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Case Study

In UM/UIM Cases, Providing Notice of Intent to Arbitrate is Not Enough by Itself to Toll the Statute of Limitations

— *by* Jeffrey D. Eberhard

Claims Pointer: Initiating formal arbitration proceedings requires two steps. Step one: Initiate. This requires only one party to make an offer to begin the arbitration process. Step two: Make it Formal. This requires the demanding party to send a notice in the manner provided in the insurance policy or, if none is provided, to send it by certified mail or serve in the same manner as a lawsuit.

The case of Bonds v. Farmers Insurance Comp. of Oregon, --- Or App --- (April 13, 2009) is a trap for the unwary plaintiff's attorney. Unless the insurance policy provides otherwise (and most do not), simply sending a letter demanding UM/UIM arbitration is not enough. Instead, the notice must be sent by certified mail or hand-delivered like a lawsuit. Many plaintiff attorneys do not do this, and therefore, under the right facts, the insured claim may be time barred.

In July 2003, Plaintiff Robert Bonds (Bonds) was injured in an automobile accident. In March 2005, Bonds informed Defendant Farmers Insurance Company of Oregon (Farmers) that he intended to seek underinsured motorist (UIM) coverage pursuant to his UIM policy. The terms of Bonds's UIM policy mirrored the model terms set forth in ORS 742.504(12), including the two year limitation within which either an action must be filed or formal arbitration proceedings must be instituted. In response, Farmers sent two letters to Bonds. The first stated, "Should we disagree on the liability/damage owed by the underinsured motorist, [defendant] consents to submit this matter to binding arbitration." The second notified Bonds that Farmers disagreed over the extent of the damages owed. Two years and four days after Bonds's accident, Farmers informed Bonds that the time for resolving the dispute had expired. Bonds filed suit, seeking a declaratory judgment that his UIM claim was timely and an order compelling Farmers to arbitrate.

Farmers argued that ORS 742.504(12)(a)(B) stated that in order to toll the two-year limitation on a UIM claim, either the insurer or the insured must "formally institute arbitration proceedings." Farmers claimed that, for purposes of the statute, "institution" required an offer and acceptance to settle the dispute by arbitration. Farmers further argued that the "formally institute" language required compliance with the arbitration initiation procedures set forth in ORS 36.635(1), which requires one party to provide notice describing the nature of the controversy and the remedy sought in the manner provided for in the parties' agreement or, if the agreement does not specify, then by certified mail or by service under ORCP 7D. Farmers contended that the letters it sent did not satisfy either the "institution" or "formal" requirements. Bonds argued that "institute" required only a unilateral offer to arbitrate, such that Farmers' letter would suffice. Bonds countered that the "formally" requirement was met because Farmers' letter satisfied the terms of the parties' insurance contract for officially beginning the arbitration process.

The trial court ruled in favor of Bonds, holding that Bonds's claim was timely filed as Farmers' two letters "formally instituted arbitration." The Oregon Court of Appeals reversed.

The court concluded that each side was half-right. "Institution" requires only that one party begin the arbitration process. However, "formally" requires either initiating arbitration in a manner prescribed in ORS 36.635(1) or by some other agreed upon procedure that entails "the establishment and setting up of the formal process of arbitration." Thus, the mere notice of intent to arbitrate that was provided in Farmers' letters to Bonds did not satisfy the "formal" requirement. ❖

— Full Case Available at: www.publications.ojd.state.or.us/A134011.htm

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Medical Notes

Cold Laser Therapy

— by Thomas Freedland, DC
Article provided by Health Cost Management

"Captain, you're going to overload the phaser banks. You gotta shut it down now!"

Anyone who has watched television since 1966 should recognize the famous words of Montgomery "Scotty" Scott, Chief Engineer on Star Trek's the USS Enterprise. The "phaser" referred to was a further refinement of earlier energy beams, some only now coming into more routine use such as a "laser," an acronym for light amplification by stimulated emission of radiation.

The groundwork for the laser originated in 1917 with Albert Einstein's paper on the Quantum Theory of Radiation, but the first working demonstration of a laser would have to wait nearly a half century until May 1960. The typical immediate concept of a laser is a tool of destruction, a high energy beam that can cut or pierce a target, destroy a missile in flight, or shatter a kidney stone painfully making its transit through the body.

In more recent studies, it has been theorized that the use of low level light therapy in the form of a laser may provide an additional means of pain control for musculoskeletal conditions as well as enhancing the ability of the body to heal wounds. Within this context, there are two broad classifications of devices that are looked at. One is a low level laser and light therapy (LLLT aka phototherapy) as well as devices that are considered "hot" lasers, but still using relatively low levels of energy to the point where they are unlikely to result in tissue damage or injury to the eye.

In 2007 the Oregon Board of Chiropractic Examiners concluded evidence existed to allow the use of a variety of low-level lasers for musculoskeletal conditions. They cited that in 2002 the FDA granted clearance for the use of lasers for healing and pain relief of soft tissue disorders including carpal tunnel, rheumatoid arthritis, bursitis, and tendinitis. Their policy statement also required that the doctor and staff complete appropriate training using the device.

The research articles have varying conclusions as to the effectiveness of laser therapy on musculoskeletal conditions. There have been a number of studies where patients have displayed remarkable improvement with the use of laser therapy; yet, there are others where there was no difference between those that received laser therapy and those that did not. This discrepancy has led many insurance companies to take a position that the use of LLLT is still investigational. Regence Blue Cross of Oregon established a policy approved on May 20, 2008 that reads, "Low level laser treatment and laser acupuncture are considered investigational for all indications, including but not limited to the following: acute or chronic headache, acute pain, arthritis, back, neck, or shoulder pain, carpal tunnel syndrome, fibromyalgia, lateral medial epicondylitis, orthodontic pain, temporomandibular joint (TMJ) pain, tendinitis, other pain disorders, tinnitus, and wound healing."

We are thus faced with a dichotomy. Some governing bodies have endorsed the use of the laser for certain conditions; yet, there are others in the health industry that believe this position is premature and the laser is still experimental. For the benefit of the patient, it is incumbent to provide some latitude and look at the clinical reasoning provided by the doctor on a case by case basis. Using parameters such as the Official Disability Guidelines (ODG) and the ACOEM (American College of Occupational and Environmental Medicine) Practice Guidelines, clinical justification can be established with evidence-based response to treatment. In the performance of medical care involving a series of procedures, the provider should note the patient's response to treatment and if there is little or no change after six encounters, then it is unlikely that mode of treatment will provide clinical relief.

In reviewing and assessing the legitimacy of these services, the clinical documentation or daily chart notes should reflect the manner in which the treatment is provided. In this case the type of laser procedure, the location of the treatment on the patient's body, as well as the duration and settings. There should be a discussion in the notes on the date of the visit as well as on subsequent visits what response to the treatment was noted, specifically if it applies to the laser therapy. With such a controver-

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sial means of care, one would not expect to see a "shotgun approach" to treatment; thus, multiple modalities within the same visit would be contraindicated. Low-level laser with the addition of electrical stimulation or ultrasound, or some secondary procedure might be appropriate, but a battery of procedures including massage or manual therapy, traction, laser therapy, ultrasound, and electrical stimulation would obscure the ability to assess the efficacy of the treatment performed.

There is no specific AMA Current Procedural Terminology (CPT) code for any type of light therapy. Thus, CPT code 97139 (unlisted therapeutic procedure) could be used provided there is a specific explanation for the laser therapy. HCPCS has procedure code S8948, laser low level, 15 minutes; however, the S codes are temporary national codes initiated by private payers. There is no obligation for any individual insurance company or entity to honor the S series codes. It still becomes incumbent to provide as much clarification within the documentation as possible as to the procedure performed.

Those reviewing such cases may need to check the documentation relative to the procedure to determine whether the provider has given a clinical rationale for the laser therapy and in turn has provided support for its ongoing use. Thus in cases where there may be a suggestion that musculoskeletal pain exists and may be responsive to such treatment, an endorsement for a few visits may be given, but additional clinical documentation would be necessary to support continued utilization of the therapeutic procedure.

We have not reached the point where Dr. "Bones" McCoy can scan his tricorder about the patient's body to determine the appropriate treatment and then institute it as they lay on a bed with a monitor mounted above their head. Instead, we must rely on Scotty's words, "Captain, I'm not sure if this thing is going to work but we'll give it a try." ❖