

Chiropractors to Sue Aetna for Underreimbursements

The New York Chiropractic Council and Donna Restivo, D.C., have retained the law firm of Pomerantz Haudek Block Grossman & Gross LLP to bring a class action against Aetna, Inc. for improper reductions in health care payments for chiropractors who are not part of Aetna's network of providers (known as out-of-network or "ONET" providers).

The case focuses on Aetna's decisions in 2006 and 2007 to change its policy with regard to a number of chiropractic services and declare them to be not covered under its health care plans pursuant to their "experimental and investigational" exclusion. In particular, Aetna claims that the following chiropractic services are no longer covered because they purportedly have not been demonstrated to be safe and effective: Surface Scanning Electromyography ("SEMG") (CPT 95999); Mechanical Traction (CPT 97012); and Aqua Massage (Dry Hydrotherapy) (billed under Code 97022).

In the complaint that is being prepared, the plaintiffs will allege for each of these practices that they are standard and common services which are generally accepted in the chiropractic community, such that ONET chiropractors such as Dr. Restivo are entitled to provide such services and to be paid appropriate benefits under Aetna's plans. Plaintiffs believe that they have substantial evidence in support of their position. With regard to SEMG, for example, a Florida court has explicitly found that it is a common and acceptable chiropractic service. *See Dep't of Health v. Merritt*, Case No. 1D05-729 (Flor. 1st Dist. Ct. App. Jan. 5, 2006), at 8, 9 (the ALJ's finding that SEMG testing "has significant medical value as a diagnostic tool with respect to the treatment of a patient suffering from injuries like those arising out of a motor vehicle accident . . . is supported by competent substantial evidence"; "competent substantial evidence supports this finding . . . that surface EMG has reached a level of general acceptance in the relevant provider community," including both chiropractors and medical doctors).

Similarly, in *Introna v. Allstate Ins. Co.*, 850 F. Supp. 161 (E.D.N.Y. 1993), the court explicitly held that "intersegmental traction treatments," among other chiropractic services, are, "as a matter of law, 'normal and customary procedures and treatments offered by chiropractors'" and "lie squarely within the range of normal and customary 'treatments and modalities.'"

The use of Aqua Massage (dry hydrotherapy) is also entirely appropriate. Not only have various studies confirmed its efficacy, but the State of Washington has also adopted regulations which specifically call for the Chiropractic Quality Assurance Commission (9 CCQAC) to "maintain a classified list of chiropractic procedures and instrumentation" that are deemed to be "approved" for treatments by chiropractors. Pursuant to this list, the CQAC has affirmative "approved" the use of aqua-med hydrotherapy tables, as well as intersegmental traction tables and SEMG.

Significantly, Aetna has not only determined that these practices will no longer be covered, but it also has demanded that Dr. Restivo pay back some \$50,000 for benefits that it has previously paid. Plaintiffs believe that Aetna has taken similar steps with other chiropractors. In plaintiffs' view, such actions are patently improper and in violation of law.

In addition to these issues, the complaint will also challenge how Aetna determines the usual, customary and reasonable ("UCR") rates for services provided by out-of-network chiropractors. In making its UCR determinations, Aetna uses a database it has licensed from Ingenix, Inc., a wholly-owned subsidiary of United Healthcare Group. Plaintiffs allege that this database is inherently flawed and cannot provide a valid basis for setting UCR rates. Notably, in *Davekos, P.C. v. Liberty Mut. Life Ins. Co.*, 2008 Mass. App. Div. 32, 2008 Mass. App. Div. LEXIS 12, *9, 12 (Jan. 24, 2008), the Massachusetts appellate court explicitly upheld a claim by a chiropractor that the insurer could not rely on Ingenix to set reimbursement rates, holding that it "lacks the

requisite indicia of reliability to be admissible,” and did not constitute proof “of what could be considered fair and reasonable charges for those services.”

Aetna itself has now recognized the flaws in the database, as on January 15, 2009, it announced that “it will stop using the Ingenix databases for the purpose of determining ‘prevailing’ or ‘usual, customary and reasonable’ charges when members receive covered care from providers outside a health plan’s network.” Instead, Aetna will “help the [New York] Attorney General to create a new independent database for this purpose,” including by paying \$20 million to help fund the creation of the new database, “and will use the new database when it is ready for use.” What now remains is therefore to get appropriate reimbursement for the prior improper use of Ingenix. Cases have been brought against Aetna on this issue on behalf of subscribers and medical doctors (with various medical associations, including the American Medical Association, serving as named plaintiffs, along with individual doctors). However, no class action has been filed relating to the UCR benefits for non-physician providers, such as chiropractors.

If you would like further information relating to this anticipated lawsuit, or if you have information that you believe will help in its prosecution, please email D. Brian Hufford, Esq. of Pomerantz Haudek at dbhufford@pomlaw.com, or call Mr. Hufford, care of his associate, Susan Weiswasser, at 212.661.1100.