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"JUST KIDDING" LANGUAGE IN STIPULATIONS: IS THE JOKE ON US?

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As workers' compensation adjusters and attorneys, we have been trained to be careful when Medicare is involved or could become involved in our settlements with employees. Employers, insurers, and employees tend to view Medicare as the intimidating big brother who they don't want to upset and can't afford to ignore, yet they aren't entirely clear on what might make Medicare unhappy on a case-by-case basis. As a result, more and more frequently, employers and insurers are being asked to include "back out," "just kidding," or "escape" language, as it has come to be referred to, in their Stipulations for Settlement where there is concern that Medicare could take issue with the settlement entered into by the employer and insurer and employee.

The notion seems to more or less stem from the idea that, should Medicare pick a fight with the settlement entered into by the employer and insurer and the employee, the parties can point to this language in the Stipulation for Settlement and cry, "just kidding!" or "we take it back!" If you, Medicare, don't like what we said about closing out future medical benefits, we take it all back, or at least take it back in part. The goal of this article is to help you better understand this issue, and also teach you how to spot this language and respond to requests for it.

HOW TO SPOT "JUST KIDDING" OR "BACK OUT" LANGUAGE:

This language can generally be found toward the end of a Stipulation for Settlement, typically under the last Roman numeral, and after where it is indicated what monies are to by paid to the employee, the employee's attorney, and any intervenors. There, the parties typically include a section discussing the lengths the parties have gone to in order to consider Medicare's interest and not shift their responsibility relative to the workers' compensation claim to the federal government. After these recitations are made, you will typically find a last paragraph or paragraph toward the end that states something like the following:

"With respect to the medical closed out herein, it is stipulated and agreed that in the event that Medicare deny payment of a medical bill, objects to the terms of the settlement, assert that a Medicare set aside was necessary, or claims reimbursement of treatment expenses paid on behalf of the Employee, the provision of this settlement, closing out medical treatment, shall be considered null, void and unenforceable, with the exception of any treatment modalities that are not reimbursable under the Medicare system. In the event of a Medicare objection, any claims for treatment modalities that are left open are subject to any and all defenses including, but not limited to, the nature and extent of any injury, reasonableness, necessity, payment pursuant to any applicable fee schedules and the treatment parameters."

WHY ATTORNEYS ARGUE FOR ITS INCLUSION:

A chief argument is support of this "just kidding" or "back out" language made by the plaintiffs' bar is that it is needed to protect their clients from Medicare. Another argument in support of this language is that it is needed to show Medicare's interest was considered so as to avoid the potential for backlash from Medicare at some point in the future. I have also heard it claimed that this language does not hurt anything because it only applies if Medicare takes issue with the Stipulation for Settlement.

WHY I ARGUE THIS LANGUAGE ISN'T NEEDED:

I argue this language is generally not needed because:

1. An employee has the right to settle out his/her workers' compensation claim so long as Medicare's interest has been reasonably considered; and
2. The parties can establish Medicare's interest has been reasonably considered by instead following the guidelines Medicare has provided to the workers' compensation bar in protecting its interest, and calling to attention in the Stipulation the lengths they have gone to in order to consider Medicare.

Medicare has laid out criteria explaining under what circumstances a workers' compensation claim can be submitted to Centers for Medicare and Medicaid Services ("CMS") for review/approval and under what circumstances it cannot. If the claim does not meet the "threshold" but the parties are concerned about whether Medicare's interest has been properly considered, the parties can obtain an MSA and conditional payment letter(s), if applicable (resolving any conditional payments as needed), and attach those as support to the Stipulation as support. If the claim does meet the "threshold," the parties can request a conditional payment letter(s) and submit the MSA to CMS for approval. If and when the conditional payment letter(s) is received (and any conditional payment claims resolved) and the approval of the MSA is received, that documentation can be attached to the Stipulation as support. Note: if you have any questions regarding what the "threshold" is in this context, I recommend you contact your attorney who can explain this. The parties can then spell out in the Stipulation what actions it took and why to show consideration for and compliance with Medicare.

I argue demonstrating to Medicare that the parties have considered its interest makes more sense and is more compelling than including a paragraph that opens wide the door to Medicare to take issue with your settlement by proffering to scrap a portion of your Stipulation upon request. While there is no guarantee Medicare could not later take the position that "just kidding" language should have been included in your Stipulation for Settlement, based on all of the information Brown & Carlson has reviewed on the topic to date, I do not believe it is language that should be included in most cases, and certainly not automatically, without specific consideration given to the facts of your case.

HOW TO RESPOND WHEN "JUST KIDDING" LANGUAGE IS REQUESTED:

When this language is included in a draft of a Stipulation for Settlement you receive, and you do not want the language included, sometimes having this language removed is as simple as requesting its removal or crossing out the language when returning the draft. When I prepare a Stipulation without the language and a request is made for its inclusion, sometimes simply refusing to include it "as a matter of policy" is sufficient. I am actually surprised how often this language is asked for or included as a matter of course, but really is not a "deal breaker" when it comes down to it.

I have also found it effective to explain why the particular claim at issue is unlikely to be one that Medicare would take issue with - i.e. because the claim did not meet the threshold and a zero allocation MSA was obtained; because the MSA was submitted and approved by CMS. If you are having a difficult time identifying a basis, you can always contact an attorney for guidance.

However, if you meet some resistance from someone who wants this language included, I recommend making the following arguments to him/her:

- The employer and insurer entered into the Stipulation for Settlement with a primary objective of closing out future medical benefits. If this "just kidding" or "back out" language is included, the employer and insurer are not getting the benefit they bargained for.
- This language has the opposite effect it is intended to have as it signals to Medicare that its interest has either not been considered properly or that the parties simply don't know how to properly consider its interest and, as a result, were forced to instead rely on this language.

If it is the language of the Stipulation for Settlement itself that you or another party is concerned Medicare could take issue with, there are likewise attorneys and vendors who are willing to review the language proposed for a Stipulation for Settlement and make recommendations.

In rare cases, however, you may find the other party is simply not willing to proceed with the Stipulation without the "just kidding" or "back out" language under any circumstance. In that case, you will want to take into consideration whether the employer and/or insurer has a hardline position on the issue (i.e. the party will never settle if said language is included), the odds of Medicare taking issue with your particular settlement at some point in the future (consider whether/what workers' compensation benefits are you closing out relative to a date of injury that Medicare might later argue should have been left open), and what your odds look like if you proceed to Hearing on the claim and forego the settlement. If you do not want to include the "just kidding" language, I recommend you note this during settlement negotiations, especially if it is a deal breaker for you. In some cases, it might make more sense to take the claim to Hearing than agree to include this language. In other cases, you might decide it is okay to have this type of "just kidding" language, provided it is very limited in scope. The important thing is that you know what this means and how it may affect your particular case. Considering how Medicare affects each case on its own merits is what is important. Again, this is a decision your attorney can help you make. Your attorney can also draft for you "just kidding" language that is more conservative or more limited in scope, if that if your preference.

Hopefully this article taught you a little bit about the "just kidding" language we are seeing with increased frequency in Stipulations for Settlement. If you have questions regarding this language or dealings with Medicare more generally, the attorneys at Brown & Carlson, P.A., and myself are available to you. Please do not hesitate to contact us.

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