Some comp cost increases blamed on Medicare rules

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Roberto Ceniceros

Inflated rulings on how much employers must set aside to ensure Medicare does not pay for workers compensation medical claims are resulting in needless cost increases, risk managers and claims experts contend.

Claim settlement delays and government practices for evaluating workers comp claims requiring a Medicare set-aside are boosting costs for those claims by as much as 20%, several employers and claims experts estimate.

At issue are Medicare secondary-payer laws, which preclude Medicare from being the primary payer for future medical expenses arising from workplace injuries or illnesses that employers or workers comp insurers are obligated to fund.

To ensure that workers comp-related medical expenses won't be pushed onto Medicare once an employee reaches retirement age, insurers and employers are supposed to finance workers compensation Medicare set-aside arrangements.

That typically requires allocating a portion of a workers comp claim settlement into a trust fund for the injured employee's future medical care. Set-asides are required in cases where workers comp claimants are eligible for Medicare, nearing retirement age, or qualify for a Social Security disability insurance program.

The set-asides have been recognized since 1995 as a preferred method for considering Medicare's interest in workers comp settlements. But Medicare during the past year has issued new guidelines on the set-asides as it increasingly steps up efforts to make sure parties to a workers comp settlement properly fund for future medical liabilities, experts say.

Regional offices of the U.S. Department of Health and Human Services' Centers for Medicare & Medicaid Services review and approve set-aside arrangements on a case-by-case basis.

While CMS is carrying out its role of protecting Medicare, its staff members often are too aggressive when determining the appropriate amount that must be set aside for workers comp claims, said Fred O. Pachón, vp of risk management for Santa Barbara, Calif.-based Select Staffing Inc.

“CMS is doing what it is supposed to do, but they are being overly conservative,” Mr. Pachón said. “We as insureds really ought to be putting CMS under a microscope, and we need to challenge any CMS set-aside where they seem out of line.”

Inconsistent decisions made by new CMS workers who lack experience evaluating workers comp claims are to blame for some of the cost increases, observers say. While inconsistent, they often call for set-aside amounts greater than employers' estimates for an appropriate amount, several sources said.

CMS did not respond to several interview requests.

But estimating reserves for long-term medical claims is a difficult challenge even for seasoned workers comp professionals, said Bob Briscoe, a senior consultant, principal and head of the workers compensation claims practice in New York for Milliman Inc.

With many CMS workers lacking substantial workers comp experience, it's understandable employers are seeing inconsistent decisions that often increase expenses, Mr. Briscoe said.

“It's absolutely unpredictable (when) you send in an MSA for $30,000 whether it comes back at $20,000 or $60,000,” Mr. Briscoe said. “To the extent that the average result is higher than submitted, then obviously the price has gone up.”

Several industry sources say that, so far, workers comp research organizations have not tracked cost increases associated with CMS claims decisions. But Mr. Pachón said he has seen claims cost increases ranging from 10% to 20%, and other sources say 20% is roughly average.

“I don't think I would disagree with a 20-odd percent estimate,” Mr. Briscoe said.

Several factors complicate the process, including various incentives for attorneys and payers to hold off on settling cases requiring a set-aside, several sources said. For instance, requiring a large set-aside may encourage some payers to delay settling some workers comp claims in hopes that the claimant's medical condition improves, thus reducing the ultimate set-aside amount.

In addition, workers comp claimants may back out of a settlement agreement during the time a claim payer corresponds with CMS negotiating an appropriate set-aside amount, Mr. Briscoe said.

“Keep in mind, while you haven't settled a claim you are still paying medical (expenses) and maybe even indemnity,” Mr. Briscoe said. “So the cost of a claim increases with a delay even if CMS (eventually) agrees with your settlement amount.”

Other CMS practices also contribute to the higher costs, experts say.

For example, CMS last year said it would use the average wholesale price—the published price of drugs generally used in setting Medicaid reimbursements—to determine set-aside amount for pharmaceuticals.

But workers compensation claims payers rarely pay AWP, said Roy Franco, director of risk management strategies for supermarket chain Safeway Inc. in Pleasanton, Calif. Payers usually pay discounted amounts established by state pharmaceutical fee schedules.

“No one in the industry uses average wholesale price,” said Mr. Franco, who also is a member of the external affairs committee for the Risk & Insurance Management Society Inc. “Everybody gets discounts. Not even Medicare pays AWP. It has caused quite an increase in MSA costs.”

To reduce costs, many employers turn to vendors that specialize in challenging CMS. The vendors can question, for example, whether medical expenses CMS uses in its estimations really stem from a work injury, said Paul Braun, managing director of casualty claims for Aon Global Risk Consulting in Los Angeles.

But not all vendors are equal, and employers can test their worth by comparing how each values a claim, Mr. Braun said.

Mr. Pachón agrees. One vendor valued a set-aside for one of his claims at $80,000 while another valued it at $200,000, Mr. Pachón said.

“We had to reopen the case and send it back to CMS and they agreed with the $80,000,” Mr. Pachón said. “Make sure the vendor is being very aggressive.”