

## Medicare Update – January 2006

### CMS Issues Prescription Medication Memo for 2006.

On December 30, 2005, the Centers for Medicare & Medicaid Services (CMS) issued a new memorandum regarding the Medicare Secondary Payer Statute and its relationship to settlement of workers' compensation claims which involve prescription medication.

As expected, CMS issued new guidelines regarding how parties to a workers' compensation settlement must protect Medicare's interest with regard to prescription medication.

The new memorandum indicates that "all WC settlements that occur on or after January 1, 2006, must consider and protect Medicare's interests when future treatment includes prescription drugs along with a future medical service that would otherwise be reimbursable by Medicare."

The recommended method to protect Medicare's interests is to include prescription medication costs in the Workers' Compensation Medicare Set-Aside.

Therefore, when protecting Medicare's interests, the parties must set forth in detail:

1. The specific amount being set aside for future prescription medication; and
2. The specific amount being set aside for medical treatment.

The new guidelines issued by Medicare are consistent with the Medicare Secondary Payer laws and regulations which prohibit the parties to a workers' compensation settlement from shifting liability for the underlying work injury to Medicare.

However, one issue not resolved by the December 30, 2005 Memorandum is whether using the Average Wholesale Price (AWP) to project future prescription medication costs is a reasonable method. The new Memorandum indicates the parties can use the "actual cost" or "Average Wholesale Price" (AWP), to project future prescription medication costs.

The phrase "average wholesale price" leads most of us to believe that it is the average price paid by a pharmacist or physician for a particular drug. However, the AWP is provided by each drug manufacturer and is not verifiable. Furthermore, there is currently considerable litigation against the drug manufacturers for allegedly inflating the AWP to increase the reimbursement rate paid by Medicare and Medicaid. Because of the alleged artificial inflation of the AWP, Medicare stopped using the AWP for reimbursement as of January 1, 2005.

Therefore, the fact that in current litigation Medicare is alleging the AWP is inflated, but yet indicates in the Medicare set-aside area we can use it for projecting future prescription costs, is one more issue to address in each Medicare set-aside.

The December 30, 2005 CMS Memorandum can be obtained by visiting our web site at:  
<http://www.msp-solutions.com/Developments.php>

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