October 31, 2008

California Orthopaedic Association

SUMMARY of STATE LEGISLATIVE/REGULATORY ISSUES 2007-2008 LEGISLATIVE SESSION

The 2007-2008 Legislative Session has now concluded. Legislators left Sacramento after disappointing efforts to reform health care, resolve budget deficits, and fine-tune the Workers' Compensation Utilization Review process. COA, however, had many successes on bills that we sponsored, opposed, or to which we sought amendments. They are described below.

Prohibition on Balance Billing

In July, 2006, Governor Schwarzenegger issued an Executive Order to the Department of Managed Health Care (DMHC) asking the Department of Managed Health Care to take action to protect Californians from balance billing. In response to this Executive Order, the DMHC issued draft regulations making it illegal for non-contracted providers to balance bill patients for services rendered in the emergency room and expanded the Gould criteria for determining reasonableness of fees charged.

COA joined with other health care professionals adamantly opposed to these regulations. We also questioned the Department's ability to regulate physicians and opposed expansion of the Gould criteria for establishing reasonable reimbursement rates. We argued that the Department is authorized to regulate health plans, not physicians or their reimbursement rates. Public hearings were held, but due to the opposition, the regulations did not move forward.

In September, 2007, the Department issued another set of regulations on this issue. These regulations still prohibited balance billing, but set a floor reimbursement of 150% of Medicare 2007 as the minimum payment to non-contracted providers. The regulations included a mechanism for an annual increase. In addition, the regulations set-up an expedited appeal process that the physician could invoke if he/she felt the reimbursement was too low.

Again, a public hearing has been held with more tentatively scheduled in November, 2007. Physicians continued to be opposed to these revised regulations, indicating that carriers should pay the bill as billed and be able to invoke an appeal process should they feel the payment was excessive. Witnesses testified that physicians would not have the resources to file these appeals. With this payment level in place, the carriers would have no incentive to reasonably contract with providers. CMA remains opposed to the regulations and believes that if the Department moves forward with the regulations as proposed, they will sue and win the case based on the regulations going beyond the authority of the Department.

In the meantime, the emergency room physicians have taken the lead and proposed numerous options to the Department for resolving this issue. One ER doctor indicated that they have put together 30-40 potential options, including the latest one – establishing a minimum payment level.

COA's Board of Directors has previously taken an oppose position on any prohibition on balance billing patients for emergency room care and remains opposed to the regulations. In spite of opposition from medicine, the DMHC has approved regulations which declare balance billing to be an "unfair billing pattern." The regulations went into effect on October 15. **COA has joined the CMA and other medical specialties in filing a lawsuit asking the courts to declare the regulations illegal, as we believe they exceed the authority of the Department.** The DMHC is authorized to regulate health plans, not physicians. Our first court hearing will be in November, 2008.

Balance Billing

SB 981 (Perata) was an effort by the emergency room physicians to resolve the Department of Managed Health Care Services' concerns that non-contracted physicians were inappropriately balance billing patients when their carrier refuses to pay the physician's charges. The bill would only have applied to emergency room physicians. COA reviewed the bill, but did not ask to be amended into the bill as we were opposed to the principle of not being able to bill patients for the services we render in the emergency room. The bill passed the Legislature, but was vetoed.

Digital Radiologic Technology

SB 1670 (Aanestad), a COA-sponsored bill in the 2005-2006 Legislative Session allows limited licensed x-ray technicians (XTs) to operate digital radiologic equipment after they complete 20 hours in continuing education

credits in digital radiographic technology. The bill was signed into law in 2006. Previously the Radiologic Health Branch had adopted a regulation that prohibited XTs from operating digital equipment. Since the availability of CRTs is limited and the cost of hiring them significantly greater, this prohibition could have limited an orthopaedic surgeon's ability to have in-office radiologic services. This had become more and more of a problem for orthopaedic offices as they convert their analog equipment to digital or install digital equipment. The Radiologic Health Branch has finalized its regulations implementing SB 1670 and are approving schools to offer the course.

Scope of Practice Issues

Physical Therapists
The highest priority for the Physical Therapy Association this year has been AB 1444 (Emmerson), a bill which would have expanded a physical therapist's scope of practice to allow them to have direct access to patients. This means that a patient could be treated by a physical therapist before a physician and surgeon has examined the patient and made a diagnosis. COA has adamantly opposed this bill. Physical therapists who continue to push for the passage of this bill simply do not respect the important role of the physician making the medical diagnosis to rule out underlying causes of joint pain such as tumors and cancer before beginning a course of physical therapy treatments. They worked hard to gain support for the bill. Due to COA's opposition, the bill did not meet its legislative deadlines and has died.

Another physical therapy bill of interest was, **AB 2111 (Smyth).** For purposes of licensure, this bill would have required physical therapists to be tested in examination and evaluation, diagnosis, prognosis, treatment intervention, prevention, and consultation skills. Several of these areas are beyond the scope of practice of a physical therapist. COA opposed this unnecessary testing and the language was deleted. As amended, the bill was signed into law.

Radiologist Assistant
AB 623 (Lieu) proposes to establish a new radiology category called a "radiology assistant." This concept has been previously introduced in SB 700 of the 2005-2006 Legislative Session. A radiology assistant would be a "super" certified radiologic technologist who could only work under the supervision of a radiologist. The State Radiologic Health Branch would have been charged with adopting regulations to establish protocols for these radiology assistants that are consistent with guidelines adopted by the American College of Radiology. The ACR could then establish standards allowing only radiology assistants to perform the high end diagnostic tests; and thus, eliminate these tests from physicians' offices unless a radiologist was on-site. COA continued to oppose this bill.

The radiologists' concern with allowing other physicians to supervise a radiology assistant is that the assistant would have a broader training than the physician's actual practice. They feared that the physician would ask the radiology assistant to perform services beyond the physician's normal practice. To address that concern, COA offered amendments which clarified that a physician not specializing in radiology may supervise an RA only within their area of specialization. The author accepted the amendments, but as amended the radiologists dropped the bill.

Leased Diagnostic Imaging Services
AB 2794 (Blakeslee) will prohibit a physician from charging, billing, or soliciting payment for performance of the technical component of the diagnostic service if the physician did not actually perform the service. This bill is to rein in leasing arrangements in which the physician is leasing time on the diagnostic equipment, but not actually performing the service. COA sought amendments to clarify that the bill would not apply to services rendered within a physician's office. The author accepted COA's amendments. As amended, the bill passed and signed into law.

Acupuncturist – Low-Level Laser Stimulation
AB 636 (Levine) would have added the use of "low-level laser stimulation to the modalities that may be performed by an acupuncturist. This therapy would have been performed with a biostimulation laser device designated as a class IIb laser by the FDA. This bill failed passage in Committee.

Scope of Practice - Nurse Practitioners
AB 1436 (Hernandez) - This bill would have significantly expanded the scope of practice of a nurse practitioner. The bill attempted to recognize nurse practitioners as independent practitioners and would have authorized them to provide comprehensive health care including making diagnoses and initiating emergency procedures. The Board of Registered Nursing would have been given the sole authority for oversight. The bill was opposed by medicine and failed passage in Committee.

Workers' Compensation

Post-Surgical Rehabilitation Services
In response to statewide complaints regarding the Workers' Compensation Utilization Review system and your inability to obtain authorization for post-surgical rehabilitation services for injured workers. COA sponsored **AB 1073 (Nava)** to exempt post-surgical rehabilitation from the existing 24 visit cap. AB 1073 was passed and signed into law. The bill will go into effect January, 1, 2008. Under AB 1073, post-surgical rehabilitation services are exempt from the 24-visit cap as long as they comply with rehab guidelines developed by the Division of Workers'

Compensation. COA is working with the Division to develop these guidelines, seeking input from our members. The guidelines are expected to be in place early next year.

Utilization Reviewers
COA supported, **AB 2969 (Lieber),** a bill sponsored by the California Society of Industrial Medicine and Surgery (CSIMS). AB 2969 would have required **physicians performing utilization review under the Workers' Compensation system, to be licensed in California.** California licensure is important so that there is oversight and a remedy should these UR physicians make inappropriate medical decisions. COA had included similar language in legislation we sponsored last year. The bill made it to the Governor's desk, but unfortunately was vetoed. COA will continue to look for ways to make UR physicians more accountable for the decisions they are making.

Utilization Review Toolkit
COA has developed an on-line Utilization Review Toolkit to assist members in the utilization review process. The Toolkit includes: a sample appeal letter, UR Flowchart to assist members in understanding the process, Authorization for Medical Treatment form, DWC complaint form, and reference to important UR Labor Codes and regulations. The Toolkit is available on COA's website: www.coassn.org

Official Medical Fee Schedule - Physician Services
Efforts have begun to update the Official Medical Fee Schedule for physician services to the 2008 CPT coding system. In addition, the fee schedule will be converted to an RBRVS-type system. This does not necessarily mean that reimbursement will be reduced. The multiplier will be key to this discussion. COA has argued that reimbursement should not be reduced as a result of this transition. In fact, it should be increased since fees have not been increased for over 10 years. The DWC has commissioned The Lewin Group to make recommendations on this transition and provide an assessment of the impact on each procedure. In addition, COA has been part of discussions to update the Ground Rules to be more consistent with Medicare coding rules. These discussions will begin in earnest in 2008.

In preparation for this transition, COA has surveyed its members to assess the impact of the reforms and to determine whether injured workers' access to musculoskeletal services has been negatively impacted. The survey found that there is a trend toward orthopaedic surgeons leaving the Workers' Compensation system statewide. We have cautioned the DWC that this trend will continue if reimbursement is reduced.

Discrimination in Disability Evaluations
SB 1115 (Migden) would have prohibited discrimination on the basis of race, religious creed, color, national origin, age, gender, marital status, sex, or genetic predisposition in any Workers' Compensation disability determination. COA opposed this legislation as being unnecessary. The Governor agreed and vetoed this bill indicating that there are already laws prohibiting discrimination.

Medical Evidence Evaluation Advisory Committee
In response to complaints that ACOEM's Practice Guidelines do not cover chronic conditions, the DWC has formed the Medical Evidence Evaluation Advisory Committee (MEEAC) to assist them in refining the guidelines. COA's representative on the Committee is Peter Mandell, M.D. To date they have adopted refined guidelines for elbow injuries and acupuncture. They are also developing the post-surgical rehabilitation guidelines required by AB 1073 to which COA is providing input from our members. These guidelines are expected to be patterned after the ODG Post-Surgical Rehabilitation Treatment Guidelines. The Committee has also reviewed low back guidelines from ACOEM.

Claims Processing
SB 906 (Runner) as originally introduced would have clarified that pharmacies could contract with an outside agent for purposes of submitting their billings. The bill was amended to apply to all providers of medical treatments. In addition, it contained confusing language which could have been interpreted to mean that the maximum reimbursement level due a provider would be the lesser of either the OMFS rates or the rates under any other contract to which the provider had agreed to. There were several problems with this language including who would decide which reimbursement level would apply and whether the language violated other contract laws. COA expressed concern with the bill indicating it has gone way beyond the original intent of the bill affecting all providers not just pharmacies. The bill was ultimately vetoed by the Governor.

Integrated 24-hour Coverage
AB 550 (Ma) would have established a "24-hour care" pilot project that would allow participating employers to direct treatment for occupational injuries to their workers' group health providers. The plan was drafted by a task force consisting of employers, labor representatives, and health care providers whom the Governor asked to devise a way of combining group health with workers' compensation medical care. The bill was amended late in the session and has become a two-year bill.

Whistleblower Protection

AB 632 (Salas) clarifies that a physician and surgeon is protected as a whistleblower when information is given to a health care facility, government accreditation committee, or peer review body.
COA supported this bill which was signed into law.

Never Events

AB 2146 (Feuer) would have prohibited reimbursement for hospital-acquired conditions and adverse events. The bill attempted to define which conditions are "never events. " This proved to be very difficult. While there was agreement that a hospital or provider should not be reimbursed for performing the wrong procedure or on the wrong limb, many of the conditions included in the definition, were beyond the control of the surgeon. COA opposed the bill as a result of these concerns. The bill died in Committee.

HMO Fines

SB 1379 (Ducheny) closes a loophole that allowed health plans to benefit from violating the law. HMO fines will no longer be used to offset the fees they pay to the Department of Managed Health Care. The fines will instead be donated to the Steve Thompson Loan Repayment Program (STLRP) and the Major Risk Medical Insurance Program (MRMIP). STLRP provides loan forgiveness to medical school graduates who agree to practice in underserved areas. MRMIP provides insurance to those with pre-existing medical conditions who cannot obtain coverage in the open market. This bill passed and was signed by the Governor.

Corporate Ban on the Practice of Medicine

AB 1640 (Ashburn) would have eliminated the corporate bar on the practice of medicine by affirmatively stating that corporations may have the professional rights, privileges, and powers of physicians. This billed failed passage.

Medical Records

SB 1415 (Kuehl) - Medical Record Retention
This bill would have required physicians to provide notice to their patients as to their policy on retention of their medical records. The bill went through many different versions of how physicians would be required to give notice to their patients. All of the versions would have clearly been an additional burden on physicians. While current law on the retention of medical records could use some clarification, there was no consensus on the process. COA opposed this bill because it added this new burden on physicians. The bill passed the Legislature, but was vetoed.

AB 211 (Jones) - Patient Confidentiality
AB 211 requires all health care providers to implement safeguards to protect the privacy of patient's medical records. This bill responds to incidences in hospitals where patient medical information was disclosed to unauthorized individuals. The bill sets up fines and penalties for failure to take reasonable steps to protect patient information. The bill passed and was signed into law.

Motorcycle Safety Helmets

AB 425 (Adams) - Safety Helmets—Motorcycles
This bill would have exempted from the motorcycle helmet law, a driver who is 18 years of age or older who has either completed a motorcycle rider training program or has been issued a class M1 license. The AAOS and CMA were instrumental in requiring motorcycle riders to wear safety helmets. The bill failed passage in the Transportation Committee.

Health Care Reform

Governor Schwarzenegger has declared 2007 the year for health care reform. The Governor's initial proposal, while including some good reforms such as an individual mandate to have health insurance, it also included onerous provisions such as a 2% tax on providers. COA opposed this new tax on providers. We developed our own list of health care reform principles which we presented to the Governor's spokesperson on health care reform at COA's 2007 Annual Meeting/QME Course in Monterey. Ongoing legislative hearings continue to be held in an effort to reach consensus between the Governor's proposal and a proposal developed by Democrats in the State Legislature. Reform discussions reached an impasse. No reforms were adopted.