

Medicare Secondary Payer

## Penalties Set to Arrive in 2020

*By: Heather Sanderson, chief legal officer, Franco Signor LLC*

Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) imposed mandatory reporting requirements on liability insurance (including self-insurance), no-fault insurance, or workers' compensation, collectively referred to as Non-Group Health Plan (NGHP) or NGHP insurance who are responsible to pay settlements, judgments, awards or other payment obligations to Medicare beneficiaries..

(Note: Section 111 of the MMSEA is sometimes referred to as "Section 111". The provisions for Liability Insurance, No-Fault Insurance, and Workers' Compensation can be found at 42 U.S.C. 1395y(b)(8). An organization that must report under Section 111 is referred to as a Responsible Reporting Entity (RRE).)

The Office of Management and Budget (OMB) recently posted on its website about a forthcoming Notice of Proposed Rulemaking (NPRM) on Civil Monetary Penalties (CMPs) and Medicare Secondary Payer Requirements which intend to set out parameters around the amount and criteria in which CMPs would be imposed upon RREs for noncompliance with MSP Reporting requirements. The intended release date for issuance of the NPRM was October 2019, and although this date has passed, the industry expects that the NPRM will be released by the end of calendar year 2019, or early 2020.

The industry has been waiting for this NPRM because under the Strengthening Medicare and Repaying Taxpayers Act of 2012 (SMART Act), CMS was required to establish criteria and practices in which CMPs would be imposed under the Act. Through the SMART Act, specifically Section 42 USC 1395y(b)(8), the imposition of CMPs of \$1000 per day per claim for noncompliant RREs was modified to provide that such CMPs would be "up to \$1000 each day of noncompliance with respect to each claimant."

In other words, the SMART Act allowed for CMPs to be discretionary rather than mandatory and capped penalties at \$1000 per day per claim. To set parameters around CMS' discretion for imposing a range of penalties CMS must develop safe harbors and standards for RREs to determine when CMPs should be issued and the monetary amount of such CMP. Back in 2013, CMS issued an Advanced Notice of Proposed Rulemaking (ANPRM) regarding these safe harbors, but for the past five years has taken no further regulatory action until now.

It is anticipated that the NPRM will provide for safe harbors for RREs which can evidence good faith efforts to report or report properly. However, in scenarios where RREs have failed to either register as an RRE or report reportable claims, or scenarios in which there is improper termination of Ongoing Responsibility for Medical (ORM), it is anticipated that the RRE will likely be subject to CMPs. There is no indication at this time whether the CMPs will be issued retroactively versus prospectively.

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## CASE LAW UPDATE

By Lindsay Underwood



### Bache v. TIC-Gulf Coast

The North Carolina Court of Appeals recently issued an unpublished decision in the case of *Bache v. TIC-Gulf Coast*. The opinion highlights issues relevant to personal travel versus business travel.

Plaintiff was hired as a heavy equipment operator by Defendant, an industrial construction company. He relocated from Florida to Wayne County, North Carolina for the project and was paid a per diem for his living expenses. He lived in a motel for two weeks, then moved in with a co-worker. Approximately one month after starting his job, Plaintiff went to look at rental properties with a co-worker. They then went to dinner, where Plaintiff consumed alcohol. On their way home from dinner, they were involved in a car accident.

Plaintiff was severely injured, and became paralyzed from the chest down. Plaintiff filed for workers' compensation benefits. At the deputy commissioner level, it was determined that Plaintiff was not in the course and scope of his employment at the time of the accident. The claim was determined to be not compensable. Plaintiff appealed, and the Full Commission affirmed. Plaintiff then appealed to the Court of Appeals.

The Court of Appeals affirmed the Full Commission's holding. The Court held that, though Plaintiff

was paid a per diem for living expenses, the per diem did not separately compensate him for travel to and from work. Thus, Plaintiff was not a traveling employee. The Court further held that Plaintiff was not traveling to or from the job site, as he had made stops to look at rental properties and to have dinner. Finally, because Plaintiff's work for Defendant was fixed at one jobsite and did not require him to travel to other locations, he did not qualify as a traveling employee.

This case is a good reminder that, just because an employee is located at a certain place for a business purpose, an injury that occurs during travel may not be compensable due to the specifics of the employment, deviations due to personal errands, and the standardized nature of a job site.

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### **Penalties** *Continued from page 1*

The NPRM is going to require a great deal of consideration by the industry and by CMS to determine reasonable standards for penalty scenarios. There are a large number of variables for an RRE to successfully report: cooperation by the injured party, a successful query result with CMS, and then the RRE has to successfully populate 164 data fields regarding the claim in its claim input file to CMS.

Essentially, the burden upon the RRE is great, and CMS should consider all of these factors before sanctioning an RRE with a CMP. However, as the standards for issuing Section 111 CMPs are unknown at this time, RREs should take proactive steps now to effectuate compliance with Section 111 Reporting, before CMPs are issued.

## *President's Note*

### *Medicare Secondary Payer in the News*

As we report elsewhere in this issue of our newsletter, the Centers for Medicare & Medicaid Services is preparing to release a proposed penalty rule specifying penalties for noncompliance with Medicare Secondary Payer reporting requirements, known widely as "Section 111." Self-insurers, along with other players in workers' compensation, are keeping an eye on developments as the rule has the potential to make a significant impact.

The rule was expected to be released in October 2019 and - despite the delay - analysts still expect it to be released in a matter of weeks. The National Council on Self-Insurers, our parent organization, has informed us it is working behind the scenes with the Medicare Advocacy Recovery Coalition (MARC), an advocacy group dedicated to addressing Medicare-related issues.

Separately, if you follow how policies at the state level affect workers' compensation, you might be interested in the November 12 webinar hosted by the Workers Compensation Research Institute. WCRI says participants will learn about the key decisions states must think about in designing and updating a fee schedule, as well

as how states have resolved these choices. Participants can also learn how prices paid for professional and hospital services are shaped by policy choices.

As you may recall, in its recent analysis of North Carolina's workers' compensation system, WCRI concluded major reforms passed by the General Assembly in 2011 and new medical-fee schedules imposed in 2015 are moderating indemnity and medical costs. We are pleased that Carol Telles, a senior analyst at WCRI who authored the study, will present and discuss her findings at our 2020 conference, scheduled for March 25-27 at the Holiday Inn Resort in Wrightsville Beach.

With very best wishes,  
Stephanie Gay



## *At the Commission*

### *New investigations unit*

The North Carolina Industrial Commission recently merged its employee classification section with its criminal investigation unit to form a new division called the Criminal Investigations & Employee Classification Division. The agency says the reorganization provides expanded resources to investigate allegations of employee misclassification.

The Criminal Investigations & Employee Classification Division consists of a division chief, five criminal investigators, two investigative assistants and a director of the employee classification section. Sam Constance is the director of the consolidated division and Bradley Hicks is director of the employee classification section.

Employer misclassification is defined as avoiding tax liabilities and other obligations imposed by Chapter 95, 96, 97, 105, or 143 of the North Carolina General Statutes by misclassifying an employee as an independent contractor. The Commission's employee classification section receives reports of and investigates alleged employee misclassification, and is responsible for recovering any back taxes, wages, benefits, penalties, or other monies owed.

On its website, the Commission provides a link to enable concerned citizens to report misclassification anonymously, and

notes records of its employee classification section are not public. To facilitate reports of employee misclassification, the agency has created the following checklist:

- Name and address of business and/or individual suspected of misclassification;
- Nature of work/activities being performed by worker;
- Relationship of reporting party to the business, if any (employee, former employee, partner, competitor, etc.);
- Details about employer relationship with workers, including but not limited to: employer establishes the activities that constitute the daily work requirements for workers, employer provides direction on how to complete specific working tasks, or employer provides equipment for workers to complete assignments/tasks;
- Documentation that supports the claim for misclassification, including but not limited to: tax documentation, copies of payment records, employment offer letter, or documentation pertaining to agreement for contracted services;
- The number of additional workers performing the same and/or similar duties;
- Additional information pertaining to suspected misclassification activity; and
- Other agencies, if any, to which this information has been reported.

# coming up

March 25-27, 2020

NCASI Annual Conference

Holiday Inn Resort, Wrightsville Beach

*NC Workers' Comp News* is produced and distributed quarterly by the North Carolina Association of Self-Insurers.

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*The employers' voice in workers' comp*

## WCRI

# Webinar on fee schedules, medical prices

The Workers Compensation Research Institute will host a webinar Nov.12 at 1 p.m. Eastern on the various design choices of fee schedule regulations and their impact on variation in medical prices and payments across state workers' compensation systems.

“Those who attend this webinar will learn the key decisions states have to think about in designing and updating a fee schedule as well as how states have resolved these choices. They can also learn how prices paid for professional and hospital services are shaped by policy choices,” says Ramona Tanabe, executive vice president and counsel of the Workers Compensation Research Institute (WCRI).

Hosting the webinar will be Dr. Rebecca Yang, a senior public policy analyst at WCRI. Dr. Yang will discuss the Institute's latest research (*Designing Workers' Compensation Medical Fee Schedules, 2019*, *WCRI Medical Price Index for Workers' Compensation, 11th Edition*, *Hospital Outpatient Payment Index: Interstate Variations and Policy Analysis, 8th Edition*) on the topic, which examines both medical professional services and hospital outpatient services, and take questions from the audience.

Questions addressed during the webinar:

- What are the different types of fee schedules that states use to regulate reimbursement for medical professional and hospital outpatient services?
- How do medical prices paid for professional and hospital outpatient services in your state compare with others?
- How are medical prices shaped by fee schedule policy choices?
- What is the impact of recent fee schedule reforms on medical prices paid?
- Webinars are \$50 for non-Members and FREE for WCRI members, media outlets, legislators as well as their staff, and state public officials who make policy decisions regarding workers' compensation. Attendance is limited to 500 people. All attendees will receive a free copy of the slides and a recording of the webinar.

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