



ATTORNEYS AT LAW

Los Angeles Office
15760 Ventura Boulevard
Fifth Floor
Encino, CA 91436
Telephone (818) 783-5530
Facsimile (818) 783-5507

PLEASE REPLY TO:
Los Angeles Office

Andrew H. Selesnick
aselesnick@mrlp.com

April 16, 2009

VIA OVERNIGHT MAIL
AND U.S. MAIL

Lucinda Ehnes
Director
California Department of Managed Health Care
980 Ninth Street, Suite 500
Sacramento, California 95814-2725

Re: *CAL/ACEP'S Response to CAPG'S Petition for Amendment of Regulation*
28 CCR 1300.71(a)(3)(B)

Dear Ms. Ehnes:

We represent the American College of Emergency Physicians, State Chapter of California, Inc. ("CAL/ACEP"). CAL/ACEP submits this response to the California Association of Physician Groups, Inc.'s ("CAPG") most recent petition for a selective amendment of 28 CCR 1300.71(a)(3)(B) (the "Regulation"). On March 12, 2006, CAPG unsuccessfully submitted a similar petition proposing the same amendments it proposes now. Nothing has changed since that petition was denied that would warrant the seismic change sought by CAPG in determining the reasonable value of services for non-contracted emergency service providers.

CAPG, an association of largely for profit managed care entities or risk-bearing medical organizations (RBOs), submitted a legally flawed petition.¹ With a letter devoid of any statistical data to support its argument, CAPG seeks to have the Department completely occur the Regulation, which was subject to public scrutiny and stakeholder comments for years. The subject matter of the Regulation – the method by which payers should reimburse non-contracted emergency providers – was based in part on long standing case law, and has been approved by the

¹ It is ironic that CAPG would ask the Department to change the regulation, when many CAPG members have publicly taken positions in court proceedings that they are not subject to regulation by the Department, or bound by the Knox-Keene Act.

New York Office
114 West 47th Street
24th Floor
New York, NY 10036
Telephone (212) 730-7700
Facsimile (212) 730-7725

Orange County Office
4 Hutton Centre Drive
Suite 300
Santa Ana, CA 92707
Telephone (714) 557-7990
Facsimile (714) 557-7991

San Francisco Office
455 Market Street
Suite 1420
San Francisco, CA 94105
Telephone (415) 882-7770
Facsimile (415) 882-1570



Lucinda Ehnes

Re: CAL/ACEP'S Response to CAPG'S Petition for Amendment of Regulation

April 16, 2009

Page 2

California Supreme Court as well as two different Courts of Appeal. Just as the Department denied virtually the exact same petition three years ago, we strongly urge the Department to again deny CAPG's current petition.

CAPG'S petition is virtually identical to the one the Department denied in 2006

While CAPG claims that the current Regulation needs to be "re-examined" in light of recent developments, the vast majority of its petition is a re-hash of the one it filed in 2006. Indeed, CAPG's current petition lifts 7 of its 9 pages directly from that petition, and is flawed for many of the same reasons. In 2006, CAPG tried to rely on certain cases, including *Mitch Grissim & Associates v. Blue Cross and Blue Shield of Tennessee*, "New Baltimore," and *Temple University Hospital v. Healthcare Management Alternatives, Inc.*, for its proposition that the Regulation should be amended. The problem then was that these case citations were either inaccurate or incomplete. Given the alleged gravity of the situation, one would have expected CAPG to have at least taken *some* care in drafting the current petition to address those same errors over the last three years. Instead, CAPG's current petition includes these same cases – with the same incorrect, incomplete citations. (Petition, pp. 6-7.) This is not merely a technical point, but also an indicator of the weakness of CAPG's position, which is not supported by law.²

In the 2006 petition, CAPG attempted to demonstrate the need for an amended Regulation through the introduction of "data" which purported to show that the Regulation was vague or under-inclusive. (2006 Petition, pp. 8-10.) In the current petition, however, CAPG has dropped any pretense of a factual basis for amending the Regulation. It cites no studies, data, or facts to support the need for an amendment, much less one with the favored text it wants added.

The Department may not amend the Regulation unless it is inconsistent pursuant to California Government Code §§11439.1 and 11349. If anything, the case law since the Regulation was adopted, and certainly since CAPG's last petition, supports the consistency of the Regulation. The petition should be denied.

Why the Regulation was enacted

Conspicuously absent from CAPG'S petition is any historical perspective as to the reasons for promulgation of the Regulation. Emergency physicians do not have a choice as to whether they can treat or not treat a patient in an emergency room: They are required by law to provide medical screening and stabilizing care to emergency room patients, regardless of the patients' "insurance

² Because CAPG has chosen to literally repeat previous arguments, certain portions of CAL/ACEP's response will also be repeated, as their applicability today is the same as it was three years ago.



Lucinda Ehnes

Re: *CAL/ACEP'S Response to CAPG'S Petition for Amendment of Regulation*

April 16, 2009

Page 3

status, economic status, or ability to pay for medical services.” Cal. Health & Safety Code § 1317(b); accord, 42 U.S.C. § 1395dd. In fact, emergency care providers must render treatment without first even inquiring as to the patients’ ability to pay. Cal. Health & Safety Code § 1317(d).

Thus, emergency physicians cannot refuse to see patients who are enrollees of CAPG affiliated medical groups or IPAs, even if the CAPG affiliated RBOs have a longstanding history of inappropriate underpayment for these services. Unlike office based physicians, who can refuse to see patients based solely upon the payer, emergency physicians have no such luxury.

The Legislature recognized the unique burden placed upon CAL/ACEP members (and all emergency service providers) by requiring payers like CAPG affiliated RBOs to reimburse emergency physicians for services rendered. *See*, Cal. Health & Safety Code §1371.4. The Department, understanding that some payers would try to game the system and pay as little as they possibly could to non-contracted EMTALA-obligated providers, utilized the regulatory process to create a methodology that payers would follow to properly reimburse non-contracted emergency service providers. After careful thought and deliberation, with input from interested stakeholders spanning several comment periods, the Department issued the Regulation.

Emergency physicians treat some 10 million Californians each year. Despite the fact that emergency room visits are increasing, over 60 Emergency Departments have been forced to close in the last ten years, mostly due to inadequate reimbursement. CAPG apparently seeks to accelerate the closures through its proposed “amendment” of the Regulation. CAPG cannot dispute that its petition would result in more dollars for managed care organizations, and less dollars for those who actually deliver the care.

Both *Prospect* and *Bell* support the current Regulation

The Regulation helps to ensure that payers use a common sense methodology which should result in reasonable reimbursement, and is consistent as required by California Government Code §§11439.1 and 11349. In relevant part, the Regulation mandates reimbursement using the following factors:

- (i) the provider's training, qualifications, and length of time in practice;
- (ii) the nature of the services provided;
- (iii) the fees usually charged by the provider;
- (iv) prevailing provider rates charged in the general geographic area in which the services were rendered;
- (v) other aspects of the economics of the medical provider's practice that are relevant; and
- (vi) any unusual circumstances in the case.



Lucinda Ehnes

Re: *CAL/ACEP'S Response to CAPG'S Petition for Amendment of Regulation*

April 16, 2009

Page 4

See, 28 CCR §1300.71(a)(3)(B).

CAPG seeks to amend the Regulation to reflect payments by CAPG members and other payers, including payments under the Medicare and Medi-Cal fee schedules. Such demands have already been properly rejected by both the Department and the Courts.

CAPG first claims that *Bell v. Blue Cross of California* (2005) 131 Cal.App.4th 211, and *Prospect Medical Group, et al. v. Northridge Emergency Medical Group, et al.* (2009) 45 Cal.4th 497, both support its view that the Regulation should be amended. (Petition, pp. 2-3.) Put simply, CAPG is wrong. In fact, both cases actually support the current Regulation without amendment.³

In *Bell*, the Court quoted the entire Regulation verbatim, noting that it provided a methodology for determining reasonable reimbursement. *Bell*, supra, 131 Cal. App. 4th at 216. Holding that Blue Cross could not reimburse whatever amount it wanted, *Bell* found that emergency service providers are entitled to “reasonable reimbursement.” *Id.* at 220.

In *Prospect*, supra, the California Supreme Court wholeheartedly endorsed the *Bell* decision. 45 Cal. 4th at 505-508. In determining that non-contracted emergency service providers may not balance bill patients because they can obtain reasonable reimbursement directly from the health plans, the High Court affirmatively approved of the current Regulation. *Id.* at 505. Like the *Bell* Court, the Supreme Court quoted the Regulation verbatim and emphasized that the providers’ ability to obtain reasonable reimbursement, premised in part on the Regulation, was key to its decision. *Id.* at 507. Any attempt to amend the Regulation would therefore run counter to the law as defined by the State Supreme Court.

Even the Court of Appeal’s decision in *Prospect* supports the current Regulation. *Prospect Medical Group, et al. v. Northridge Emergency Medical Group, et al.* (2006) 136 Cal.App.4th 1155, overruled on other grounds by *Prospect*, supra. In that decision, Prospect argued that the

³ CAPG also argues that the Governor’s Executive Order S-13-06 and one Workers Compensation Appeals Board opinion now require an amendment to the Regulation. First, S-13-06, issued almost three years ago, actually states that the Department should ensure that current criteria “results in fair reimbursement for the provider...” Second, *Kunz v. Patterson Floor Covering, Inc.* (2001) 67 Cal.Comp. Cas 1588, is a case decided almost *four years* before CAPG’s first petition. In any event, *Kunz* does not negatively interpret *Gould v. Workers Compensation Appeals Board* (1992) 4 Cal.App.4th 1059, but rather applies only to outpatient surgical facilities, which is not an issue here.



Lucinda Ehnes

Re: *CAL/ACEP'S Response to CAPG'S Petition for Amendment of Regulation*

April 16, 2009

Page 5

Medicare reimbursement rate was the reasonable fee to be paid to non-contracted emergency service providers.⁴ The Appellate Court, however, looked favorably upon the Regulation, holding that “[t]he fact that the DMHC adopted a six-part test to determine the rate for reimbursing non-contracted physicians strongly indicates that employing any sort of across-the-board rate mechanism, such as the Medicare rate, would be inappropriate.” *Id.* at 1171. Citing to a number of Comments made while the Regulation was being formulated, the Court of Appeal noted repeatedly that the Department rejected reliance on government fee schedules, citing the Department’s own response:

"REJECT: The Department recognizes that these government programs are not designed to reimburse the provider for the fair and reasonable value of the services rendered and are[,] therefore, an inappropriate criteria. [Italics added.]"

Id. at 1171 -1172 (emphasis added).

CAPG's proposed added text is contrary to existing law

Only at the end of its petition does CAPG recite the proposed added text, which again is the exact same text it wanted to add years ago. Not only is there no legal or factual basis to add the text, but also the proposed language is contrary to existing law.

CAPG first demands that the Regulation be amended to include average contract rates for providers and payors. (Petition, p. 9.) While it attempts to cite to certain cases to support this argument, the citations were either incomplete or inaccurate. *See, above*, p.2. In any event, other courts have routinely found that contract rates should not be used in determining reasonable reimbursement. *Brown v. Carolina Care Plan* (2006) 2006 U.S. Dist. LEXIS 64811, 14 (“[T]he rates which should have been used for comparison are the ‘average and prevailing charge(s) for the same health service,’ not the reduced in-network rates charged by a in-network providers”); *HCA Health Services of Georgia, Inc. v. Employers Health Ins. Co.* (11th Cir. 2001) 240 F.3d 982, 997 (“A prudent person . . . would not even consider the discounted fee because it only arises out of a specified, contractual relationship. The usual and customary fee is the reasonable fee and, as such, is the fee recognized by a prudent person. . . Unlike the fee common in the industry, a discounted fee is the product of a unique contractual relationship between provider and insurance company”); *Geddes v. United Staffing Alliance Employee Medical Plan* (10th Cir. 2006) 469 F.3d 919, 930 (Interpreting usual and customary fee as synonymous with lower, contracted fees “renders ‘usual and customary’ virtually meaningless).

⁴ Prospect abandoned this argument in its appeal to the Supreme Court of California, and thus the Court of Appeal’s reasoning is still persuasive.



Lucinda Ehnes

Re: *CAL/ACEP'S Response to CAPG'S Petition for Amendment of Regulation*

April 16, 2009

Page 6

Discounted contract rates and payments can not be considered in determining the reasonable value of a non-contracted provider's services because they represent only a portion of the total compensation that contracted providers receive for contracted services. The additional component of this compensation is reflected in the economic value of the considerations exchanged for the discount from the provider's usual and customary charge. These considerations include, among others: exclusive or preferred referral arrangements (volume); prompt payment; access to electronic billing and payment; limits on down-coding, bundling, and other payer practices that reduce payments to non-contracted providers; and even the preservation of the provider's medical staff privileges which, under coercive contracting and other forms of "economic credentialing," are threatened when hospital-based providers decline to accept below fair market rates for contracted services. Including contracted rates and payments is inappropriate, as they ignore the economic value that is exchanged for the discount. Furthermore, the difficulties involved in determining, revealing, and validating confidential contracting rates, and in placing a fair value on the considerations exchanged for the contracting discount, makes the use of contracting rates as proposed by CAPG impermissible.

CAPG next demands that government fee schedules, including Medicare and Medi-Cal, be included. (Petition, p. 9.) As set forth above, the Courts and the Department have already rejected CAPG's criteria as "inappropriate" and "not designed to reimburse the provider for the fair and reasonable value of the services rendered..." *Prospect*, supra, 136 Cal.App.4th at 1171-1172. *See also*, Section 19-710.2(b)(2)(i) of Maryland's Health-General Article (Payment to a health care provider not under a written contract, provides that a health maintenance organization "may not use Medicare, Medicaid, or workers' compensation payments as part of any methodology used to determine a payment at the usual, customary, and reasonable rate").

Finally, without citation to legal authority, CAPG demands that the amounts paid to and accepted by non-contracted providers should also be included in the Regulation criteria. (Petition, p. 9.) However, it fails to consider the various reasons that a non-contracted emergency physician may decline to dispute an underpayment, which may include, but is not limited to, insufficient volume of claims to warrant the attention required to dispute the underpayments, hospital politics (coercive contracting), aversion to litigation, the cost of disputing small-value claims, and cumbersome and inefficient claims dispute procedures, to name a few. Because each situation is unique and fact-specific, previous amounts paid and accepted are an inappropriate criteria for inclusion in the Regulation to determine reasonable reimbursement. Other jurisdictions agree with this approach. *See, Mercy Mt. Clemens Corp. v. Auto Club Ins. Ass'n.* (1996) 219 Mich. App. 46, 54, 555 N.W.2d 871 (Amounts health care providers accepted as payment in full from various third-party payers were not relevant in determining whether the amounts health care providers charged were reasonable and customary).



Lucinda Ehnes

Re: *CAL/ACEP'S Response to CAPG'S Petition for Amendment of Regulation*

April 16, 2009

Page 7

Conclusion

CAPG'S latest petition is a poor sequel to the original petition. It attacks the Regulation for the same reasons properly rejected years ago by the Department during the Comment periods. Since the adoption of the Regulation, a Supreme Court of California case and two Court of Appeal decisions have also affirmed the use of, and reliance on, the Regulation as it is currently written. CAPG has again failed to present any evidence to support its argument that the Regulation is not consistent with the law. If anything, it has emphasized that the law supports the Regulation. CAL/ACEP therefore respectfully requests that the Department deny CAPG's recent petition as it did in 2006.

Sincerely,

MICHELMAN & ROBINSON, LLP

A handwritten signature in black ink, appearing to read 'Andrew H. Selesnick', written over a horizontal line.

ANDREW H. SELESNICK

AHS:mm

Copy: Client