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June 3, 2022

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Jun 03 2022

SC Court of Appeals

VIA EMAIL

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The Honorable V. Claire Allen
Chief Deputy Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Randy H. Faulkenberry v. Conbraco Industries and
Great American Alliance Insurance Co./Strategic Comp.
Appellate Case No.: 2021-001211

Dear Claire:

On Friday, May 27, 2022, I received your letter requesting an update as to the status of this case. While I initially anticipated staying this appeal for a period consistent with the Court's January 25, 2022 Order, wholly unanticipated, but substantially material, developments have occurred since the January 18, 2022 filing of this Motion.

On January 20, 2022, I learned the Centers for Medicare and Medicaid Services (CMS), the agency which regulates settlement of claims involving the beneficiaries of these programs, had radically changed its protocol in this context. Specifically, CMS departed from its longstanding policy, which: (a) allowed parties to make a "good faith" estimate of the sums necessary to adequately protect Medicare's interest when attempting to settle claims; and (b) did not condition the "good faith" of this estimate on its formal approval of the Medicare Set-Aside allocation.

Significantly, the newly adopted standard: (a) hinges the "good faith" of this estimate on formal submission to/approval of the Medicare Set-Aside proposal by CMS; (b) automatically "treats the use of non-CMS-approved products as a potential attempt to shift financial burden by improperly giving reasonable recognition to both medical expenses and income replacement"; (c) results in CMS' denial of "payment for medical services related to the WC injuries or illness requiring attestation of appropriate exhaustion equal to the **total settlement** less procurement costs before CMS will resume primary payment obligation for settled injuries or illnesses"; and (d) "will result in the claimant needing to demonstrate complete exhaustion of the **net settlement amount**, rather than a CMS-approved WCMSA amount."

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In essence, this complete departure from prior policy has resulted in: (a) the absolute necessity for formal submission/approval of any Medicare Set-Aside component when potential settlement of a covered claim involves a Medicare beneficiary; (b) the automatic presumption an unsubmitted Medicare Set-Aside proposal constitutes a potential attempt to improperly impose liability for workers' compensation related medical expenses on Medicare; (c) denial of payment for any expenses Medicare deems to be workers' compensation related conditions, notwithstanding exhaustion of any sums informally allocated to a Medicare Set-Aside account; and (d) the imposition of an obligation on a claimant who settles a claim, without CMS approval of the Medicare Set-Aside proposal, to not only prove exhaustion of the Medicare Set-Aside funds, but also any **other sums paid in connection with the potential settlement (including nonmedical payments)**, in satisfaction of workers' compensation related medical charges, prior to Medicare accepting responsibility for future expenses related to the workers' compensation covered condition.

This final element of the reconstructed CMS policy is particularly problematic, as: (a) failure to submit the Medicare Set-Aside component for approval results in presumptive invalidity; and (b) this invalidity materially increases the potential a claimant will be required to exhaust not only informally allocated Medicare Set-Aside funds, but also non-medical settlement proceeds prior to availing himself of Medicare benefits. Conversely, formal submission and approval by CMS allows receipt of Medicare benefits for even workers' compensation related conditions upon exhaustion of the Medicare Set-Aside funds.

Long before the recent renewal of settlement discussions, Respondents, Conbraco Industries, Inc. and Great American Alliance Insurance Company, obtained a Medicare Set-Aside estimate from their selected vendor. I, in turn, retained Daniel W. Hayes, Esquire of Teague Campbell, a Medicare Set-Aside account specialist, to independently assess the validity of Respondents' estimate. As Mr. Hayes was comfortable with the proposed figure, the parties agreed to hold the pending appeal in abeyance while attempting to formally resolve this matter. However, given the magnitude and implications of CMS' radical shift in its submission requirements, in light of Mr. Randy H. Faulkenberry's status as a Medicare beneficiary, I concluded it was absolutely essential to obtain CMS approval of the Medicare Set-Aside component prior to finalizing the settlement terms.

During the ensuing weeks, Mr. Hayes received all relevant documents from counsel for the respective parties, which were submitted, with a formal allocation proposal, to CMS on March 17, 2022. Shortly thereafter (March 29, 2022), Mr. Hayes received a letter from CMS requesting additional medical records. Although these records were promptly submitted, CMS made a second request on March 31, 2022. Additional relevant documents were then provided to CMS on the same date.

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In response to a May 4, 2022 telephone inquiry, the CMS representative informed Mr. Hayes all documents necessary for determination had been received and were being analyzed. Despite this fact, he subsequently received a May 17, 2022 letter from CMS requesting three additional items. After verifying two of these records did not exist, the third item was submitted to CMS on May 27, 2022.

Upon seeking a status update from a CMS agent this afternoon, I was advised the review process remained pending. I would also note Mr. Hayes independently verified CMS' receipt of our May 27, 2022 responsive submission.

Although this letter likely contains more information than you were anticipating, I wanted to ensure your complete awareness of the current circumstances. In the event you require any additional information, I will make every effort to provide it.

Thank you for your consideration.

With kindest regards, I am

Very truly yours,


Andrew N. Safran

ANS/pfb

cc: Benjamin M. Renfrow, Esquire
Daniel W. Hayes, Esquire