



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

**Effective Date: October 1, 2013**

**Revised: January 4, 2015**

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### **I. Authority**

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

### **II. Effective Date**

- A. 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 and December 16, 2013).
- B. 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 either from the member or from the individual/entity designated to administer any set-aside established to pay future medical expenses.<sup>3</sup> The WTC Health Program will follow best practices for WC recoupment as outlined by the Centers for Medicare & Medicaid Services (CMS).

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<sup>1</sup> 42 U.S.C. § 300mm et seq.

<sup>2</sup> 42 U.S.C. § 301 et seq.

<sup>3</sup> See 42 U.S.C. § 300mm-41(b)(1).

### III. 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) awards.<sup>4</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>5</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>6</sup>
2. CMS requires that in reaching the lump-sum settlement, all parties protect CMS' interests.<sup>7</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 beneficiaries/individuals safe harbor from recoupment actions if they set aside and use an agreed-upon amount of their settlement for future medical expenses.
3. After a claimant accepts a WC settlement, CMS will refuse to pay for Medicare covered services for that claimant. Instead, CMS requires that the claimant use money from the settlement to pay for future medical expenses. If the claimant has established an approved set-aside to pay future medical expenses, CMS will not pay for Medicare services until the claimant has paid medical expenses up to the agreed-upon amount.

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<sup>4</sup> NY WCL, Art. 2, § 32.

<sup>5</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>6</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>7</sup> *Id.*

4. Additional information regarding CMS policies on lump--sum settlements for future medical expenses can be found 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>

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

1. Following on the CMS interpretation of WC settlements, the WTC Health Program interprets the Zadroga Act to require that when a member settles a WC case by releasing the employer/WC insurer from payment for future medical expenses, the member "has been paid" for services for which the WTC Health Program would otherwise pay.
2. Similar to CMS WC settlement requirements, the WTC Health Program requires that all parties to a lump-sum settlement involving a WC claimant take the interests of the WTC Health Program into account when settling the claim. If a WTC Health Program member settles his/her WTC-related WC case by entering into a Section 32 agreement *after* October 1, 2013 the settlement must protect the interests of the WTC Health Program. The parties are encouraged to do so by setting aside adequate settlement funds to pay for future medical expenses that would otherwise have been paid by WC.
3. The Clinical Centers of Excellence and the National Provider Network do not have the ability to bill members of the WTC Health Program directly for WTC Health Program services. Therefore, The WTC Health Program will continue to pay providers who treat members of its program who have also received a lump-sum WC settlement. However, to ensure that such members repay the government for any health care treatment it provides but for which they have already received payment from WC, the WTC Health Program will recoup money for services it renders from such members up to the amount of any approved set-aside.
4. Congress has appropriated funding for the WTC Health Program through September 30, 2016. Therefore, the WTC Health Program will only require that money be set aside for future medical expenses to be incurred while the Program is funded. CMS may impose separate and additional requirements relating to workers' compensation settlements, judgments, awards or other payments.
5. 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 both the WTC Health Program and CMS are protected in any settlement by a member. Because this policy will apply prospectively, 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.

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

##### **A. Determining Set-Asides**

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 its expenditures for medical treatment and prescription medications since July 2011. The parties may obtain such an estimate by requesting it from [wtchp.recoup@cdc.gov](mailto:wtchp.recoup@cdc.gov). The WTC Health Program relies on these past expenditures to project future medical expenses.

##### **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.

##### **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. The submission should include the following information, at a minimum:
  - a. The name, address, and date of birth of the claimant;
  - b. The WCB Claim number;
  - c. Whether a set-aside is proposed;
  - d. Amount of any proposed set-aside;
  - e. 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. Explanation of why the amount of the proposed set-aside is adequate to protect the interests of the WTC Health Program; and,
  - g. If CMS has reviewed the settlement, the amount of any Medicare set-aside.

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. If the settlement includes compensation to the member for lost wages under WC, the parties should explain how much of the settlement represents payment for indemnity benefits.

**D. When No CMS Set-Aside is Required**

1. Where no CMS MSA is required, the WTC Health Program will assume that the member's medical condition is stable and will evaluate the reasonableness of any proposed set-aside by calculating the per-month cost of medical treatment for affected members and projecting those costs forward through the end of FY 2016.
2. When circumstances indicate that a member's medical condition is not stable and that future medical expenses will vary significantly from past expenses, the WTC Health Program will project future medical expenses based on published data regarding the cost of treating each certified condition. Where a member believes that the cost of future medical care will be substantially less than the cost of past care, the member should submit medical evidence explaining why that is so.

**E. 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. The WTC Health Program will either bill the member annually for the cost of treatment, or the member can establish an MSA funded with the predetermined amount needed to fund future treatment, 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>8</sup>

**Issued:** October 1, 2013

**Revised:** January 4, 2015

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<sup>8</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.