

# Workers' Comp LAW BLOG

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## Workers' Compensation Settlements and MSAs



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When trying to resolve a workers' compensation claim, the question "Do we need an MSA?" is often asked. Below is a brief refresher on why and when MSAs should be used [6].

In all settlements, compliance with Medicare rules and regulations can involve two obligations: 1) the satisfaction and discharge of Medicare's reimbursement claim for injury-related care from the date of injury through the date of settlement; and 2) the evaluation of obligations associated with future costs of care that may be provided to the claimant from the date of settlement onward. Medicare's future interest should be considered in workers' compensation settlements in which the obligation to pay future injury-related medical expenses is being permanently shifted from the workers' compensation plan to Medicare.

In this regard, if a workers' compensation claimant will have future medical expenses as a result of his/her injury, the wise practitioner advises his/her client of the need to set aside settlement funds to pay for Medicare-covered expenses as a means of protecting the client's Medicare card.[7] The most accepted compliance method for this obligation is to calculate and fund an MSA when appropriate. [8]

The purpose of an MSA is to pay for future injury-related care that would otherwise be covered by Medicare. Because every workers' compensation settlement has a future cost of care damage allocation, the only remaining condition to consider is if there is a permanent burden shift to Medicare in the obligation to pay for that future injury-related medical care.

Based on currently enacted law and guidance provided by CMS, an MSA is needed in a workers' compensation settlement when the following criteria are met:

- 1) The claimant is either currently enrolled in Medicare or possesses a "reasonable expectation" of Medicare enrollment within 30 months of settlement;
- 2) The workers' compensation settlement closed future medical expenses, effectively shifting the burden of future injury-related care from the workers' compensation carrier to Medicare going forward; and
- 3) The claimant, in fact, requires future injury-related care that would otherwise be covered by Medicare. If a workers' compensation settlement meets all three criteria, then an MSA is appropriate.

However, MSAs are not needed in all workers' compensation settlements. If one of the above criteria is not met, then an MSA is not necessary or appropriate for the settling parties to be the Medicare Secondary Payer compliant in a workers' compensation settlement. An MSA may not be necessary when:

- 1) The claimant lacks the requisite Medicare enrollment status (no current Medicare enrollment at settlement and/or no "reasonable expectation" of Medicare beneficiary status within 30 months of settlement);
- 2) Future medical coverage is not being permanently settled (no burden shift exists or future medicals are left open); or
- 3) If the claimant's treating physician can support that no future injury-related care is necessary (no future costs of care in the first place). [9]

CMS' Policy Memoranda defines the term "reasonable expectation" as it relates to determining a person's Medicare enrollment status for MSA determination purposes. The April 2003 CMS Policy Memorandum states that a "reasonable expectation" included any injured party that has: (1) applied for Social Security Disability Income ("SSDI"); (2) been denied SSDI but anticipates appealing the decisions; (3) is currently appealing the denial of SSDI or is re-filing for it; (4) is 62.5 years old; or (5) suffers from an end stage renal disease but has not yet qualified for Medicare. [10]

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[6] "The Use and Propriety of Medicare Set Asides in Liability Settlements," John V. Cattie, Jr., Esquire of Garretson Resolution Group (July 12, 2011).

[7] 42 C.F.R §§) 411.46 and 411.47.

[8] Memorandum from Parashar B. Patel, Deputy Director, CMS Purchasing Policy Group, Center for Medicare Management, to All Associate Regional Administrators, "Workers' Compensation : Commutation of Future Benefits" (July 23, 2001), available at <http://www.cms.hhs.gov/WorkersCompAgencyServices/> last visited June 30, 2011).

[9] <http://www.cms.hhs.gov/WorkersCompAgencyServices/Downloads/42203Memo.pdf>

[10] <http://www.cms.hhs.gov/WorkersCompAgencyServices/Downloads/42203Memo.pdf>

## **About Kristian Cross**

Kristian Cross is an associate with Collins & Lacy practicing in Workers' Compensation and Retail / Hospitality / Entertainment law. In addition to her position on the South Carolina Bar Workers' Compensation Committee, Kristian serves on the executive board of Sexual Trauma Services of the Midlands. Kristian received her Juris Doctor from the University of South Carolina, where she served as the Secretary of the Student Bar Association, as well as the Academic Assistance Program Property Tutor. During law school, she also served as a law clerk for Collins & Lacy and another local firm. Prior to joining Collins & Lacy in 2010, Kristian worked as an attorney for a Columbia-based firm practicing in the areas of business, commercial and insurance litigation.

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