CLM 2018 Business Insurance Workers Compensation Conference
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Evolution of Permanent Injury Cases:
From Lump Sum to Surrogate Mom:
Round the clock medical and financial security for the injured worker

I. Houston, We Have an Opportunity

Crossing the CMS (Centers for Medicaid and Medicare Services) Threshold

CMS will review, and only review, new workers compensation proposals that meet the following criteria: the claimant is a Medicare beneficiary and total settlement amount is greater than $25,000; or claimant has a reasonable expectation of Medicare enrollment within 30 months and anticipated total settlement amount for future medical expenses and lost wages over a lifetime is expected to be greater than $250,000.

The Centers for Medicaid and Medicare Services was established on July 30, 1965. But it wasn't until the first Bush administration that CMS began to look at the creation of Medicare Set Asides. And it wasn't until June 1, 2009 that independent pricing of Part D prescription drugs related to the injured worker. Often the costs for prescription drugs exceeds all other categories of the MSA. Workers compensation covers more than 130 million employees nationwide. Total wages paid to those workers exceeds $7 trillion dollars. Workers compensation pay 100% of related medical costs for injured workers along with cash, or structure payments, for lost work time.

Workers compensation medical spending is estimated at $33-$37 billion dollars per year. In 2013, the pharmacy portion equaled 18% of all medical expenses but that percentage seems to be increasing annually. Of course the opioid crisis is a major factor.

Carriers, of course, are required to establish reserves in accordance with state and federal regulations. The indemnity portion of any claim is to some extent always dependent on state rules. Medical costs are typically front-loaded while initial trauma and treatment are realized. The long term medical needs are ultimately set forth by the MSA providers. The timeframe between accident and MSA varies greatly. Also, and there will be more on this later, life expectancy plays a large role in the final reserve calculations of future or settlement cost. Depending on the carriers book of underwritten business the type and nature of claims can be quite diverse, or in a particular industry line, very similar. At the end of the day, all carriers are looking to properly compensate injured workers.

When we approach settlement the cost to fund the medical portion, through the MSA, becomes a focal point. Often once the case has been adjudicated the indemnity part is settled out first. There can be reluctance on the part of the injured party about settling their medical claim. This stems from several things: the convenience of having medical needs fully covered and fear of the future. Today, unlike any time in the past, claimants are better protected. With the inclusion of MSA's, the past medical needs are preserved into the future and projected for their lifetime needs. Independent third parties are evaluating both medical needs, as well as, future life expectancy.

Offers to settle normally now include upfront cash and a guaranteed stream of future annual payments. Payments that can be professionally managed, along with networks of providers that reduce future costs and thus preserve more of the money available over a claimant's lifetime.

Plaintiff counsel also pays a key role. Claimants that are represented look toward counsel for guidance. Often the structure broker can help to explain the offer especially when the MSA is structured and professional administration is offered.

II. Using Aggressive Cost Mitigation Strategies

What does it mean to obtain the lowest defensible MSA allocation and what are the best practices to ensure you are getting a favorable response from CMS? It's important that any and all legal and medical arguments available are used to reduce the cost of the MSA. Aggressive MSAs should be balanced with awareness of potential exposures so that you understand your risk of potential CMS overage. A myriad of cost containment strategies involving pharmaceutical usage and medical record evaluations must be used to mitigate any excessive payments.

Stumbling blocks in the approval process cost time, money and create unanticipated medical exposures. The goal is to avoid stumbling blocks with CMS approval by anticipating Medicare's needs prior to submission and addressing those needs from the start. Some of these proactive steps include: Requests for updated information, pharmaceutical printouts, court orders and current claims payment histories.

Keep in mind during the submittal process that "timing is everything" when it comes to obtaining the quickest CMS approval. MSAs may not be ripe for submission at the time of initial preparation. Allocations will need to be used to forecast and to identify opportunities to mitigate costs. Often additional documentation may be critical in getting allocation approved. In the end it is essential to wait until the facts of the case are favorable prior to submitting.

III. Structuring the Deal

MSA's are tailor-made for the structured settlement industry. Unlike liability claims which take into account things like pain and suffering and unknown future medical costs, workers compensation claims come "prepackaged". The MSA spells out in great detail the upfront cash needs, as well as, the annual prescribed payments. Carriers, or any defendant, can opt to purchase an annuity to fund the future periodic payments.

The MSA provider has researched the past two years of co-morbidities and determines the needed medical treatments and annual costs. Life expectancy is ultimately provided through CMS which examines the rated age reports it receives. Those rated ages can be obtained by the structured settlement broker or independent sources approved by CMS.

Once a structure broker is retained to assist the carrier, the broker will need to obtain their own medical underwriting records to submit to their represented life insurance companies. Although the life expectancy years are set by CMS, every participating life company will need to underwrite the file. These companies employ physicians and other medical professionals that review the records and set forth their own rated age. Those rated ages are used for pricing considerations. It bears mentioning that all carriers are not created equal. Some prefer orthopedic injury cases while other are more competitive underwriting internal injuries or cases involving paralysis. Also, the length of time the carrier is committed to making annual payments plays a role. Because of underwriting and pricing considerations, it is important that the structure broker be licensed with all of the available carriers. This insures best pricing which reduces the overall cost of the claim.

Most annuitants utilized in the settlement of workers compensation claims are called “temporary life annuities”. They are designed to pay the annual benefit for the life expectancy period as set forth by CMS. They do not pay for lifetime per se, but only the prescribed number of years in the CMS approved MSA. If the claimant dies prior before all payments are made, the annuity ceases payments. This arrangement allows the life market to price their exposure to the exact number of years provided for in the MSA. A true lifetime annuity contract normally used in liability cases or retirement plans would cost more. However in some instances, the carrier may choose to buy a “period certain” annuity contract to fund the MSA. By so doing, the carrier may retain an ownership interest in the annuity contract. If for instance the injured work dies early, the remaining guaranteed payments can be commuted and a refund obtained. A competent structure broker can provide different annuity options for their client’s assessment. Cases involving high rated ages that appear to exceed normal life expectancy are good candidates. All major insurance companies that provide annuities to the workers compensation market will compete for your business.

Life insurance companies are all rated by AM Best along with the other major rating services. Best has been the gold-standard in carrier rating. The participating companies range from A to A++. All are vetted by the state insurance regulators and allowed to write business in every state. Life insurance carriers are considered financially stable and one of the most secure institutions in America.

Prior to 1987, annuities purchased by a defendant to settle workers compensation or disability cases could not be assigned. An assignment is the process by which a defendant that purchases an annuity to settle a case can “assign” the ownership of that contract to another party. By so doing, the defendant carrier can create a novation that eliminates their future liability. The injured party then agrees to look solely to the insurance life market for all future payments. Defendants can then write down the claim, remove reserves, and close the case. Structuring MSA’s and other cases reduce the costs involved and provide a guaranteed stream of future benefits to the injured party.

IV. Professional Administration of the Medical Funds

In the course of settling a worker's compensation or liability case there are many obstacles to overcome.

While settling may be a scary thought for the injured party, the truth is that keeping the case open can also prove to be a huge hassle for them. Subjecting their medical care to the insurance carrier's Utilization Review guidelines and continuously having treatment and medications denied can often make an already difficult situation worse, typically resulting in more tension and frustration for both parties.

A professional administrator is an independent party that can help both sides bridge the gaps to settling the future medical claim. Let's take a look at the basics of professional administration and how a professional administrator can assist in the process of settling a claim.

At its core, a professional administrator is a company that makes sure the injured individual gets the medical treatment they need after settlement with personal attention to ensure their future medical care needs are handled smoothly.

The professional administrator establishes a dedicated bank account for the individual's medical funds from settlement. Then, most administrators provide the claimant with a unique card that works just like a health insurance card. When the claimant shows the card at their pharmacy or doctor, the administrator receives the bill, applies group purchasing discounts, and then pays the bill automatically. The injured individual never touches the bill, but receives a record of every transaction, the savings and their account balance information.

In addition to handling all of the injured individual's medical concerns, a professional administrator also automatically files all reporting for Medicare Set Aside (MSA) accounts thereby protecting the claimant's Medicare benefits as well as the statute to take Medicare's interests into consideration. The service can be used for any medical allocation (MSA or non-MSA medical funds) as the many benefits of the service extend beyond MSA reporting. Ametros and its flagship product CareGuard is the largest pure-play professional administration provider in the country and the only company that offers online portals and access to preferred provider organizations (PPO) medical networks to the injured individuals to manage their account.

How can involving a professional administrator help determine an adequate settlement amount to cover future medical expenses?

Developing Settlement Strategies

Professional administrators currently manage the settlement funds of injured individuals who settled their cases, so they have a current and accurate perspective of how much medical treatment will cost. This information is extremely valuable to use as a basis for negotiations on and understanding the cost of future medical expenses.

For liability claims, allocating a portion of the settlement for future medical expenses can sometimes be more of an art than a science. On large settlements, extensive life care plans and Medicare Set Asides (to be discussed further below) will be created to detail out the specific costs the injured party will need to cover after they settle. Often times, due to volume discounts, the administrator can show deep discounts to the projected costs and can therefore help give the injured party comfort to settle the claim knowing they will have enough funds to cover their future medical costs. While a professional administrator cannot change the value reached for an MSA, their current pricing can show if the pricing in the MSA is close to reality. The professional administrator can provide a real look at what the future costs would be because the administrator is currently paying bills for existing injured individuals. In many cases, the professional administrators pricing will be far below the pricing in the MSA. Professional administrators will often speak with the injured party and/or their attorney prior to settlement and address their concerns about managing their future medical care. This enhances their quality of life and their potential to recover. Some injured parties are hesitant or unwilling to settle their cases because they have fears about taking care of their future medical and/or remaining compliant with the reporting requirements of their MSA. A professional administrator is experienced in navigating these issues and will talk with the injured party about how they can minimize the risks so that the benefits of the settlement are front and center. Professional administration gives the injured party a company to answer their questions after settlement so that the attorney's office is not fielding questions about healthcare. In addition, when it comes to MSAs, many attorneys recognize the complexity of abiding by the MSP statutes.

Professional administration automates all of the MSA reporting and is responsible for making sure all of the treatments are MSA-eligible. If any new treatments or drugs are suggested that were not originally listed in the MSA, the professional administrator will make sure the injured party gets a letter of medical necessity from their doctor in order for the expense to be documented properly. Many attorneys view professional administration as essential in minimizing the potential for any confusion or liability down the road. It's worth sharing the option of professional administration with injured parties. It helps improve the chances of the case settling and the injured party understanding and being comfortable with how they will manage their medical care after settlement.