



## State of New Jersey

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### MEMORANDUM

June 7, 2012

To: All Judges and Attorneys

From: Peter J. Calderone, Director and Chief Judge ✓

Subject: Medicare and CMS

The New Jersey Advisory Council on Safety and Health has requested a response to questions below concerning Medicare and the Center for Medicare Services ("CMS"). The questions were presented to several supervisory judges and we believe the issues are of general interest. We are therefore presenting the questions and our response for open review and consideration.

Question One: Where the CMS conditional payment is based on medical care for a denied claim later found or agreed to be compensable and the respondent is reimbursing CMS, should petitioner's attorney be entitled to a fee for recovery of medical payments from respondent under Section 64 for reasonable and necessary medical care provided by Medicare that was found or agreed to be the responsibility of the respondent?

Answer Question One: We do not see any difference in this situation from any other case where the petitioner had unauthorized medical care and the respondent has agreed or is required to pay the medical bills for care the petitioner received. This is in our view a benefit to the petitioner under N.J.S.A. 34:15-64 and the trial judge may consider the respondent's reimbursement to CMS under these circumstances in setting the counsel allowance.

Question Two: Where CMS conditional payments are part of a judgment or order, CMS regulations provide that CMS may allow a counsel fee from the conditional payment amount to petitioner's attorney for the CMS recovery. Would it be permissible for the judgment or order to provide that the respondent submit the CMS reimbursement to the petitioner attorney's trust account and allow the petitioner's attorney to deal with CMS as to the final reimbursement amount less any CMS awarded counsel fee to petitioner's attorney?

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Answer to Question Two: Where petitioner's attorney has handled the CMS process and may be entitled to a fee from CMS, it would appear useful in our view for petitioner's attorney to finalize the CMS process. Any monies from the judgment or settlement that are to be paid to CMS can be submitted by the employer or carrier to the petitioner attorney's trust account and not directly to the attorney. The petitioner's attorney would then have the responsibility for finalizing the CMS reimbursement procedures.

We note that there was some difference among those who reviewed these questions as to whether the fact that CMS may authorize a reduction in the conditional payment to allow a fee to the petitioner's attorney should be considered in setting the workers' compensation counsel allowance. Since trial judges have discretion in setting any counsel allowance, we believe that the trial judge may at his or her option consider the possible CMS payment in determining an appropriate counsel allowance.