ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

For past installments of the *George the Bartender* series, please visit our web site at http://www.kttlaw.us/memos.html

RE: GEORGE THE BARTENDER AND THE ATTACK OF THE MEDICARE SET-ASIDE TRUST OR THE EXPANSION OF OUR COTTAGE INDUSTRIES AND OUR ALPHABET SOUP

FROM THE LOBBY BAR AT THE HYATT:

After a hard day of denying benefits, I arrived at the lobby bar and was greeted by a beaming Ron Summers, the workers' compensation attorney for George the Bartender.

Ever since the implementation of the new reform law courtesy of SB899, scowls not smiles were the order of the day for Ron. Of course, I inquired into the source of Ron's happiness.

Ron explained that the impact of the AMA Guides on permanent disability were being offset somewhat by the bonanza in the value of future medical treatment brought about by the Medicare Set-Aside Trust scare.

Ron told me that almost all large claims administrators (insurance carriers and third party administrators) either had their own MSA departments or had contracted with one of the large MSA companies and that these **"cottage industries"** made sure that the dollar amount of the monies set aside for Medicare were both large and generous.

Ron's usage of the term **"cottage industries"** gave me pause for thought as when I started in workers' compensation in 1973 there were no **"cottage industries"** such as bill review companies, structured settlement companies, MSA companies, etc., and yes, I am sad to say, defense attorneys are also a "**cottage industry."**

In our Workers' Compensation system we really only have two players with truly vested interests, those that pay the benefits and those that receive the benefits, unless we forget it is the employer that ultimately shoulders the financial burden.

When I joined our firm we were considered a large defense law firm, as we had then an unheard of number of attorneys - seven. How times have changed.

Ron must have seen the faraway look in my eyes as he interrupted by telling me that before the Medicare Set-Aside Trust scare, he was very fortunate to negotiate even a minimal amount in terms of monies for his clients' future medical treatment.

Ron went on to tell me that most of his clients wanted lump sum settlements and once they saw the dollar figure in the Compromise and Release offer they really did not seem to mind the amount that defendants were offering for their future medical treatment.

They wanted the money, Ron noted!

Ron explained his strategy with respect to Medicare Set-Aside Trusts as follows: He always negotiates a Compromise and Release Agreement with a self-administered Medicare Set-Aside Trust and since the amount of the MSA is always provided for in the Compromise and Release Agreement this means a larger attorney's fee for Ron.

As Ron continued to boast about his large MSA settlements I reflected back on the changing relationship between Medicare and workers' compensation over the years.

When Medicare was created in the 1960s it was created as the primary payer for those individuals that qualified for Medicare and/or Medi-Cal benefits.

However during the 1970s and 1980s Medicare, as the primary payer, began to shoulder medical expenses submitted by medically eligible Medicare patients that were due to their workers' compensation injuries.

Since these cases had been concluded by way of Compromise and Release Agreement Medicare found that it was assuming liability for medical treatment that was not either provided for in the Compromise and Release agreement or should have been provided by the workers' compensation carrier.

Therefore, in the early 1990s Congress amended the Medicare law to provide that Medicare was a secondary rather than a primary payer and that in the case of a workers' compensation injury the primary payer was the defendant carrier and/or employer.

This law spawned the birth of today's **"cottage industry"** that specializes in ensuring that enough money to cover the applicant's future medical expenses is set aside in the settlement agreement by way of what has now come to be known as a Medicare Set-Aside Trust. Magically the Workers' Compensation system added some more initials to its alphabet soup, the term MSA.

Initially, no one paid attention to the secondary payer law and, hungry for business, the MSA people and attorneys specializing in MSAs came out to California from Denver and Florida. At various insurance seminars and conventions held around the State they told us the awful things that could happen to us if we did not create a Medicare Set Aside Trust in the appropriate case and submit it for approval to Medicare.

We were told that failure to provide for Medicare by reason of a Medicare Trust could result in the rescission of the Compromise and Release by reason of fraud or fines being levied against the employer and/or carrier or worse, but it was never explained what the "worse" was.

That was when they spoke to the defense side. When they spoke to the applicant's side at the California Applicants' Attorneys' Convention they indicated that injured workers would be turned

away at the Gates of Medicare when it was discovered that their need for medical treatment actually resulted from an industrial injury which had been settled. The inference was plain: These injured workers would either sue their former attorneys, file a complaint with the State Bar or both.

The constant outpouring of warnings (some call them warnings, I call them scare tactics) from Florida and Denver had the desired effect, and more and more carriers during the late 1990s began utilizing companies that specialized in not only putting together Medicare Set-Aside Trusts but obtaining approval through Medicare.

This frenzied action resulted in the creation of another **"cottage industry,"** called the Center for Medicare & Medicaid Services and, of course, we created more alphabet soup - the CMS.

CMS was created to deal with the volume of proposed Medicare Set Aside Trusts submitted to Medicare in all 50 states. CMS is not actually a branch of Medicare or the Federal Government, but is a private company which contracts with Medicare for the express purpose of assessing, analyzing and approving submitted Medicare Trusts.

With all of the horror stories about what would happen to our industry if a case involving a Medicare-eligible applicant was settled by way of Compromise and Release Agreement without taking into account the interests of Medicare, the truth is that the answer is nothing - at least as of today.

To date, I am not aware of any case in the State of California in which a Compromise and Release has been overturned for fraud by Medicare, nor am I aware of a case in which an insurance carrier and/or employer has been fined or otherwise disciplined.

Unfortunately, this immunity soon may be coming to an end as Congress has passed a new law named The Medicare, Medicaid and SCHIP Extension Act (more initials for our alphabet soup–where is Danny Kaye when you really need him?[1]) in which a carrier and/or employer can be fined $1,000.00 per day, per file, for the mere failure to report to Medicare with respect to files in which the applicant may be potentially eligible for Medicare benefits.

This law mandates that all claims administrators are to provide the Department of Human Health and Services (DHHS–please add to your initial bank) electronic reports of ALL workers' compensation and liability cases.

This law was passed in 2007 and will be effective July 1, 2008. There will be a one-year grace period for carriers and employers to perfect their reporting requirements. Thereafter, Medicare promises to start levying fines at $1,000.00 per day per file.

[1]For those of you that are over 55 you will recall Danny Kaye performed in several comedy movies in which he would recite poems and sing songs highlighted by alphabet tongue twisters.

Up to now, Medicare would only be red flagged if a Medicare recipient was denied coverage because of a prior Compromise and Release Agreement which did not contain an approved MSA.

Under this law our industry could be heavily fined for non-reporting or untimely reporting, whether or not an injured worker applies for Medicare benefits.

I am sure that this new reporting law will spawn even more **"cottage industries"** as we have now received e-mails from our MSA companies that CMS plans to draft reporting requirements (oh joy, more rules and regulations) designed to implement Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 by July 1, 2008 or possibly even earlier.

COMPROMISE AND RELEASE AGREEMENT VERSUS STIPULATED FINDINGS AND AWARD OR IS IT WORTH IT?

For years our industry has fallen in love with the Compromise and Release Agreement. However, the ever increasing dollar figure of the Medicare Set-Aside Trust mandates that we examine a case carefully to determine whether the actual exposure for future medical treatment warrants the preparation of a Medicare Set-Aside Trust.

Cases can be concluded by way of Compromise and Release Agreement with a provision that medical treatment be left open as to the admitted body parts or a Stipulated Findings and Award. In such a case, we would want to utilize the balancing act between the cost of keeping the file open to administer future medical or going ahead with a Medicare Set-Aside Trust.

Remember, the MSA usually does not effectively take into account our ability to conduct prospective and retrospective utilization review pursuant to Labor Code §4610 and proper utilization of UR has greatly reduced the industry's exposure to future medical treatment Awards.

Disclaimer:

Ah for the simple life of the 1970s again! The above fictional characters, historical prospective and story are a product of my warped imagination.

However, Medicare Set-Aside Trusts and potential heavy fines are at last a reality! The above rendition of the historical evolution of Medicare in workers' compensation is based on my imperfect and ever growing vague memory and any errors are mine and mine alone.

Make mine a double, George.

WJT/pj