.

Your assistance in facilitating review of these matters and consideration of the introduction of reform legislation would be greatly appreciated.

Sincerely,

Joel Alpert

Denice M. LeVasseur

Chairman

Workers' Compensation Defense Counsel

Workers' Compensation Committee

Michigan Association for Justice

Richard Swanson

Douglas J. Holmes

Workers Injury Law & Advocacy Group

President

UWC – Strategic Services on

Unemployment & Workers' Compensation