



## **Policy and Procedures for Recoupment: Lump-Sum Workers' Compensation Settlements**

**Effective Date: October 1, 2013**

**Revised: July 7, 2016**

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### **I. Authority**

- A. James Zadroga 9/11 Health and Compensation Act of 2010 ("Zadroga Act").<sup>1</sup>
- B. James Zadroga 9/11 Health and Compensation Reauthorization Act.<sup>2</sup>
- C. Social Security Act ("SSA").<sup>3</sup>

### **II. Effective Date**

This *Policy and Procedures for Recoupment: Lump-Sum Workers' Compensation Settlements* restates and revises the policy regarding lump sum settlements that has been in effect since October 1, 2013 and was included in the earlier *Policy and Procedures for Recoupment & Coordination of Benefits: Workers' Compensation Payment* dated September 1, 2013 (as revised on October 1, 2013, December 16, 2013, and January 4, 2015).

### **III. Policy**

When a World Trade Center (WTC) Health Program member accepts a lump-sum settlement for a workers' compensation (WC) claim relating to conditions for which treatment is provided by the WTC Health Program, and that settlement releases an employer/insurer from responsibility for future medical expenses, the WTC Health Program will seek to recoup its costs of providing health care, including pharmacy

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<sup>1</sup> Public Law 111-347, codified at 42 U.S.C. § 300mm et seq.

<sup>2</sup> Public Law 114-113.

<sup>3</sup> 42 U.S.C. § 301 et seq.

benefits, either from the member or from the individual/entity designated to administer any set-aside established to pay future medical expenses.<sup>4</sup> The WTC Health Program will follow best practices for WC recoupment as outlined by the Centers for Medicare & Medicaid Services (CMS) in its “Workers’ Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide” (February 3, 2014).<sup>5</sup>

#### **IV. Background Information**

##### **A. Lump-Sum Settlement Agreements of Workers’ Compensation Claims**

1. In New York State (NYS), WC claimants, including WTC Health Program members, may settle their WC cases by accepting a lump-sum payment for any or all issues in a WC case. The NYS Workers’ Compensation Board (WCB) calls such settlements Section 32 (waiver agreements) agreements.<sup>6</sup> Section 32 agreements must be approved by the NYS WCB.
2. Recoupment issues arise when a WC settlement releases, or has the effect of releasing, the WC insurers’ obligation to pay future medical expenses.<sup>7</sup>

##### **B. Medicare Policies Relating to Lump-Sum Settlements of Workers’ Compensation Claims**

1. Under Medicare, when a claimant settles a WC claim within 30 months of becoming eligible for Medicare, and that settlement waives an employer’s/WC insurer’s obligation to pay for future medical care, in the view of CMS, the claimant “has been paid” for WC-related medical services and Medicare reimbursement is not available for such services.<sup>8</sup>
2. CMS requires that in reaching the lump-sum settlement, all parties protect CMS’ interests.<sup>9</sup> CMS encourages, but does not require, the parties to do so by establishing a *Medicare Set-Aside Arrangement* (MSA) to pay future medical expenses. For settlements above a certain threshold, CMS will review proposed MSAs to determine if the amount of money to be set aside to meet future medical expenses is adequate. CMS grants

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<sup>4</sup> See 42 U.S.C. § 300mm-41(b)(1).

<sup>5</sup> <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/November-06-2013-WCMSA-Reference-Guide-Version-2.pdf>

<sup>6</sup> NY WCL, Art. 2, § 32.

<sup>7</sup> See 77 Fed. Reg. 35,917 (June 15, 2012) (“Medicare Program; Medicare Secondary Payer and “Future Medicals”). Available at <http://www.gpo.gov/fdsys/pkg/FR-2012-06-15/pdf/2012-14678.pdf>

<sup>8</sup> CMS. Workers’ Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide. Available at <http://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/November-06-2013-WCMSA-Reference-Guide-Version-2.pdf>

<sup>9</sup> *Id.*

beneficiaries/individuals safe harbor from recoupment actions if they set aside and use an agreed-upon amount of their settlement for future medical expenses that would otherwise be covered by Medicare.

3. After a claimant accepts a WC settlement, CMS will refuse to pay for Medicare covered services related to the condition covered by WC. Instead, CMS requires that the claimant use money from the settlement to pay for future medical expenses related to the WC-covered health condition. If the claimant has established an approved set-aside to pay future medical expenses, CMS will not pay for Medicare services related to the WC-covered condition until the claimant has paid medical expenses up to the agreed-upon amount.
4. Additional information regarding CMS policies on lump-sum settlements for future medical expenses can be found in the above-cited “Workers’ Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide.”

**C. WTC Health Program Policies Regarding Lump-Sum Settlements of Workers’ Compensation Claims**

**1. Duty to Protect the Interests of the WTC Health Program**

a. Consistent with CMS’ view of claimants who enter into WC settlements, when a member settles a WC case and releases the employer/WC insurer from payment for future medical expenses, the WTC Health Program considers that the member “has been paid” for services for which the WTC Health Program would otherwise pay. This interpretation is consistent with CMS’ interpretation of the Medicare Secondary Payer statute.<sup>10</sup>

b. Similar to CMS WC settlement requirements, the WTC Health Program requires that all parties who enter into a lump-sum settlement that releases the employer/insurer from the obligation to pay future medical expenses for a WC claim after October 1, 2013 must protect the interests of the Program when settling the claim. This is done by setting aside adequate settlement funds, as required by the Program, to pay for future medical expenses that would otherwise have been paid by WC. No duty to protect the interest of the WTC Health Program arises if the lump-sum settlement does **not** release the employer/insurer from the duty to pay future medical benefits. Also, the WTC Health Program will not inquire about whether an agreement entered into prior to October 1, 2013 sets money aside for future medical care.

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<sup>10</sup> 42 U.S.C. § 1395y.

c. Unlike CMS, however, the WTC Health Program will not stop paying treatment claims for members who have settled their WC cases because the Clinical Centers of Excellence and the Nationwide Provider Network do not have the ability to bill members of the WTC Health Program directly for WTC Health Program services. Instead, to ensure that such members repay the WTC Health Program for any health care treatment it provides but for which they have already received payment from WC, the Program will recoup money for services it renders from any set-aside established for future medical expenses related to covered health conditions. The WTC Health Program will only seek to recoup up to the amount of any approved set-aside agreement. The WTC Health Program will pay all medical expenses incurred for treatment above the amount of any approved set-aside.

d. The WTC Health Program will pay providers for treatment in accordance with 42 C.F.R. § 88.22(b); to the extent that the WC insurance pays for treatment at a lower rate, the WTC Health Program will recoup treatment costs at the WC insurance rate.

e. The WTC Health Program will grant members safe harbor from recoupment actions, if the Program approves the amount to be set aside for future medical expenses and the member repays the Program up to the agreed-upon amount, for any WTC Health Program-related treatment services already compensated by the WC settlement.

f. The WTC Health Program and NYS WCB will notify the parties to NY WC claims of their duty (imposed on the WC insurer and claimant) to ensure that the interests of the WTC Health Program are protected in any settlement by a member. The parties may have a separate duty to protect the interests of CMS in any WC settlement.

## **2. Policy Regarding Settlements Agreed to Between October 2013 and December 2015**

a. Congress initially appropriated funding for the WTC Health Program through September 30, 2016. Therefore, from October 2013 through December 2015, the WTC Health Program required that money be set aside for future medical expenses to be incurred up to September 2016, the date on which initial funding for the Program was scheduled to expire.

b. The WTC Health Program will continue to honor the safe harbor granted to members whose future medical set-aside was approved by the Program between October 2013 and December 2015.

### **3. Policy Regarding Settlements Agreed To After December 2015**

a. On December 18, 2015, Congress reauthorized and funded the WTC Health Program through 2090. This means that for most WTC Health Program members, the Program will be in effect for their lifetime. Therefore, for any lump-sum settlement entered into after December 2015 that releases the employer/insurer from the obligation to pay future medical expenses, the WTC Health Program will require that the settlement set aside an adequate amount of money to reimburse the Program for all future medical expenses, both medical treatment and pharmacy claims, relating to the health conditions covered by the Program that are the subject of the WC claim being settled.

b. If no set-aside is provided in the settlement or if the WTC Health Program does not approve the amount of a proposed set aside, the WTC Health Program member may be required to repay the Program for medical treatment, including pharmaceuticals, for which the claimant “has been paid” by a WC carrier. In addition, the WTC Health Program will require that any settlement agreement resolve who will pay all outstanding claims for medical treatment and pharmacy expenses up to the date the settlement is approved. CMS may impose separate and additional requirements relating to workers’ compensation settlements, judgments, awards or other payments.

## **V. Procedures for Estimating the WTC Health Program's Interest In Future Medical Payments**

### **A. Obtaining Payment Information**

To help parties gauge how much money they should set aside to protect the WTC Health Program’s interests, any party to a WC claim may request preliminary information from the WTC Health Program on the amount of the Program’s expenditures for medical treatment and prescription medications since July 2011. The parties to a pending WC claim may obtain such an estimate by requesting it from [wthcp.recoup@cdc.gov](mailto:wthcp.recoup@cdc.gov).

### **B. CMS Set-Asides**

Where CMS has reviewed and approved a proposed set-aside for future medical expenses related to the same conditions certified for treatment by the WTC Health Program and covered by the WC settlement agreement, the WTC Health Program will defer to CMS’ estimate of future medical expenses. Members may use a Medicare Set-Aside arrangement (MSA) to pay costs incurred by the WTC

Health Program in treating health conditions covered by a MSA in a manner consistent with CMS policy.<sup>11</sup>

**C. Submission of Proposed Set-Aside to WTC Health Program**

1. The WTC Health Program will review any proposed set-aside arrangement on a case-by-case basis to determine whether an adequate amount of any settlement has been allocated to future medical expenses. The parties should submit a proposed set-aside arrangement to the WTC Health Program for review at [wtchp.recoup@cdc.gov](mailto:wtchp.recoup@cdc.gov)
2. A submission to the WTC Health Program seeking approval of a proposed set aside arrangement must include the following information:
  - a. Name, address, and date of birth of the claimant;
  - b. WCB Claim number;
  - c. Whether a set-aside for future medical expenses is proposed;
  - d. Amount of any proposed set-aside for future medical expenses;
  - e. Description of the conditions covered by WC (including the relevant ICD-9 or ICD- 10 codes, if available) and indication of whether the NY WCB has ordered the carrier to pay medical benefits or whether the carrier's liability for medical benefits remains in dispute;
  - f. If CMS has reviewed the settlement, a copy of the CMS approval of any Medicare set-aside; and
  - g. An actuarial projection of the anticipated future medical expenses, including pharmaceutical expenses, for each condition covered by the WC Settlement.
3. The WTC Health Program will evaluate the adequacy of any proposed set-aside based on the amount of the settlement remaining *after* attorney's fees and other expenses of procuring the settlement have been deducted. Where the settlement represents a compromise of a contested WC claim, the Program may accept a pro-rata share of anticipated future medical expenses as adequate to protect the Program's interests on a case-by-case basis. When submitting such a compromise settlement to the WTC Health Program

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<sup>11</sup> <https://www.cms.gov/medicare/coordination-of-benefits-and-recovery/workers-compensation-medicare-set-aside-arrangements/downloads/self-administration-toolkit-for-wcmsas.pdf>

for review, the individual requesting approval must include a written explanation of why the proposed pro-rata amount of the settlement proposed to be set-aside is adequate to protect the Program's interest in recouping its future medical expense. This policy is consistent with CMS' approach as outlined in 42 C.F.R. § 411.37 ("Amount of Medicare recovery when a primary payment is made as a result of a judgment or settlement").<sup>12</sup>

**D. WTC Health Program-Approved Set-Asides**

1. If the WTC Health Program approves the amount of any proposed set-aside, neither the member nor the WC insurer (or self-insured employer) will be responsible for future medical expenses above the approved amount.
2. The member will have two choices to satisfy the repayment obligation. If the member is designated as the individual to administer the set-aside, the WTC Health Program will bill the member annually for the cost of treatment. If another individual or entity is designated to administer the set-aside, the member should notify the Program of that fact and the WTC Health Program will annually bill only the MSA for treatment up to the agreed-upon amount. If the settlement provides that the member will self-pay, and the member does not do so, the WTC Health Program reserves the right to pursue further action against all payers as permitted by the Zadroga Act.<sup>13</sup>

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<sup>12</sup> See <https://www.gpo.gov/fdsys/pkg/CFR-2015-title42-vol2/pdf/CFR-2015-title42-vol2-sec411-37.pdf>.

<sup>13</sup> The WTC Health Program has the authority to bill each member and/or the primary payer under 42 U.S.C. § 1395y(b)(2)(B)(iii), incorporated by reference in 42 U.S.C. § 300mm-41.