

Summary of Intent of Provisions in the Proposed WCMSA Legislation

This summary reviews the provisions of the legislation introduced by Representatives Thompson and Holding (HR 4161)

SECTION 1. SHORT TITLE.

This Act may be cited as the 'The Comp Act ' The Clarification of Medicare and Workers' Compensation Act.

SEC. 2. APPLICATION OF MEDICARE SECONDARY PAYER RULES TO CERTAIN WORKERS' COMPENSATION SETTLEMENT AGREEMENTS.

(a) Secondary Payer Provisions for Workers' Compensation Settlement Agreements- Section 1862 of the Social Security Act (42 U.S.C. 1395y) is amended--

- (1) in subsection (b)(2)(A)(ii), by inserting 'subject to subsection (p),' after '(ii)'; and
- (2) by adding at the end the following new subsection:

'(p)

'(1) DEFINITIONS- For purposes of this subsection and subsection (q):

'(A) COMPROMISE AGREEMENT- The term 'compromise agreement' means a workers' compensation settlement agreement that--

- '(i) applies to a workers' compensation claim that is denied or contested, in whole or in part, by a workers' compensation payer involved under the workers' compensation law or plan applicable to the jurisdiction in which the agreement has been settled; and
- '(ii) does not provide for a payment of the full amount of benefits sought or that may be payable under the workers' compensation claim.

'(B) Workers' COMPENSATION CLAIMANT- The term 'workers' compensation claimant' means a worker who--

'(i) is or may be covered under a workers' compensation law or plan; and

'(ii) submits a claim or accepts benefits under such law or plan for a work-related injury or illness.

'(C) Workers' COMPENSATION LAW OR PLAN-

'(i) IN GENERAL- The term 'workers' compensation law or plan' means a law or program administered by a State or the United States to provide compensation to workers for a work-related injury or illness (or for disability or death caused by such an injury

or illness), including the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901-944, 948-950), chapter 81 of title 5, United States Code (known as the Federal Employees Compensation Act), the Black Lung Benefits Act (30 U.S.C. 931 et seq.), and part C of title 4 of the Federal Coal Mine and Safety Act (30 U.S.C. 901 et seq.), but not including the Act of April 22, 1908 (45 U.S.C. 51 et seq.) (popularly referred to as the Federal Employer's Liability Act).

`(ii) INCLUSION OF SIMILAR COMPENSATION PLAN- Such term includes a similar compensation plan established by an employer that is funded by such employer or the insurance carrier of such employer to provide compensation to a worker of such employer for a work-related injury or illness.

`(D) Workers' COMPENSATION PAYER- The term `workers' compensation payer' means, with respect to a workers' compensation law or plan, a workers' compensation insurer, self-insurer, employer, individual, or any other entity that is or may be liable for the payment of benefits to a workers' compensation claimant pursuant to the workers' compensation law or plan.

`(E) Workers' COMPENSATION SETTLEMENT AGREEMENT- The term `workers' compensation settlement agreement' means an agreement, between a claimant and one or more workers' compensation payers which-

-
` (i) forecloses the possibility of future payment of some or all workers' compensation benefits involved; and

`(ii)(I) compensates the claimant for a work-related injury or illness as provided for by a workers' compensation law or plan; or

`(II) eliminates cause for litigation involving issues in dispute between the claimant and payer.'.

Intent: this language is intended to provide clear definition of terms that are used in the administration of workers' compensation for reference in determining the relationship between Medicare and workers' compensation law.

(b) Satisfaction of Secondary Payer Obligations - Section 1862 of the Social Security Act (42 U.S.C. 1395y), as amended by subsection (a), is further amended by adding at the end the following new subsection:

`(q) Treatment of Medicare Set-Asides Under Workers' Compensation Settlement Agreements-

`(1) SATISFACTION OF SECONDARY PAYER OBLIGATIONS -

`(A) FULL SATISFACTION OF CLAIM OBLIGATIONS-

`(i) IN GENERAL- If a workers' compensation settlement agreement, related to a claim of a workers' compensation claimant, includes a Medicare set-aside (as defined in subparagraph (B)(i),

such set-aside shall satisfy any obligation with respect to payments reasonably expected to be made under subsection (b)(2)(A)(ii) with respect to such claim.

`(ii) RULE OF CONSTRUCTION- Nothing in this section shall be construed as requiring the submission of a Medicare set-aside to the Secretary.

Intent: this language is intended to clarify that once a workers' compensation settlement meets the terms of the statute it satisfies the obligations of the parties with respect to MSP in the settlement and enables the parties to finalize the workers' compensation settlement as a matter of the applicable state and federal law. It also assures that the submission of a WCMSA to CMS or its contractor is not required but is an option available to the parties. Such submission is currently not required but there is no statutory language that addresses the question.

`(B) MEDICARE SET-ASIDE AND MEDICARE SET-ASIDE AMOUNT DEFINED- For purposes of this subsection:

`(i) MEDICARE SET-ASIDE- The term 'Medicare set-aside' means, with respect to a workers' compensation settlement agreement, a provision in the agreement that provides for a payment of a lump sum, annuity, a combination of a lump sum and an annuity, or other amount that is in full satisfaction of the obligation described in subparagraph (A) for items and services that the workers' compensation claimant under the agreement received or is reasonably expected to receive under the applicable workers' compensation law.

`(ii) MEDICARE SET-ASIDE AMOUNT- The term 'Medicare set-aside amount' means, with respect to a Medicare set-aside, the actual dollar amount provided for in clause (i).

Intent: the language is intended to be clear about how the payment may be made to satisfy MSP obligations in a settlement. It reflects current practice that is addressed in CMS policy but is not addressed in statute. It also references subparagraph (A) to be clear about the amount needed to meet MSP obligations with respect to the settlement.

`(2) MEDICARE SET-ASIDE-

`(A) SATISFACTOIN OF MEDICARE SET-ASIDE- For purposes of this subsection, a Medicare set-aside meets Medicare secondary payer obligations if the Medicare set-aside amount reasonably takes into account the full payment obligation described in paragraph (1)(A), while meeting the requirements of subparagraphs (B) and (C) and is determined based on the following:

- `(i) The illness or injury giving rise to the workers' compensation claim involved.
 - `(ii) The age and life expectancy of the claimant involved.
 - `(iii) The reasonableness of and necessity for future medical expenses for treatment of the illness or injury involved.
 - `(iv) The duration of and limitation on benefits payable under the workers' compensation law or plan involved.
 - `(v) The regulations and case law relevant to the State workers' compensation law or plan involved.
- `(B) ITEMS AND SERVICES INCLUDED- A Medicare set-aside--
- `(i) shall include payment for items and services that are covered and otherwise payable under this title as of the effective date of the workers' compensation settlement agreement and that are covered by the workers' compensation law or plan; and
 - `(ii) is not required to provide for payment for items and services that are not described in clause (i).

Intent: The intent is to set forth the basic parameters that must be addressed in a WCMSA in order to meet MSP obligations and to require that the WCMSA must address items and services that are covered for Medicare and covered to be paid under the applicable workers' compensation law. Currently there is no statutory or regulatory guidance to define this relationship. The basic factors included do track with basic factors provided in CMS policy and the basic factors that are addressed in workers' compensation settlements under workers' compensation law.

`(C) PAYMENT REQUIREMENTS-

`(i) REQUIRED APPLICATION OF WORKERS' COMPENSATION LAW AND FEE SCHEDULE-

`(I) IN GENERAL- Except in the case of an optional direct payment of a Medicare set-aside made under paragraph (5)(A), the set-aside amount shall be based upon the payment amount for items and services under the workers' compensation law or plan and applicable fee schedule (effective as of the date of the agreement).

`(II) Workers' COMPENSATION FEE SCHEDULE DEFINED- For purposes of this subsection, the term `workers' compensation fee schedule' means, with respect to a workers' compensation law or plan of a State or a similar plan applicable in a State, the schedule of payment amounts the State has established to pay providers for items and services furnished to workers who incur a work-related injury or illness as defined under such law or plan (or in the absence of such a schedule, the applicable medical reimbursement rate under such law or plan).

Intent: this language is intended to be very clear about the law to apply in determining amounts to be set aside under the applicable workers' compensation law to meet MSP obligations. Case law has recognized this relationship but it has been unclear in administration by CMS.

`(ii) OPTIONAL PROPORTIONAL ADJUSTMENT FOR COMPROMISE SETTLEMENT AGREEMENTS-

` IN GENERAL- In the case of a compromise settlement agreement, a claimant or workers' compensation payer who is party to the agreement may elect to calculate the Medicare set-aside amount of the agreement by applying a percentage reduction to the Medicare set-aside amount for the total settlement amount that could have been payable under the applicable workers' compensation law or similar plan involved had the denied, disputed, or contested portion of the claim not been subject to a compromise agreement. The percentage reduction shall be equal to the denied, disputed, or contested percentage of such total settlement. Such election may be made by a party to the agreement only with the written consent of the other party or parties to the agreement.

Intent: this language is intended to describe how compromise settlements should be handled. Compromise settlements are common in workers' compensation in cases where there is a dispute about compensability or the amount that may be required to be paid under workers' compensation law. CMS has been inconsistent in how it addresses this issue. In some cases an insistence by CMS that amounts initially claimed (that were disputed and settled) to be set aside has resulted in settlements that meet the terms of workers' compensation law but are not approved by CMS or its contractor.

`(3) OPTIONAL PROCESS FOR APPROVAL OF MEDICARE SET-ASIDES-

`(A) OPTIONAL PRIOR APPROVAL BY SECRETARY- A party to a workers' compensation settlement agreement that includes a Medicare set-aside may submit to the Secretary the Medicare set-aside amount for approval.

`(B) NOTICE OF DETERMINATION OF APPROVAL OR DISAPPROVAL- Not later than 60 days after the date on which the Secretary receives a submission under subparagraph (A), the Secretary shall notify in writing the parties to the workers' compensation settlement agreement of the determination of approval or disapproval. If the

determination disapproves such submission the Secretary shall include with such notification the specific reasons for the disapproval.

`(4) APPEALS-

` IN GENERAL- A party to a workers' compensation settlement agreement that is dissatisfied with a determination under paragraph (3)(B), upon filing a request for reconsideration with the Secretary not later than 60 days after the date of notice of such determination, shall be entitled to--

`(i) reconsideration of the determination by the Secretary (with respect to such determination);

`(ii) a hearing before an administrative law judge thereon after such reconsideration; and

`(iii) judicial review of the Secretary's final determination after such hearing.

Intent: this language is intended to establish a reasonable process for review of WCMSAs if the parties elect to submit a WCMSA for review, and a right of appeal through an administrative appeal process. CMS has established a re-review policy without statutory or regulatory authority, but the re-review is limited and at the discretion of CMS. A specific appeals provision is needed in statute.

`(5) ADMINISTRATION OF MEDICARE SET-ASIDE PROVISIONS-

`(A) OPTIONAL DIRECT PAYMENT OF MEDICARE SET-ASIDE AMOUNT-

`(i) ELECTION FOR DIRECT PAYMENT OF MEDICARE SET-ASIDE AMOUNT- Effective 30 days after the date of enactment of this subsection, with respect to a claim for which a workers' compensation settlement agreement is or has been established, a claimant or workers' compensation payer who is party to the agreement may elect, but is not required, to transfer to the Secretary a direct payment of the Medicare set-aside amount. The parties involved may calculate the Medicare set-aside amount of such set-aside using any of the following methods:

`(I) In the case of any Medicare set-aside of a compromise settlement agreement under paragraph (2)(C)(ii), the amount calculated in accordance with such paragraph.

`(II) In the case of any Medicare set-aside, the amount based upon the payment amount for items and services under the workers' compensation law or plan and fee schedule (effective as of the date of the agreement) in accordance with paragraph (2)(C)(i)(I).

`(III) In the case of any Medicare set-aside, the payment amount applicable to the items and services under this title as in effect on the effective date of the agreement.

Such transfer shall be made only upon written consent of the other party or parties to the agreement.

`(ii) ELECTION SATISFYING LIABILITY- An election made under clause (i), with respect to a qualified Medicare set-aside shall satisfy any payment, in relation to the underlying claim of the related workers' compensation settlement agreement, required under subsection (b)(2) to be made by the claimant or payer to the Secretary.

Intent: the intent of this language is provide an option for the parties to a workers' compensation settlement that the amount of the WCMSA may be paid directly to Medicare (instead of maintained by the injured worker to pay for items and services as they may be incurred). The direct payment accelerates the amounts actually received by Medicare to the benefit of the trust fund, providing additional revenue during the 10 year budget period. The option also serves to reduce administrative expense associated with tracking WCMSA expenditure reports. Surveys of workers' compensation claimants indicate that approximately one-third of WCMSA amounts would be paid directly to Medicare if the option were available.

`(B) ELECTION OF PROFESSIONAL OR BENEFICIARY SELF ADMINISTRATION OF MEDICARE SET-ASIDE PAYMENTS- Nothing in this subsection or subsection (p) prohibits an individual from electing to utilize professional administration services or to self-administer payments of their Medicare Set-Aside in accordance with existing law.

Intent: this language recognizes the role of professional administrators who may be engaged to manage WCMSAs.

`(6) TREATMENT OF STATE WORKERS' COMPENSATION LAW- For purposes of this subsection and subsection (p), if a workers' compensation settlement agreement is accepted, reviewed, approved, or otherwise finalized in accordance with the workers' compensation law of the jurisdiction in which such agreement will be effective, such acceptance, review, approval, or other finalization shall be deemed final and conclusive as to any and all matters within the jurisdiction of the workers' compensation law, including the determination of reasonableness of the settlement value; any allocations of settlement funds; the projection of future indemnity or medical benefits that may be reasonably expected to be paid under the State workers' compensation law; and, in the case of a compromise agreement, the total amount that could have been payable for a claim which is the subject of such agreement in accordance with paragraph (2)(C)(ii).'

Intent: this language is intended to be clear that workers' compensation law controls with respect to amounts to be paid and obligations under workers' compensation law. CMS administration has been inconsistent in determining amounts to be included in WCMsAs with contractors at times second guessing treating physicians and the terms of settlement agreements that have been finalized under law.

- (c) Conforming Amendments- Subsection (b) of such section is further amended--
- (1) in paragraph (2)(B)(ii), by striking `paragraph (9)' and inserting `paragraph (9) and subsections (p) and (q)';
 - (2) in paragraph (2)(B)(iii)--
 - (A) in the first sentence, by striking `In order to recover payment' and inserting `Subject to subsection (q), in order to recover payment'; and
 - (B) in the third sentence, by striking `In addition' and inserting `Subject to subsection (q), in addition'; and
 - (3) in paragraph (3)(A), by striking `There is established a private cause of action' and inserting `Subject to subsection (q), there is established a private cause of action'.

Intent: this language was copied from the earlier versions of the proposed legislation to assure that references are consistent and are to the appropriate sections.

- (d) Modernizing Terminology for Purposes of Medicare Secondary Payer Provisions- Subsection (b)(2)(A) of such section is amended by striking `workmen's compensation law or plan' and inserting `workers' compensation law or plan' each place it appears.
- (e) Limitation on Liability- The parties to a workers' compensation settlement agreement which met the provisions of section 1862(b) of the Social Security Act (42 U.S.C. 1395y(b)) on the effective date of settlement shall be accepted as meeting the requirements of such section notwithstanding changes in law, regulations, or administrative interpretation of such provisions after the effective date of such settlement.
- (f) Effective Date- The amendments made by this section, unless otherwise specified, shall apply to a workers' compensation settlement agreement with an effective date on or after January 1, 2020.

Intent: this language is intended to update the reference to “workers’ compensation” law instead of “workmen’s compensation” It also establishes an effective date of January 1, 2020 in contemplation of enactment before the end of 2019.