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OSN COMPLIANCE and the Law

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OCULAR SURGERY NEWS brings you issues in compliance with billing and coding regulations.

'Incident to' rules violation results in false claims allegation against physician

The case is believed to be the first of its kind to focus exclusively on this type of violation.

by Alan E. Reider, JD

OSN REGULATORY/LEGISLATIVE SECTION EDITOR

A Massachusetts physician has agreed to pay $150,000 to settle allegations that he submitted false claims to Medicare and Medicaid for office and nursing home visits performed by employed nurse practitioners and physician assistants without appropriate supervision. It is believed to be the first case of its kind to focus exclusively on violations of the "incident to" rules.

In addition to the physician, the medical billing company responsible for submitting the bills also settled and agreed to pay $100,000 to avoid further litigation. This case is particularly significant in light of the fact that a review of compliance with the incident to requirements was one of the items listed on the Office of the Inspector General Work Plan for fiscal year 2007, as reported in this column in the Dec. 1 issue of OCULAR SURGERY NEWS.

Physicians who employ nurse practitioners, physician assistants and other health professionals in their practice – and who bill for services performed by those professionals under the "incident to" rules – should take note to be sure they are operating in compliance with applicable Medicare rules.

'Incident to' rules

The "incident to" rules allow a physician to bill under his or her number for services performed by nurse practitioners, physician assistants and nurses, as long as the following requirements are met:

1. The services performed are integral, though incidental to a physician service and plan of care;
2. The services are of the type commonly furnished in physician's offices or clinics;
3. The service may not have its own benefit category; and
4. The service is performed under the direct supervision of the physician.

"Direct supervision" requires that the physician be on-site in the office suite where the service is being performed. It does not require that the physician be in the room or have "hands on" the patient; importantly, however, it does not allow the physician to be in another location (ie, performing surgery in a hospital or ASC, or seeing patients in another office) when the service is being performed.

Failure to meet this fourth criterion is the most common problem in complying with the "incident to" rules.

The case in Massachusetts was based on a failure to comply with the fourth criterion, ie, the failure to provide direct supervision.

In an interesting twist related to this case, but not generally found in connection with "incident to" situations, nurse practitioners and physician assistants, professionals who do not require direct supervision by physicians and whose services may be billed directly to Medicare under their individual number, performed the services in question.

In those cases, however, Medicare will pay only 85% of the physician fee schedule. Therefore, the Massachusetts physician could have billed for the services to reflect that they were performed by these professionals, rather than as "incident to" services. Although he would have received a slightly reduced amount, he could have avoided the liability imposed.

The Massachusetts case arose as a result of a whistleblower who recovered $50,000 of the total $250,000 paid by the physician and the billing company.

Whistleblowers continue to be a significant source of information for government investigations. And, although violations of the "incident to" rule generally would not be considered fertile ground for new cases, the successful resolution of this case from the government's perspective may trigger closer scrutiny of this area. OSN

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