Part B Insider (Multispecialty) Coding Alert

INCIDENT-TO BILLING: Pre-2002 Incident-To Claims Could Still Wind Up In Court

Now is the time to scrutinize your documentation

Ignorance of the incident-to law is no excuse--even if the law was unclear and confusing.

That's the message that the federal **Eleventh Circuit Court of Appeals** may be sending providers, in the wake of a new ruling in United States ex. rel. Walker vs. R&F Properties of Lake County (04-15283). Possibly the most prominent case having to do with incident-to billing, Walker could decide whether thousands of other providers face legal liability.

Background: Nurse practitioner **Kathryn Walker** worked at a clinic run by R&F Properties from 1997 to 1999, and she saw many patients without a physician being present in the building. The clinic still billed for those visits as "incident to" a physician's services because a physician was available by pager or phone. Walker filed a whistleblower suit claiming that R&F billed improperly for incident-to services from 1994 to sometime in 2002. A district court dismissed the suit because it agreed with R&F that Walker's suit should only reference the dates she worked at the clinic, and incident-to rules were unclear then.

Then, in a regulation that took effect January 2002, the **Centers for Medicare & Medicaid Services** clarified that you can't bill incident-to unless the physician is physically present in the same office suite. The appeals court reversed the dismissal of Walker's suit. It held that:

• Walker could introduce evidence of improper billing all the way from 1994 to 2002, because it was in the government's interest as co-plaintiff.

• R&F kept billing for unsupervised visits incident-to after the January 2002 clarification.

• R&F had talked to consultants, attended seminars and read carrier and CMS documents, all of which indicated that the law required a physician to be physically present, even before 2002.

What does this mean to you?

The appeals court ruling just means that Walker's case will go to trial, and it's too early to say what the result will be, attorneys caution. But it's possible the court will rule that incident-to claims from before 2002 still have to show that a physician was present, or there could be legal liability.

The statute of limitation on the False Claims Act is usually six years, but could be even longer in some cases, says **Alan Rumph**, an attorney at **Smith Hawkins Hollingsworth & Reeves** in Macon, GA.

You should have been documenting a physician's presence even for incident-to visits before 2002, say some attorneys. "I think the incident-to rules have been clear forever," says attorney **Alice Gosfield** with **Alice Gosfield & Associates** in Philadelphia, although she admits that carriers used to give "wildly disparate advice" about incident-to billing.

What to do: Before you panic about your pre-2002 claims, review your old carrier newsletters to see what your carrier was saying back then. If your carrier was giving you incorrect advice, you may be off the hook.

If you did bill incorrectly for incident-to services, especially after the January 2002 clarification, then make sure your non-physician practitioners have their own provider numbers. That way, you can write a check to your carrier for the 15

percent extra you received for the incident-to services, Gosfield advises.

Bottom line: It may still be too early to decide if you are liable for pre-2002 incident-to claims. But for any undocumented visits that took place after January 1, 2002, you should make a refund to your carrier, advises **William Maruca** with **Fox Rothschild** in Philadelphia. Don't get the **HHS Office of Inspector General** involved unless there was clear intent to violate the law, attorneys advise.

The most important message you should take from this case: A good compliance program is not only essential, it's a great defense against whistleblowers, says Gosfield.