SETTLEMENT TOOLS TO ACHIEVE THE BEST CLAIM OUTCOME

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The main goal of every settlement is to achieve the best claim outcome for the injured worker and the insurer or self-insured while meeting the needs of the injured worker. What are the needs of the injured worker when settling a worker's compensation claim? The injured worker is looking for financial security in order to meet their medical needs as well as their loss of income.

So, how can we meet the income and medical needs of the injured worker and show a cost benefit to the insured, insurer or self-insured? If we settle the case at present value, we end up getting them a lump sum, but have we done the best thing for the worker? Should we fund the Medicare Set Aside as a lump sum? Studies have shown that a large lump sum is usually dissipated quickly leaving the worker with a lesser quality of life and, if they spend the Medicare funds for non-Medicare expenses, they would lose their Medicare benefits until they incur medical expenses equal to their Medicare Set Aside which was a lifetime amount. If the injured worker is on full disability they most likely are receiving Social Security disability benefits. If a lump sum settled their workers' compensation claim, how will this settlement affect their Social Security disability benefit?

Let's first address the funding of a Medicare set aside.

When Medicare put out its first memo regarding Medicare Set Aside accounts, the insurance industry thought this would escalate the cost of settlements. The early vendors were putting together allocations that included an inflation factor, then applied a discount rate to reduce the figure to present value (PCV). Later, CMS addressed the inflation factor issue in the October 15, 2004 memo, indicating that the allocations do not need an inflation factor and should not be reduced to PCV. The inability to reduce the set aside to PCV increased the cost of settlements, however, the memo further went on to spell out that funding the settlement via a structured settlement was allowable, creating an opportunity for the insurer to see cost savings.

Medicare recognizes structured settlements as a viable method of funding MSA Accounts and gives specific instructions for calculating an MSA using a structured settlement annuity. They further advise that Medicare will become the primary payer of medical expenses once documentation is provided showing funds were spent appropriately, and continue to pay medical expenses until the next annual payment is made from the structured settlement.

This was a win-win for the insurance industry and injured workers. Since this would allow the carrier to spread out the Medicare funds over the injured worker's lifetime and allow this to be funded via an annuity purchased from a life insurance company. By illustrating this cost savings to the carrier, it increased the possibility for the settlement of workers' compensation claims, allowing injured workers to see finality to their claims, allowing them to move on with their lives outside of the confines of the workers' compensation venue.

As anyone can realize, spreading lifetime funds over an individual's life expectancy can result in a lower cost of settling the claim. Numerous individuals have conducted studies concerning the cost differential between the life time lump sum and the cost of funding the MSA via periodic payments. When looking at the different studies they all reach the same conclusion, an average savings of 46%. This percentage is even higher with males after CMS began using non-gender-specific life expectancies.

In a study released by CMS in October, 2008, they indicated that over a three year period they approved lifetime amounts totaling $1,530,538,733 or approximately $510,179,544 per review year. If all had been funded via periodic payment, the resulting savings to the industry would be $234,682,590 per year.

Will an annuity also get a better outcome for everyone when settling the indemnity portion of the claim?

Section 224 of the Social Security Act (42 U.S.C.. 424a) places a ceiling on combined Social Security disability benefits and State workers' compensation benefits. The statute states that Social Security benefits "shall be reduced" by the amount necessary to ensure that the sum does not exceed 80% of the pre-disability average current earnings (ACE). The offset applies until the claimant reaches

65 years of age or when payments end. Usually the offset affects low income workers more often, and more dramatically, than higher income workers.

In all but 13 states, Social Security will offset the SSDI benefits based on the workers' compensation benefits as well as any other disability benefits that the injured worker receives (if the benefit was paid for by the employer). The 13 reverse offset states (states in which the carrier receives the benefit of the offset) are California, Colorado, Louisiana, Minnesota, Montana, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Washington and Wisconsin.

The SSDI offset, when settling a WC case, is guided under the POMS (Program Operation Manual System) of Medicare. Chapter DI 52110.001 deals with Annuities and Trusts. DI 52110.001B deals specifically with workers' compensation awarded as an annuity. This states that where the WC award provides that a worker shall have the option of receiving a lump sum or an annuity in lieu of statutory periodic benefits, the lump sum or purchase price of the annuity (not including interest) is off settable according to the normal proration rules. It further indicates that if the worker has no option, (e.g., the carrier's policy is to pay in a certain manner) the amount of the lump sum or purchase price of the annuity is off settable as of the time the annuity payments are actually received by the party.

When we utilize 52110.001 in our negotiations, we can generate an income equal or greater than the injured worker would receive if they remained on WC. This can be achieved through the use of periodic payments funded through a structured settlement annuity.

Taxation Considerations

According to Internal Revenue Code 86(d)(3}, Social Security benefits are taxable while state workers' compensation benefits are not. However when Social Security disability benefits are reduced due to receipt of workers' compensation benefits, federal income tax liability attaches to the full amount of Social Security disability benefit before the offset. The net result is taxation of the WC benefit that would not occur but for the offset.

Remaining on WC, an injured worker, age 50, would receive a maximum between WC and SSDI of $2,667.00. If we settled the case at the PCV ($455,984.00) the settlement language would be formatted to reflect the WC off settable rate at $1,010.60 monthly allowing the injured worker to receive SSDI payments of $1,256.00. If an annuity is purchased paying the difference between the annuity and the 80% ACE ($1,411.00 monthly) the claimant could receive a lump sum of $210,850, thereby keeping the claimant's income and lifestyle exactly as it has been while giving him a large lump sum that he can use for other needs. If you increase his ACE level of $3,333 monthly (his gross pay at time of injury), the claimant could receive a lump sum of up to $94,645.00.

Example:

Indemnity Settlement:	$430,844[i]
80% ACE	$2,608.00[ii]
Monthly Social Security Disability:	$1,256.00
Difference (Maximum Comp)	$1,353.00
Lump Sum over Life Expectancy:	$1,238.06 monthly

Will receive Max SSDI Benefit

80% ACE	$2,608.00
Monthly Social Security Disability:	$1,256.00
Difference (Maximum Comp)	$1,352.00
Lump Sum Settlement	$430,884
Cost of annuity (generate $1,352.00)	$271,570[iii]
Lump sum available for cash	$159,274

This is a great negotiation tool and can help reduce settlement costs. If we can generate the same income level as the claimant is receiving prior to settlement, i.e. the 80% ACE level, for $271,570, you may be able to reduce the cash needed up front to satisfy claimant and attorney fee. Also, the utilization of the rated age would reduce the costs of the annuity thereby having more cash available for up front needs.

As you can see, by using the pro rata offset calculations we can generate the same income to the injured worker plus a lump sum that places him in a better position than if he remains on workers' comp and leaves his claim open. If the attorney receives 20% fee, there is about $70,000 that can be used to negotiate the lump sum to the claimant.

By utilization of structured settlements to negotiate benefits (not cash) for the injured worker we can meet their needs and achieve a better outcome for the insured, carrier and or self-insured.

Partnering with the Structured Settlement Specialist

Structured settlement proposals require a team effort between the claim professional and the structured settlement specialist. The sooner the structured settlement specialist is brought into the claim, the better. By forming a partnership early in the process, the claim professional and structured settlement specialist can begin to gather information and make an informed decision on whether or not the claim is a candidate for a structured settlement.

A meaningful structured settlement meets as many of the claimant's needs as possible within the settlement range established by the claim professional. It is the claim professional's knowledge of the claimant that allows the proposal to be designed to fit the needs of the claimant and his or her family. As such, the claim professional is responsible for defining each party's role during the initial strategy sessions. Once those roles are clearly defined, the structured settlement specialist attends all settlement conferences, mediations and meetings the claim professional deems appropriate.

It's important to note that structured settlement specialists are paid by the life insurance company upon the purchase of an annuity. That means all services offered by the structured settlement specialist are free of charge, which can present claim professionals with an important source of cost savings.

One such service includes the securing of age ratings, a technique designed to maximize annuity payments for the claimant. Other valuable services offered free of charge by structured settlement specialists include providing structured settlement proposals with periodic updates and changes, providing quotes from multiple life insurance companies to maximize the annuity payments and security of the claimant, analyzing economist reports for future damages, analyzing Medicare Set Aside allocation reports, providing present value figures and assisting in the negotiation process by attending settlement conferences, mediations and trials.

Coordinating the Claim Professional's knowledge of the claimant and the Structured Settlement Specialist's skills and tools achieve the best cost outcome for the self-insured and the most security and financial benefit for the injured party. ■

David J. Korch, JD, AIC, SCLA is Vice President of Workers' Compensation and Medicare Practices for EPS Settlement Group as a national resource for the brokerage staff in the negotiation and settlement of workers' compensation claims and third party claims with a workers' compensation component through the utilization of structured settlements. He has been in the insurance industry for over 30 years as a multi-line claim handler, supervisor, claim manager, home office claim consultant and structured settlement broker. He was associated, for over 17 years, as a large loss settlement consultant with structured settlement programs at The Travelers and The Hartford specializing in the settlement of workers' compensation claims.

EPS Settlements Group is a company that symbolizes innovation, longevity, service, and premier leadership in the structured settlement industry. As early pioneers in the industry, we are proud to have helped thousands of individuals to receive a structured settlement – providing a future stream of periodic payments to address their essential needs.