

Part B Insider (Multispecialty) Coding Alert

Incident-To Billing: Court Upholds Incident-To Supervision Requirement

Medicare has the right to require a physician to personally supervise non-physician practitioners when they're billing for services under the physician's number on an incident-to basis, a court ruled.

The **9th U.S. Circuit Court of Appeals** upheld a district court verdict that Dr. **Gary Gibbon** must repay \$600,000 for nurse and therapist services he billed incident-to his own provider number between 1995 and 1997. Gibbon argued that the Medicare rule requiring his physical presence when he supervised these providers was invalid for a few reasons.

- 1.** First, Gibbon said that the current definition of "incident-to" came out in the Medicare Carriers Manual and never went through the process of having a proposed rule with comment period. Therefore, Medicare shouldn't apply the rule to him. The court rejected this argument, saying the statute's definition of "incident-to" is vague and the manual was within its rights to provide a definition.
- 2.** Gibbon also argued he wasn't aware the services wouldn't be covered, and consequently billed under good faith and should be paid.
- 3.** Finally, Gibbon said the rule violated the "equal protection" clause because Medicare requires the physician's presence in board-and-care facilities, but not in hospitals or skilled nursing facilities. Therefore, Medicare was discriminating against Gibbon's patients. But the court said that the distinction made sense because a skilled medical practitioner is always nearby in a hospital or SNF.