

Eli's REHAB REPORT™

NEWS & ANALYSIS ON FINANCE, LAW, RESEARCH & TECHNOLOGY

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*Legislative News***THERAPISTS NEED TO GET ON CONGRESS' CASE ABOUT THE CAP**

If Congress doesn't act soon, the \$1,500 Medicare cap on outpatient therapy services will go back into effect on Jan. 1.

That's why therapy associations are pulling out all the stops to grab legislators' attention and convince them to repeal the cap. The House already has passed a bill that would continue the current moratorium on the cap for another two years, but the Senate needs to move on its version of the bill for that to happen.

Congress has been slow to act on the cap — or any other health care issue — partly due to the uncertainties of the upcoming election. Both parties feel they have good chances at taking the House and Senate in November, so they are hesitant to pass any laws before they attain their hoped-for majorities, insiders say. The cap repeal effort is stuck in neutral as legislators wait to see who'll win the keys to the car.

In addition to the cap, provider give-back legislation also appears to be on hold.

But experts note that, given the political uncertainties on the Hill, anything could happen — and that includes Congress passing legislation on the cap and give-backs in the upcoming week.

Hoping to capitalize on this opportunity, the **American Occupational Therapy Association**, the **American Physical Therapy Association** and the **American Speech-Language-Hearing Association** are all exhorting their members to call, write or e-mail their representatives. The APTA is encouraging its members to personalize their appeals by telling legislators stories about patients who were adversely affected by the cap in 1999.

APTA's Web site provides members with contact information for their local representatives, and ASHA's Web site helps members compose a quick letter to their rep.

AOTA's **Karen Jacobs** notes that some therapists have a mental block when it comes to contacting legislators. But once they do it, Jacobs say, they've taken a big step towards becoming a better advocate for the profession.

AOTA is optimistic that, at a minimum, Congress will pass the two-year therapy cap moratorium. The Senate Finance Committee has sent some signals that it understands the importance of the

issue, AOTA's director of federal affairs, **Christina Metzler**, tells **Eli**.

"We believe this is a beneficiary give-back, not a provider give-back," Metzler says. This distinction is important, she notes. With only so much money to give out in these budget-constrained times, legislators may be more willing to give money to needy patients than to providers.

For this reason, Metzler says, it would behoove therapists to tell their legislators how the cap hurts patients. ❖

*Practice Management***HOW TO AVOID WRONGFUL DISCHARGE LAWSUITS**

No one enjoys firing an employee, but this process can be much worse than it needs to be if you deviate from specified personnel policies and consequently get slapped with a wrongful termination suit.

It's usually not the termination process that gets employers in trouble, experts note. It's what goes on before: performance reviews, discipline and documentation.

Simply firing someone is not illegal, **John Gilliland** of **Gilliland & Caudill** in Indianapolis points out. But if employees feel that their termination was less a result of job performance than an offshoot of the employer's feelings about race, gender, religion, age or disability, they could file a wrongful discharge lawsuit on grounds of discrimination.

This is most likely to happen if you abruptly fire an employee who didn't know his job was in jeopardy, Gilliland says. The employee might think there's something fishy going on, since, as far as he can tell, everything was fine up until the point you canned him.

That's why it's so important to have a progressive discipline system, in which accumulating offenses lead to escalating penalties, the last of which is termination, Gilliland tells **Eli**. After all, he says, the object isn't to fire someone but to develop him into a good employee. By letting the employee know when he's done something wrong, he has time to reform.

A progressive discipline system also gives you proof that, if the employee doesn't improve, you have the right to fire him, Gilliland says. Should he legally challenge your decision, you'll be able to show a judge or jury that he made certain mistakes and continued to make mistakes after he was disciplined, until you had no choice but to terminate his employment.

We welcome your comments and suggestions! Please let us know what you would like to see addressed in our report. Call Tom Mullen, Editor in Chief, at 1-800-798-1856 or e-mail tomm@eliresearch.com

Employment law experts offer the following additional tips for steering clear of lawsuits:

- **Document.** If you have documented all of an employee's infractions as they occurred, you are more likely to win in the event of a lawsuit, advises attorney **Pat Barrera** of **Marcin & Barrera** in Los Angeles. "Document, document, document," he says.

Gilliland concurs. "Make sure that what you're complaining about is well documented in the personnel file," he warns. He's seen cases where a person files a wrongful discharge suit, and then when the lawyers look at the person's file, they see nothing but glowing reviews.

The biggest problem, Gilliland says, is managers who don't document an employee's problems, silently seethe about the person's shortcomings and then finally explode and fire him. When the jobless person claims that he was wrongfully terminated in such an instance, he may have a case.

- **Explain your system to employees.** You should make sure you clearly explain your discipline system to your employees, Gilliland says, so they know what's coming. Print it in your employee handbook or distribute it in some other written form.

- **Involve H.R.** Barrera advises employers to involve their human resources department or H.R. staffer as much as possible. Whenever you have a manager's word versus a subordinate's word, things can get dicey. But if the H.R. department has been copied on all documentation and involved in all discussions, the firing is less likely to look like an ornery manager's vendetta and more likely to look like a dispassionate business decision.

Smaller employers that lack special H.R. staff should consider bringing in an attorney to help them navigate terminations that they think might get difficult, Barrera says. He cautions small employers from assuming that employment and discrimination laws do not apply to them.

- **Make the most of performance reviews.** Performance reviews are the perfect time to document any difficulty an employee is having with her job. Don't waste this opportunity.

If you're anything less than "brutally honest" when doing reviews, you could be setting yourself up for trouble, warns attorney **Peter**

Petes of **Ford & Harrison** in Washington. If someone is putting her job at risk with a sub-par performance, you need to note this in her review.

Gilliland points out that therapists, billers and coders are familiar with the mantra, "If it isn't documented, it didn't happen." They need to remember that this applies to management issues just as it applies to coding.

- **Be consistent when disciplining employees.** If Bob is fired for doing the same thing that Mary did, but Mary still has her job, Bob may feel that he was discriminated against in some way. Petesch warns that any time you enforce your rules in an inconsistent manner, it could look like discrimination to an employee — or to a jury.

One problem is people who have a "seat of their pants" managerial style, Petesch points out. Many small employers tend to make things up as they go along, inventing new rules for each situation. Such inconsistent management can be an open invitation to a discrimination case.

Petes

For this reason, Petesch exhorts managers to avoid "sugar-coating" their reviews.

Another problem is that people are so pressed for time, especially in health care. It's difficult to squeeze all the patient care into the day, let alone work in performance reviews and other managerial tasks, Petesch notes.

- **Perform a quick follow-up after any disciplinary issues.** "If there is a problem, don't wait for a year to pass before conducting another review," Gilliland says. "A year is too long to correct conduct." Make sure you review problem employees a certain amount of time after their infraction so you can chart their progress.

- **Beware of bad jokes.** Finally, it's important to guard against any comments that point out an employee's race, gender or other status. If a person is fired and later remembers that you once joked, "oh, you're probably too old for this," or "you're looking good," you may find yourself defending a discrimination case. ❖

*Therapy Students***CHEATING SCANDAL TARS PT TESTS**

Physical therapy students, welcome to the world of online cheating.

The **Federation of State Boards of Physical Therapy** announced Sept. 4 that it had discovered “a widespread cheating effort by physical therapy students preparing to take the National Physical Therapy Examination.”

According to FSBPT, students on an online chat site have been asking each other what questions were on the exam. Asking someone to recall questions — or recalling questions for someone else — is a serious ethical violation, FSBPT notes. Doing so compromises the integrity of the test and devalues the physical therapist certification process.

A student started the scam in July by posting an online comment inquiring about some of the exam’s questions. As soon as FSBPT was alerted to the cheating, it contacted the Web site’s administrator, which quickly moved to delete the comments.

The offending comments were posted on the chat site of www.therapyed.com, the Web site for **International Educational Resources**. IED is the **Kaplan** of rehab, offering study courses and publishing textbooks aimed at helping therapy students better understand therapy exam questions and improve their scores, explains **Doug Pendry**, owner of the Concord, MA-based company.

IED also helps students prepare for occupational therapy and physical therapy assistant exams.

Students normally use the chat site to find study partners or discuss therapy issues in general, Pendry explains. A cursory glance at the site shows that, like most Internet chat sites, the forum hosts comments and questions about various topics, from PT to politics to nicknames.

“We don’t really monitor the discussion forum,” Pendry says.

That may change. “We’re going to have to do some online monitoring” to make sure this doesn’t happen again, says **Mark Lane**, FSBPT’s vice president of professional standards and assessment. Lane says FSBPT may even plant a “spy” who will visit certain sites and ask questions to see if anyone will answer them.

“We’re taking a good close look at a lot of Web sites now,” adds **Nancy Busse**, FSBPT’s communications director. She notes that the questions mentioned on the Web site are no longer being used in the exams.

But there is only so much anyone can do to curb Internet cheating. Online cheating has become a major problem in many colleges and universities, so perhaps it was only a matter of time before it struck the world of rehab.

No matter how well IED and FSBPT monitor their sites, the Internet provides infinite other sites

*Research***SURGERY MAY BEAT SPLINTS AT CARPAL TUNNEL TREATMENT**

New research suggests that surgery may be a better option for patients with carpal tunnel syndrome than many providers previously believed.

In a study published in the *Journal of the American Medical Association*, researchers in the Netherlands studied 176 patients who either had surgery or wore wrist splints for six weeks. After three months, 80 percent of surgery patients had significantly improved, compared with only 54 percent of splint patients. The surgery patients continued to do significantly better after 18 months, the study showed.

Current practice usually has therapists giving patients splints and then seeing how they improve, with surgery held out as a treatment of last resort. But the study results may lead doctors and therapists to rethink that strategy.

The findings “suggest that surgery should be the first rather than last option” for most patients, researcher **Annette Gerritsen** of **Vrije University** in Amsterdam told the Associated Press.

The study won’t change treatment strategies right away, however. The researchers note that they only studied patients with moderate cases of carpal tunnel syndrome; they did not include patients with very mild or severe cases. More research is probably needed before providers adopt a widespread change in treatment plans, critics note. ❖

where cheaters could post information.

Complicating the matter even further is the fact that IED provides students with practice exams, and students are free to talk about these exams' questions on the chat site. That makes it difficult for IED or other monitors to tell whether a certain posting is an innocent comment about a practice exam or an unethical recall of the real exam, Pendry notes.

Cheaters Can Be Barred From Practicing

The best way to stop cheaters may be to remind them of the crippling penalties they would face if they were ever caught, and FSBPT seems to be doing a good job at that. "Physical therapy students are risking their very careers by participating in these activities," **William Hatherill**, chief executive officer of FSBPT, warns in a press release.

People who violate ethics can lose their ability to receive an academic degree and a professional license, Hatherill notes. They can be barred from ever becoming a licensed therapist and can even be sued for violation of copyright law, as the exam is a copyrighted property.

"The FSBPT is conducting a thorough investigation," it notes in the release. It is contacting state boards to decide how to deal with students who may have already cheated and passed the test. "We regret the necessity of taking these strong actions involving physical therapy candidates, but this widespread Internet cheating must be brought to an immediate end."

This is the first online cheating incident to strike the PT world, Lane tells **Eli**. Before the test was put on computers, an exam was once "compromised" when a paper copy was stolen from a room, he says. But other than that, the PT exam has been free of major cheating incidents.

The exam consists of 225 questions, 200 of which count and 25 of which are collected for statistical reasons. Students can take the exam at any time, and can retake it up to four times a year. New questions are added at least once a year, Lane says. ❖

Medicare

CMS TRIES TO MAKE APPEALS PROCESS EASY ON PROVIDERS

Rehab providers who are stuck in a seemingly endless appeals process — and providers who don't even bother appealing because they want to avoid

the awful process — may be gaining an unexpected ally: the **Centers for Medicare & Medicaid Services**.

In an Aug. 28 program memorandum (AB-02-122), CMS instructs fiscal intermediaries and carriers to establish a quality improvement program for appeals based on data analysis. After all, appeals cost the government more money the higher up the appeals chain they go, CMS notes.

As part of the appeals QI program, Medicare contractors should identify reversals from administrative law judges (ALJs) "who frequently disagree with your determinations or [hearing officer] decisions," according to the memo. When fiscal intermediaries and carriers ID those determinations, they should take corrective action, including "reevaluating contractor policy that results in a high reversal rate."

This instruction could break providers free of the appeals chains that have been binding them for years. If contractors take the directive to heart, they could revisit unfair contractor policies and revise them, and they could stop repeatedly denying claims based on the same reasons, notes attorney **Lester Perling** with **Broad & Cassel** in Tampa, FL.

When criticized for high reversal rates in the past, CMS officials have defended themselves by pointing out that ALJs are not bound by the same regulations that Medicare contractors are.

CMS also has been eager to move ALJs out from under the **Social Security Administration's** wing and make them a **Department of Health and Human Services** unit, presumably cutting down on conflicting CMS/ALJ opinions.

"Contractors should have been doing this all along," Perling tells **Eli**. "It's nice to see CMS telling them to do it." This is the first time Perling has seen CMS issue instructions to heed ALJs.

Making CMS quit running providers through the appeals cycle for the same claims has been a popular theme lately. A recent federal court case accused HHS of "trickery" when ALJs continually approved **DeWall Enterprises'** appeals for a spinal orthosis, but carriers continued to deny the claims.

Nonetheless, Perling is skeptical that contractors will jump to correct the problems that often leave providers in an appeals catch-22. "I hope that some contractors will take this information, use it and respond to it," he says, but he isn't holding his breath.

If FIs and carriers are slow to implement CMS' instructions, the memo at least gives provid-

ers some ammunition to use in a legal fight against the practice of repeatedly denying claims of the same type ALJs have reversed, Perling says. However, the matter probably would end up in a costly court battle, he predicts.

The memo makes it clear that when contractors “are told by the ALJ over and over and over, they need to take notice,” Perling says. “How long can provider claims get slapped down for the same thing?”

Additional positive CMS messages in the memo are for contractors to refund reimbursement given back by ALJ reversals in a timely manner, and to calculate accurately how much money should be returned to providers, Perling adds. Contractors frequently take months to return reimbursement from ALJ reversals, Perling notes. ❖

Editor’s Note: The memo is at www.cms.gov/manuals/pm_trans/AB02122.pdf.

Research

STUDY QUESTIONS BENEFITS OF SHOCK WAVE HEEL THERAPY

Australian researchers believe their new study casts doubt on the effectiveness of “shock wave” heel therapy, but critics charge the study itself was flawed and the therapy indeed works.

In a study published in the *Journal of the American Medical Association*, researchers say they

found no difference between the progress six and 12 weeks later of a control group and a group of patients who actually received the therapy. Both groups reported significant improvement.

“We found no evidence to support a beneficial effect on pain, function and quality of life” beyond what the control group reported, the study says.

The therapy, which was approved by the **Food and Drug Administration** earlier this year, administers shock waves to treat patients with plantar fasciitis, or chronic heel pain. The shock waves are believed to break up the painful bone spurs that develop as a result of the condition.

The treatment isn’t cheap: It runs between \$2,000 and \$3,000. For this reason, it is usually reserved for extreme cases.

The study looked at 160 patients who had reported heel pain for at least six weeks. The control group was given extremely low doses of the shock waves, and the experimental group received the regular amount.

And that’s why proponents of the therapy think the new study is meaningless. Because the control group still was treated by some shock waves, it was not a traditional control group, and it’s harder to judge the therapy’s effectiveness, they charge.

The FDA approved the treatment after a U.S. study demonstrated its effect. The U.S. study included

IndustryNews

SEC INVESTIGATING HEALTHSOUTH

Two weeks after announcing that its annual earnings could be as much as \$175 million less than expected, **Healthsouth Corp.** is struggling to win back its investors’ support.

Stock in the Birmingham, AL-based company has traded as high as \$16.84 this year, but most of the investors who weren’t scared off by the earnings announcement were scared off by an announcement Sept. 19 that the **Securities and Exchange Commission** is investigating the company.

The stock opened Sept. 23 at \$3.20, and it has lost more than \$3 billion — or 75 percent — of its value since the earnings announcement, which HealthSouth blames on an alleged change in Medicare’s group billing policy (*for more information, see RR, Vol. 9, No. 18, p. 138*).

The SEC has requested documents from the company from as far back as Dec. 1, 2001. It seems to be investigating whether Chief Executive Officer **Richard Scrushy’s** major stock sale in June was done with insider knowledge of the pending earnings announcement, and whether the company withheld information from investors in its early August earnings report, in which it gave no indication of the group billing policy’s impact.

Scrushy has said the company is still fundamentally sound, and that panicky investors are overreacting. Still, analysts say that even if one assumes the company’s stock deserves to sell for more than three bucks, the low valuation is a result of investors’ lack of trust in management. ❖

only patients who had reported pain for six months. Critics note that the Australian study is flawed for using subjects who had only been in pain for six weeks. In most cases, the therapy is only prescribed for longer-term sufferers. ❖

Fraud & Abuse

FORMER REHAB OWNER SENTENCED TO 51 MONTHS OF REHABILITATION

Rehab owners who try to conceal the fact that they own certain businesses could find themselves thrown in jail for the charade.

Nathan James Johnson, who owned **Mid-South Rehabilitation Agency** in Baton Rouge, LA, learned that lesson the hard way. He was sentenced to 51 months in prison for ignoring Medicare rules about related businesses, meddling with employee pension plans and other misconduct, U.S. Attorney **David Dugas** reports.

Mid-South was connected with rehab agency **Tri-Therapy**, but Johnson failed to disclose this relationship to Medicare. As a result, the companies ended up collecting reimbursement they weren't entitled to. According to his plea agreement, Johnson also wrote collection letters to Medicare patients who owed him money but then never sent them, choosing instead to bill Medicare — and thus ignoring the program's requirement that providers make genuine efforts to recoup debt from Medicare beneficiaries.

Johnson also admitted to illegally siphoning away more than \$100,000 from Mid-South's Medicare-funded employee pension plan, and confessed to leaving a threatening phone message at the home of a grand jury witness.

Prosecutors say the schemes cost Medicare more than \$4 million.

"I hope this sends a clear message to all who sponsor and transact business with employee benefit plans that the federal government will aggressively pursue those who deprive participants of their promised benefits," warned **Steve Eischen**, regional director of the U.S. **Department of Labor**, Pension and Welfare Benefits Administration in Dallas.

According to the *Baton Rouge Morning Advocate*, Johnson's sister **Mona Fontenot** was sentenced to two years probation earlier this year for not reporting her brother's misconduct. **Lance Alan Banks**, a former owner of Tri-Therapy, was sentenced to a year and a day in prison in July. ❖

Industry Notes

SENATE WANTS NEW GUIDANCE ON RESTRAINTS

Inpatient rehabilitation facilities and long-term care facilities may soon receive updated guidance on how and when to use chemical restraints on their patients.

Sens. **Charles Grassley** (R-IA) and **John Breaux** (D-LA) sent a letter Sept. 9 to **Tom Scully**, administrator of the **Centers for Medicare & Medicaid Services**, asking him to do a better job of telling providers when it is acceptable to use medications to restrain patients. This practice is sometimes necessary to protect the health and safety of patients with dementia, their fellow patients and their providers. However, restraints can be over-used, putting patients at risk for medication problems.

The senators charge that the current guidelines on this issue are not only confusing, but also outdated, as they were written during the Clinton administration.

"Although studies show substantial reductions in the use of chemical restraints in recent years, we nevertheless have to prevent any backslide to the bad old days of widespread sedation," Grassley said in a press release.

The guidance applies specifically to nursing homes, but it provides equally helpful guidance for IRFs, sources say.

- CMS has amended its recent program memo on speech-generating devices to make sure providers aren't taking advantage of CMS to pay for snazzy, medically unnecessary technology.

In transmittal 158, dated Sept. 11, CMS amends transmittal 150. It notes that Medicare will

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not pay for devices that can generate speech or run from vocal commands but “are not dedicated speech devices.” CMS seems to be closing a potential loophole by which providers might have tried to secure reimbursement for voice-activated word processing or accounting software.

- Americans’ life expectancy continues to grow, increasing the amount of time that they are senior citizens and the likelihood they will need some type of rehab care.

According to an annual report recently released by the **Centers for Disease Control and Prevention**, the average life expectancy for Americans is now nearly 77 years — 74 years for men and nearly 80 years for women. A century ago, the average was only 47 years.

- Got a grumble with the **HHS Office of Inspector General**? Or just want some insight into what the watchdog agency has in store for the future? Find out from OIG senior staff members at one of the regional town hall meetings the agency has in the works.

The meetings, which will be held in different parts of the country over the coming year, will allow OIG staffers to meet face to face with the provider community. OIG reps will discuss the functions of the agency and answer questions about its work and future plans.

The first gathering is slated for Oct. 18 in Boston. The meeting, scheduled to last from 9:30 a.m. til noon, will be held in the JFK Federal Building at 15 New Sudbury St.

Audience size is limited, so if you’re interested in attending, e-mail the following information to oigspeaks@oig.hhs.gov or fax it to 202-260-8512: name/title, organization, organization address, telephone number, e-mail address or fax number. Attendees who need disability access and/or special accommodations should make a note of it.

- State Medicaid fraud control units are aggressively pursuing home care employees who take advantage of residents, as a recent case from Oklahoma makes clear.

According to state Attorney General **Drew Edmondson**, the former administrator of **SunBridge Park Care and Rehabilitation** will spend 30 days in county jail after pleading no contest to nine counts of caretaker exploitation, three

counts of forgery, embezzlement and other charges.

Prosecutors say **Kimberly Kay Horan** took money from the trust fund accounts of nine different residents between June 2001 and March 2002. She was also accused of forging patients’ names on personal checks.

According to Edmondson, Horan was sentenced Sept. 4 to concurrent five-year sentences on 14 felony counts, with all but 30 days suspended. ❖

Editor’s note: To see the memo, go to www.cms.gov/manuals/pm_trans/R158CIM.pdf.

Corrections

- The Vol. 9, No. 19 issue cited the *New York Times* in reporting that **HealthSouth Corp.** CEO **Richard Scrushy** had sold 94 percent of his company stock July 31. The *Times* later corrected itself: Scrushy sold 48 percent of his stock.

- The Vol. 9, No. 18 issue stated the earnings of **U.S. Physical Therapy** in the “billions.” It should have read “millions.” We regret the error.

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