

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS

**Resolution in Support of H.R. 5284, Establishing
Workers' Compensation Medicare Secondary Payer Reforms**

Adopted by the Executive Committee on July 15, 2012, and by the Workers' Compensation Insurance Committee on July 12, 2012 (sponsored by Rep. Barry Hyde, AR). Resolution updates a version adopted by the Executive Committee on November 23, 2008, and by the Workers' Compensation Insurance Committee on November 20, 2008 (sponsored by Sen. Ralph Hudgens, GA).

WHEREAS, through workers' compensation, employers fulfill their statutory duty to provide all reasonable and necessary medical care when workers are injured on the job, at no cost to the worker, as well as cash benefits replacing lost wages, for what can be for life; and

WHEREAS, when an injured worker who is a Medicare recipient (or about to become a recipient) is injured on the job, both the insurer and Medicare may have responsibility for future medical expenses covered by both workers' compensation and Medicare, costs of which are primarily the responsibility of workers' compensation pursuant to the Medicare Secondary Payer Act; and

WHEREAS, when a worker has both workers' compensation and Medicare coverage, the Centers for Medicare & Medicaid Services (CMS) is responsible for ensuring that Medicare is the secondary payer, in cases when a workers' compensation claim is settled and the settlement forecloses payment by the employer's workers' compensation insurer for future medical services; and

WHEREAS, a workers' compensation Medicare Set-Aside (MSA) arrangement is an amount of settlement funds allocated in each settlement to be used solely by the injured worker for Medicare covered expenses; and

WHEREAS, CMS has established standards for the creation of and review of such proposed allocations in settlement agreements, without any specific statutory authority, the application of which is subjective and inconsistent; and

WHEREAS, CMS routinely rejects proposed MSA settlement agreements without providing adequate explanation; and

WHEREAS, CMS has published a series of MSA policy statements since 2001, all outside the normal rulemaking process, and thereby precluding notice and the opportunity to comment; and

WHEREAS, CMS determinations of the adequacy of an MSA, because of the lack of meaningful criteria as well as inconsistency, are an impediment to conducting business; and

WHEREAS, there is no means to appeal an adverse determination; and

WHEREAS, CMS approvals can be delayed for months and at times over a year, preventing injured

workers from settling their claims and returning to work; and

WHEREAS, the delays and uncertainty have resulted in the inability of employers and injured workers to settle and close their claims expeditiously, higher costs for insurers, higher employer premiums reflecting insurers' higher costs, MSA funding in amounts higher than under state workers' compensation laws, and an unknown future liability to CMS; and

WHEREAS, H.R. 5284, *The Medicare Secondary Payer and Workers' Compensation Settlement Agreements Act of 2012* was introduced in the United States House of Representatives to address several desirable reforms to the Medicare Secondary Payer Act and the MSA review process; and

WHEREAS, reforms to the Medicare Secondary Payer Act would protect the interests of Medicare and CMS while decreasing costs, administrative burdens, and confusion for employers, insurers, state workers' compensation systems and injured workers; and

WHEREAS, reforms supported in H.R. 5284 would amend the Medicare Secondary Payer Act to establish clear criteria for when an MSA should be reviewed; create certainty as to the rules for calculating an MSA; establish safe harbor provisions; provide optional direct payment to CMS for the set-aside to Medicare; provide a set-aside review process; and provide certainty for state-approved settlements;

NOW, THEREFORE, BE IT RESOLVED that the National Conference of Insurance Legislators (NCOIL) endorses reforms to the Medicare Secondary Payer Act, as proposed by H.R. 5284; and

BE IT ALSO RESOLVED that a copy of this resolution be submitted to each member of Congress, as well as state legislative leadership throughout the country.