

“Peer review” farce

Physician battles Dalhart hospital

BRETT BUCHANAN



Van Mask, MD, travels with his horse and mule while working as an emergency medicine locum tenens physician. He sued Coon Memorial Hospital in Dalhart for libel, slander, defamation, and falsely representing that he and seven other physicians had “quality and liability issues pursuant to a review by a medical staff committee.”

“The lawsuit depleted me of all my savings.”

BY CRYSTAL ZUZEK For the past 24 years, Van Mask, MD, has traveled throughout the United States as an emergency medicine locum tenens physician. He often calls the hospital parking lot home, living in his trailer before hauling his horse and mule to the next town needing his services. In late 2010, he was making arrangements to work holiday shifts at a Lubbock hospital emergency department when his life changed.

"My shifts were canceled, and the company wouldn't tell me more. I didn't know what to think."

"A day or two before my first shift, I got a call from the staffing company, which notified me there were 'issues with my credentials.' My shifts were canceled, and the company wouldn't tell me more. I didn't know what to think. I have a clean record, and I filled out all of the paperwork on time," Dr. Mask said.

Without getting any more information, Dr. Mask assumed the cancellation was an anomaly.

That was until another staffing company told him a Texarkana emergency department had removed him from the schedule. Other hospitals in Texas and New Mexico did the same.

Then in the summer of 2011, he found out why, thanks to an unnamed "Good Samaritan," who gave him a copy of a letter that Dallam-Hartley Counties Healthcare System Chief Executive Officer Leroy Schaffner sent Texas-based staffing company Concord Medical Group Inc. in July 2010. Mr. Schaffner recommended that Dr. Mask and seven other physicians under contract with the company discontinue working at Coon Memorial Hospital in Dalhart. Mr. Schaffner cited "quality and liability issues" per a review by the hospital's ER/Trauma Committee.

"I felt sick when I read the letter, and I was totally shocked," Dr. Mask said.

From November 2009 to April 2010, Dr. Mask worked at Coon Memorial un-

der a contract between the hospital and Concord. During that time, he says, no one at the hospital ever approached him with concerns about his work, and the hospital never restricted or terminated his privileges.

With his livelihood and professional reputation on the line, Dr. Mask turned to the Texas Medical Association for help. A TMA staff attorney gave him a list of health law attorneys. He chose Harlingen attorney Will Hughes to represent him in his lawsuit against Coon Memorial. He sued the hospital for libel, slander, defamation, and falsely representing that he and seven other physicians had "quality and liability issues pursuant to a review by a medical staff committee." He sought compensation for damage to his character and reputation and non-economic damages for mental anguish and loss of future earning capacity.

TMA filed a friend-of-the-court brief supporting him in April.

In the brief, TMA argued in part that the hospital's ER/Trauma Committee, composed primarily of nonphysicians, didn't appear to be a medical peer review committee under Texas law.

TMA said the hospital's "peer review" committee consisted of Mr. Schaffner, a surgery scrub technician, the hospital laboratory director, an ambulance driver, a hospital administrator, a licensed vocational nurse, a respiratory therapist,

and an emergency department physician. "With the exception of the lone physician on the committee, these individuals are not 'peers' as contemplated by the statutes at issue, capable of evaluating the quality of medical and health care services and the competence of physicians who are the subject of the committee's review."

Mr. Hughes says the nonphysician members of the committee said in their depositions that they weren't competent to evaluate Dr. Mask.

"The only physician member of the committee said he didn't know of any liability or quality issues involving Dr. Mask. During this lengthy case, Dr. Mask and I were under the impression there might be legitimate issues involving his care. This caused Dr. Mask great concern because he had to file suit and conduct discovery to ultimately learn he had done no wrong," Mr. Hughes said.

During the case, Dr. Mask learned Coon Memorial asked Texas A&M Health Science Center Rural and Community Health Institute to review his work at the hospital. The center concluded he hadn't deviated from the standard of care.

After TMA filed its brief, Coon Memorial retracted its argument that the ER/Trauma Committee was a peer review committee under Texas law and settled the case. The settlement terms of the case are confidential.

Robert L. Hargett, Coon Memorial's attorney in the suit, says it was unfortunate Dr. Mask's name was included in a letter suggesting there were quality or liability issues associated with care he provided.

"On further investigation, the hospital determined Dr. Mask had no such quality or liability issues. As a governmental unit, the hospital and its administrator had viable affirmative defenses that we are confident would have resulted in a favorable disposition; however, settling the case was the practical and right thing to do," Mr. Hargett said.

The legal battle took a financial and emotional toll on Dr. Mask. He was pitted against a large hospital system with abundant financial resources. "The lawsuit depleted me of all my savings. Even after it was obvious the hospital was

going to settle, they kept filing motions that cost me \$25,000 to answer. Their tactic was to deplete my financial resources, and that's just what they did," he said.

He says the road to settle the suit was "an uphill battle," and it helped to have TMA in his corner. "It was comforting to know someone cared about what I was going through."

Mr. Hughes also appreciates TMA's support.

"I believe the trial court gave great weight to the TMA briefing on the issue of what is and what is not a medical peer review committee," he said.

The other seven physicians have not sued the hospital.

A fair review

TMA advocates a peer review system that improves patient care standards. TMA's policies on medical peer review promote a fair, reasonable system; the association condemns peer review abuses that harm physicians and have negative ramifications for patient care. (See "TMA Supports Fair, Effective Peer Review," at right.)

Doctors subjected to unwarranted peer review action can sue. The Texas Medical Practice Act and the Health Care Quality Improvement Act of 1986 require health care entities, such as hospitals, medical societies, and HMOs, to follow certain standards and procedures when evaluating a physician's delivery of care. The law gives physicians the right to due process, notice, and an opportunity to request a hearing. It says a physician shall receive a copy of the committee's final decision, including a statement of the basis for that decision if the peer review committee takes action that could result in suspension, restriction, limitation, revocation, or denial of membership or privileges at a health care facility.

Dr. Mask's lawsuit charged that Coon Memorial failed to meet its legal obligations to due process. Mr. Hughes argued Mr. Schaffner's letter and the ER/Trauma Committee's action affected Dr. Mask's ability to practice at other institutions. Dr. Mask says he never received notice or an opportunity to have a hear-

ing and alleges the hospital's conduct constituted "sham peer review."

Lessons learned

Dr. Mask's suit against Coon Memorial Hospital has broad implications for physicians across Texas.

"Doctors who leave hospitals should always check with the medical staff coordinators and the credentialing and ethics committees to make sure there is no negative information in their files that could be transmitted on to subsequent hospitals. If there is, the physician should clear up whatever needs to be cleared up," Mr. Hughes said. "A mistake by one hospital where the doctor worked years ago can have really bad consequences."

Mr. Hughes offers some guidance for physicians to make sure their rights are protected during a peer review.

"Peer review by individuals from the same discipline with essentially equal qualifications promotes better medical care and improves patient safety. I would

TMA supports fair, effective peer review

TMA's policy on peer review denounces use of a review for non-patient care issues aimed at penalizing physicians for other business, financial, or administrative reasons.

The policy says TMA will work to:

- Ensure accused physicians receive reasonable rights and due process for peer review and quality assessment efforts;
- Solicit member input and address issues on misuse of the peer review process or "disruptive physicians" policies by health care facilities or peer review entities;
- Educate and inform members about the potential misuse of peer review;
- End the use of "disruptive physicians" policies extended to non-patient care issues, such as economic credentialing, failure to support marketing or business plans of the hospital or health care facility, or when physicians raise serious quality or patient safety issues about the facility and their practice;
- Strongly condemn sham peer review and manipulation of medical staff bylaws by hospitals attempting to silence physician concerns for access to quality care at hospitals; and
- Aggressively oppose sham peer review, manipulation of medical staff bylaws and enforcement of such bylaws, and other tactics that chill or inhibit staff physicians' ability to advocate for their patients.

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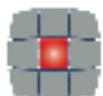
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advise any doctor to take any attempt by a physician peer or colleague to discuss his or her care seriously. Should the situation escalate past collegial intervention and should a medical staff launch a formal investigation, I recommend a physician retain competent counsel early in the process," he said.

He suggests physicians undergoing peer review examine the applicable medical staff bylaws and attend meetings to explain their side of the story.

"Most institutions follow a formal process set forth in the medical staff bylaws affording a doctor with adequate notice of the physician's right to a hearing following an investigation, as well as an appeal process," Mr. Hughes said. "Typically, physicians have opportunities along the way to resolve legitimate concerns."

Dr. Mask's ordeal has a happy ending. He's practicing unimpeded as an emergency locum tenens physician in Texas and New Mexico. He says he learned a lot from his experience and wants other doctors to take note.

"Physicians would be wise to ask each hospital they work with to provide them with a performance report annually. If there's a problem, physicians need to be sure they know about it," he said.

Should a problem arise, Dr. Mask encourages his colleagues to contact the TMA Knowledge Center for assistance by phone, (800) 880-7955, or by email, knowledge@texmed.org.

Aetna to pay \$120 million in claims dispute

Aetna's creation of a \$120 million fund to pay physicians for out-of-network claims moved closer to reality in August when a New Jersey federal judge tentatively approved a settlement of the class action lawsuit by the Texas Medical Association and its organized medicine partners. Final approval is set for March. To read the settlement, visit <http://bit.ly/16BxmsN>.

The \$120 million will come in two

parts. Half will cover claims from physicians and patients who qualified to be parties to the case but do not have the documentation to show how much Aetna owes them. It also covers attorneys' fees and administrative costs. The second will pay claims from physicians and patients who have the documentation.

The agreement, reached last December, calls for a settlement administrator to officially notify physicians of the settlement by Dec. 28. The notice will tell physicians what they need to do to file a claim. Claims must be submitted by March 28, 2014. The settlement applies to physicians who were out-of-network providers "at any time" from June 3, 2003, through Aug. 30, 2013, the date the judge preliminarily approved it, and whose claims Aetna did not pay in full.

TMA, the American Medical Association, and the medical societies of California, Connecticut, Florida, Georgia, North Carolina, New Jersey, New York, Tennessee, and Washington sued Aetna in 2009 over its use of databases licensed from Ingenix, a UnitedHealth Group Inc. subsidiary. Ingenix underpaid physicians for out-of-network services, the lawsuit said.

It also challenged other ways Aetna determined out-of-network payment rates and accused Aetna of failing to disclose how it figured those rates. A patient filed a similar suit in 2007.

Aetna, United, and other insurers agreed to stop using the Ingenix database in settlements with the New York State Attorney General in 2009. That settlement created FAIR Health, www.fairhealth.org, to take over and improve the database and establish transparent, current, and reliable health care charge information.

solve civil Medicaid fraud claims, according to Texas Attorney General Greg Abbott. Also named in the settlement is co-defendant The Harvard Drug Group, LLC.

Texas accused Michigan-based Major Pharmaceuticals of misreporting the price of various generic drugs to the Medicaid program. The action resulted in Medicaid being overcharged for certain Major Pharmaceuticals products.

Under state and federal law, drug manufacturers must file reports with Medicaid that disclose the prices they charge pharmacies, wholesalers, and distributors for their products. When manufacturers improperly report inflated market prices for their drugs, Medicaid reimburses pharmacies at vastly inflated rates. The difference between the reimbursement amount and the actual market price is referred to as the "spread."

The attorney general charged Major Pharmaceuticals with using its illegally created spreads to unlawfully induce pharmacies and other providers to purchase the company's products.

Ven-A-Care of the Florida Keys Inc., a pharmacy, first identified the defendants' improper price reporting and subsequently filed a whistleblower lawsuit pursuant to the Texas Medicaid Fraud Prevention Act.

Texas intervened in the case to recover fraudulent overpayments made by the Medicaid program to pharmacies based on the prices reported by Major Pharmaceuticals. The Medicaid Fraud Prevention Act entitles Ven-A-Care to a share of the overall recovery. ■

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Texas settles \$5 million Medicaid fraud case

Texas and the federal government will equally share in a \$5 million settlement with Major Pharmaceuticals Inc. to re-



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As Wise — Immunize™ is a service mark of the Texas Medical Association. This settlement was reached in January 2013. The Medicaid Fraud Prevention Act of 2009, which was signed into law on Nov. 20, 2009, prohibits health care providers from submitting claims for services that are not medically necessary or reasonable and necessary.