

NEW YORK
LONDON
SINGAPORE
PHILADELPHIA
CHICAGO
WASHINGTON, DC
SAN FRANCISCO
SILICON VALLEY
SAN DIEGO
LOS ANGELES
BOSTON
HOUSTON
DALLAS
AUSTIN
HANOI
HO CHI MINH CITY

Duane Morris®

FIRM and AFFILIATE OFFICES

GREGORY A. BRODEK
DIRECT DIAL: +1 207 262 5440
PERSONAL FAX: +1 207 433 1164
E-MAIL: GABrodek@duanemorris.com

www.duanemorris.com

SHANGHAI
ATLANTA
BALTIMORE
WILMINGTON
MIAMI
BOCA RATON
PITTSBURGH
NEWARK
LAS VEGAS
CHERRY HILL
LAKE TAHOE
MYANMAR

ALLIANCES IN MEXICO
AND SRI LANKA

May 24, 2021

VIA EMAIL AND FEDEX

Michael Kolosky
Associate Chief Counsel
Cigna
900 Cottage Grove Rd
Bloomfield, CT 06002

Re: Improper Change Regarding Payment for the Professional Component of Clinical Pathology Services

Mr. Kolosky:

We represent the Ohio Society of Pathologists (the “Society”) and are writing to express the Society’s grave concern over Cigna’s proposed change in its reimbursement policy pursuant to which it intends to cease paying altogether for the professional component of clinical pathology services (“PCCP Services”). In its recent announcement received by our members, Cigna states that, effective July 10, 2021, it intends to no longer make payment for claims for PCCP services submitted with Modifier 26 “when applied inappropriately based on the CMS National Physician Fee Schedule” (“New Policy”). As Cigna has acknowledged for years, PCCP Services are covered services for which Cigna health plan participants are entitled to receive benefits and for which the Society members that perform those medically necessary services are entitled to be paid. As such, there is no basis upon which Cigna can simply cease to pay for these services.

The only documentation we have seen setting forth Cigna’s rationale for implementing this unilateral change is a form announcement circulated on April 6, 2021, suggesting that the change is consistent with CMS policy. The implicit premise behind Cigna’s intended “policy update” is misplaced. Medicare has always recognized PCCP Services as compensable services.

DUANE MORRIS LLP

88 HAMMOND STREET, SUITE 500 BANGOR, ME 04401-4953

PHONE: +1 207 262 5400 FAX: +1 207 262 5401

Michael Kolosky
May 24, 2021
Page 2

The only thing that has changed is the manner in which CMS pays for these services. Hence, an assertion that Cigna's New Policy aligns with, or is otherwise supported by, CMS policy is erroneous.

The Society has identified multiple legal, contractual principles and authority that prohibit Cigna's unilateral refusal to pay for PCCP Services including, without limitation, the inability to make a unilateral change to a fundamental term of a contract, potential benefit plan violations, course of dealing and waiver considerations, and the covenant of good faith and fair dealing, just to mention a few. Pathologists spend a significant amount of time and effort fulfilling their responsibility to provide quality laboratory services to their patients and fellow practitioners, and ultimately shoulder the medical and legal responsibility for such services. With COVID-19 testing at the forefront of containing the pandemic, it is essential that pathologists be appropriately paid for the services they provide.

Indeed, Ohio law makes clear that PCCP Services are basic health care services that must be covered. Specifically, Ohio law requires health plans such as Cigna to provide basic health care services, which include emergency care, inpatient care, outpatient care, preventive health services, and "laboratory" services. Ohio Rev. Code Ann. §§ 1751.01, 175.02(I). Furthermore, health insurance corporations who fail to provide basic health care services shall be deemed to have "failed to substantially comply" with the law and can lose their authority to operate in the state. Ohio Rev. Code Ann. § 175.02(I). Furthermore, in cases where courts have looked at the issue, they found that pathologists are entitled to be paid for the PCCP Services they render. For example, in *Smith v. Peoria-Tazewell Pathology*, Case No. 94-L-245, 1997 WL 34658434, *2 (Ill. Cir. 1997), the court held that "[t]here is no genuine issue of material fact that the Pathologists provide medical services of value to all patients who have laboratory tests performed at the hospitals at which the Pathologists practice." Additionally, in *Neighborhood Clinics, L.L.C. v. Pathology CHP. S.C.*, Case No. 2005-CH-02692 at *7, *13 (Ill. Cir. 2008), the court, finding "it is not unfair that the patients pay for the pathologists' quality control services in assuring that the pathology lab established by the Hospital is run properly," held that "it does not violate the principles of justice, equity and good conscience to allow the pathologists to retain [professional component of clinical pathology] payments they received from [the payor] on the patients' behalf."

Finally, we note that payment for these services is further required by federal law when provided in connection with emergency services. Both the Emergency Medical Treatment and Active Labor Act of 1986 ("EMTALA"), and the Patient Protection and Affordable Care Act ("ACA") require that pathologists receive payment for the pathology services they provide to Cigna patients in connection with emergency medical services. Specifically, the ACA amended section 2719A of the Public Health Service Act to require that health insurers like Cigna pay for emergency services, which necessarily include the type of diagnostic services for emergency department patients provided by the pathologist through PCCP Services. Accordingly, Cigna's stated intention of refusing across-the-board to pay for the PCCP Services rendered by the Society members would also violate federal law.

Michael Kolosky
May 24, 2021
Page 3

We respectfully ask Cigna to immediately reverse its recent decision to no longer pay for PCCP Services. We ask you to please respond to this letter in writing within two weeks. In the meantime, I would welcome the opportunity to discuss this matter with you.

This letter is sent with a full reservation of rights as to all claims, rights, and defenses to which the Society and/or its members may be justly entitled, whether at law or in equity, and nothing herein should be interpreted as a waiver, estoppel, or ratification of any claim, right, or defense that it may have, now or in the future. All such claims, rights and defenses are fully reserved.

Very truly yours,



Gregory A. Brodek

GAB
Cc: Tyler Brody; Jeffrey Linstone (via e-mail)