

This article is based on a presentation by Jennifer Flynn, CPHRM, Risk Manager, Healthcare Providers Service Organization, and Lynn Pierce, BSN, RN, CPHRM, Risk Control Director, CNA Healthcare, at the 2018 FSBPT Annual Meeting.

Stay Ahead of the Curve: Trends in Physical Therapy Professional Liability Claims

As the provider of malpractice insurance for physical therapists, HPSO and CNA, the underwriter for the HPSO program, publishes a claims analysis which looks at the top areas of loss and situations that create liability exposures for PTs. This raises awareness and provides risk control information to PTs so that they can incorporate measures into their practice to increase patient safety outcomes and decrease the likelihood of a liability lawsuit.

The report has three parts. Part 1 looks at malpractice claims. This is a quantitative analysis where, within each claim file, HPSO looked at the top allegations, the injury that happened to the patient, and where the incident occurred. Part 2 of the study looked at license or disciplinary defense complaints: what was the allegation and what was the outcome? Part 3 of the report is a qualitative survey that contained demographic and workplace questions. There were questions that we could not answer in the claim file itself, so we deployed a qualitative survey for individuals who experienced a claim and compared that to a similar data set of individuals who did not experience a claim. The full survey results are found in the full report.

The 2016 Claims Report looked at a five-year set of claims (January 1, 2010 through December 31, 2014). We looked at all the incidents that came in, and we put some criteria to it to narrow the focus. We had over 3,000 incidents that we narrowed down to 443 claims that met our criteria.

We looked to see that the claim closed or resolved in a five-year period. We looked to see that the claim was against a PT, a PTA, or a PT practice. Finally, we looked at claims that were over \$10,000. The reason

we chose claims over \$10,000, is that it gives us greater insight into the deviations from standard of care that led to that patient injury.

For comparison we looked at the 2011 data set which was a ten-year view of claims (January 1, 2001 through December 31, 2010). This previous set had a similar number of claims (477).

Case Study 1

- A thirty-two-year-old patient was prescribed therapy after undergoing an arterial bypass procedure on the right leg for a popliteal artery entrapment.
- On evaluation, the patient had a complex medical history that included morbid obesity, diabetes and chronic leg pain.
- The social history revealed that the patient had a sedentary occupation, smoked a pack of cigarettes a day, and occasionally used alcohol.
- Because of the patient's size and post-surgical pain and numbness, the patient had difficulty bearing weight on the right leg and used crutches to ambulate. The patient was on several pain medications, which included hydromorphone, a non-steroidal anti-inflammatory, and Lyrica.
- The patient's surgeon prescribed physical therapy for three months to assist with mobility and strengthen the lower extremities.
- The patient attended three sessions of therapy, and at the end of each session the PT would have the patient use a transcutaneous electrical nerve stimulation (TENS) unit for twelve minutes.
- The PT adjusted the voltage based on the patient's comfort level and told the patient to let the PT know if the unit caused any discomfort.
- The patient seemed to enjoy the nerve stimulation, reporting that the TENS unit was the only thing that really seemed to be bringing feeling back into the leg and making the patient feel better.
- On the day of the incident, the patient completed a session with the TENS unit.
- When the PT took the pads off of the leg, the PT noticed two round red marks that appeared to be burns. Neither the patient nor the PT believed the burns were serious enough for the patient to go to the emergency department.
- Antibiotic ointment was applied to the burns, and the PT instructed the patient to follow up with the practitioner if needed.
- The TENS unit was checked and was in good working order. The only possible source for the burns appeared to be the pads, which looked a little worn.
- The following day, the patient called the PT to let the PT know the patient needed to go to the doctor because the burns were looking worse.
- During a follow-up telephone call, the patient informed the insured PT that the patient had been diagnosed with third-degree burns and would need debridement and skin grafts, as the burns were serious.
- The patient continued physical therapy as much as possible, but it was complicated because of the treatment of the burn and subsequent pain.
- Two months after the incident, the patient was diagnosed with reflex sympathetic dystrophy (RSD), experiencing temperature intolerance, excessive sweating, stress, and insomnia due to the pain.
- The RSD symptoms also prevented the patient from working. As a result, the patient and the

patient's family lost their health insurance benefits and suffered potential bankruptcy. Allegations included improper performance using therapeutic exercise and failure to monitor the patient during treatment.

What the Experts Said

- The patient pursued a claim against the PT, as well as the PT's employer. The claim was difficult to defend because of the absence of written policies and procedures, as well as the PT's lack of training on how to appropriately use the TENS unit.
- During the insured PT's deposition, the PT stated knowing how to use a TENS unit from experience, but the PT had never received any formal training from the employer relating to the manufacturer's guidelines.
- Based on the PT's own experience with the unit, the PT believed that the amount of voltage used on the TENS unit is up to the patient and noted that if the stimulus was painful to the patient, the PT would certainly bring it down.
- It was the defense counsel's opinion that the treatment of this patient was within the standard of care, specifically, the use of the TENS unit. However, the burns, which were serious and required several debridements, were noted immediately after the TENS unit was taken off this patient, which would make liability in this matter hard to defend.
- The possibility of a defense verdict was deemed to be less than 20 percent and the potential exposure/claim value of the case was assessed between \$750,000 and \$1 million.

Resolution

- Indemnity payment: greater than \$700,000
- Expense payment: greater than \$150,000
(Amounts represent only the payments made on behalf of our physical therapist and do not include any payments that may have been made from any co-defendants. Amounts paid on behalf of the multiple co-defendants named in the case are not available).

Risk Control Recommendations for the Treating PT

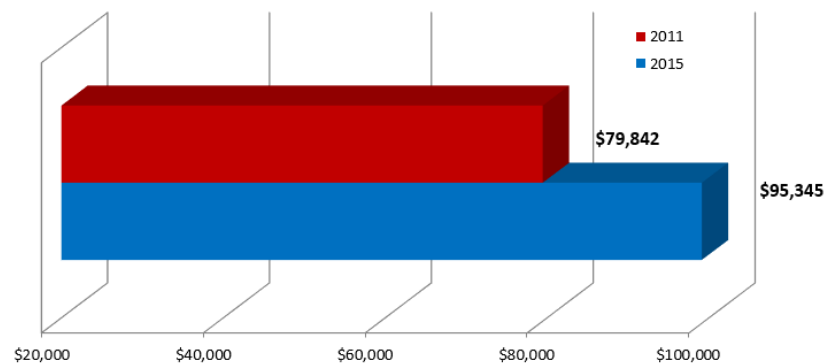
- Be aware of the high risk of burns from certain commonly used treatments and interventions, such as whirlpool, hot packs, paraffin, cold/ice packs, and electrotherapy. Ensure that each of these treatments is clinically appropriate and that there are no clinical contraindications for their use.
- Evaluate and document each patient's skin integrity, neurological status, and ability to perceive pain or discomfort and convey problems to staff. Evaluation should be performed prior to the course of treatment and periodically thereafter.
- Closely supervise and/or monitor patients during treatment, including frequent skin checks.
- Discuss any perceived alterations in skin integrity with the referring practitioner and health care team.
- Routinely test, monitor, and log temperatures of whirlpool water, hot-pack warmers, paraffin tanks, and other equipment in accordance with facility policies.

Malpractice Claims

Looking at malpractice claims, the burden of proof that is on the patient is to prove that the PT had a duty to that patient, that there was a breach in the standard of care by actions or failure to act, and that the patient can link those actions or failure to act from the PT directly causing an injury.

Closed Claims by Type of Coverage

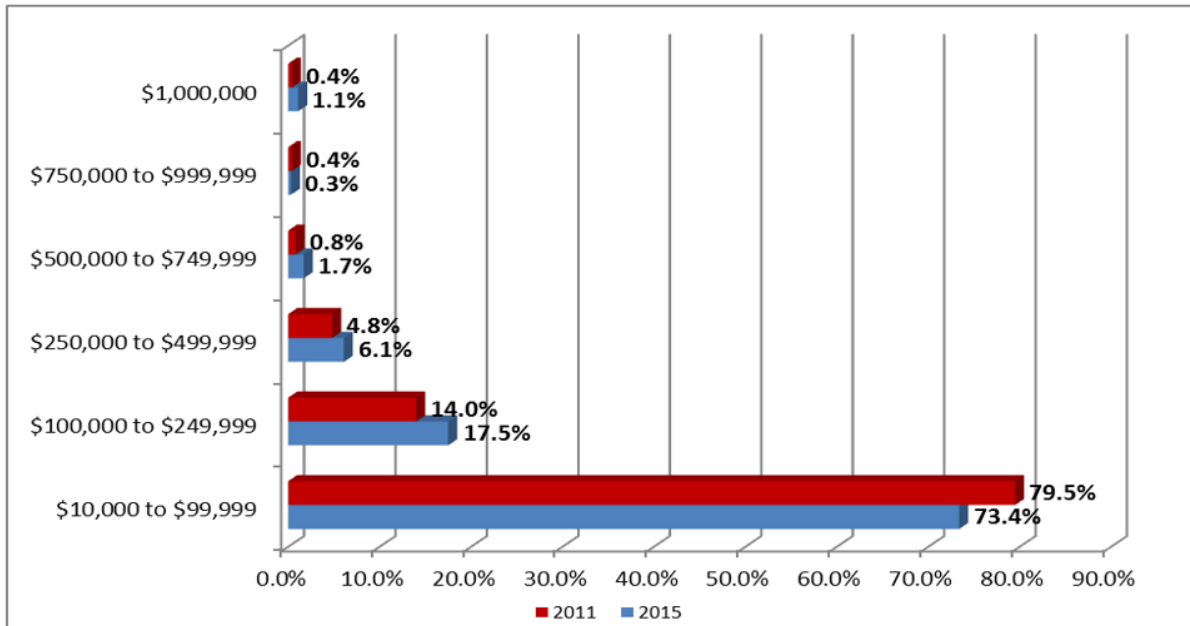
Licensure type	Percentage of closed claims	Total paid indemnity	Total paid expense	Average paid indemnity	Average paid expense	Average total incurred
Individually Insured PTA	2.0%	\$1,186,750	\$152,685	\$131,861	\$16,965	\$148,826
PT practice	75.4%	\$32,263,702	\$8,200,411	\$96,598	\$24,552	\$121,150
Physical therapist	22.6%	\$8,787,456	\$2,521,782	\$87,875	\$25,218	\$113,092
Overall	100.0%	\$42,237,908	\$10,874,878	\$95,345	\$24,548	\$119,893



The average paid indemnity is about \$95,000 per claim. So on average, when we see a claim come in against a PT, we can expect to pay at least that \$95,000. The expenses include the attorney fees and the expert witnesses hired on insured's behalf and that totals around \$24,000. In all, the cost to manage, defend, and resolve a claim against a PT averages around \$119,000.

HPSO insures about one hundred different professions, including pharmacists, counselors, and massage therapists, to name a few. HPSO's sister brand, NSO, also insures nurses and advanced practice nurses. In comparing PT to other professions, the average claim against a nurse practitioner is \$240,000. A registered nurse is \$164,000. A counselor is around \$120,000 for mental anguish and pharmacists are about \$99,000.

Distribution of Claims: 2011 versus 2016



When comparing the data from 2011 to 2015, we see fewer claims at the lower amounts and more claims at higher amounts in 2015.

Closed Claims by Allegation

Allegation	Percentage of closed claims	Total paid indemnity	Average paid indemnity
Failure to properly test/treat	1.9%	\$2,047,500	\$292,500
Equipment-related	4.7%	\$2,166,624	\$127,448
Improper performance of manual therapy	8.6%	\$3,925,490	\$126,629
Failure to supervise or monitor	19.4%	\$7,677,447	\$109,678
Improper management over the course of treatment	22.2%	\$8,370,914	\$104,636
Improper performance using therapeutic exercise	20.2%	\$6,806,382	\$93,238
Environment of care	3.9%	\$1,268,942	\$90,639
Improper behavior by practitioner	1.7%	\$479,000	\$79,833
Improper performance using a biophysical agent	17.5%	\$3,040,735	\$48,266
Overall	100.0%	\$35,783,034	\$99,122

Looking at top allegations, there are a few that represent close to 80 percent of the claims:

- failure to supervise or monitor,
- improper management over the course of treatment,
- improper performance using therapeutic exercise, and
- improper performance using a biophysical agent, such as the TENS units and hot packs.

Closed Claims by Location

Location	Percentage of closed claims	Total paid indemnity	Average paid indemnity
Long term acute care (LTAC)	0.3%	\$450,000	\$450,000
School	0.8%	\$1,140,443	\$380,148
Acute medical-surgical hospital (inpatient)	1.9%	\$1,905,496	\$272,214
Aging services facility	2.2%	\$840,000	\$105,000
Patient home	7.5%	\$2,766,821	\$102,475
Physical therapy office/clinic (non-hospital)	84.8%	\$28,425,925	\$92,895
Golf course	0.3%	\$50,000	\$50,000
Fitness center	0.3%	\$35,000	\$35,000
Practitioner office or private clinic	1.7%	\$156,349	\$26,058
Spa	0.3%	\$13,000	\$13,000
Overall	100.0%	\$35,783,034	\$99,122

Looking at the claim location, acute medical surgical hospital-based claims are relatively infrequent. Anecdotally, this maybe because those claims are not reported to HPSO, and because in many cases the hospital indemnifies the therapist as an employee there. When we have a PT who tells us they're employed, our policy becomes supplemental to the employer-provided coverage, but we're working alongside the hospital in that instance to work through the defense of that claim. Like many other health care providers, PTs may have second jobs. So their insurance coverage follows them wherever they are working.

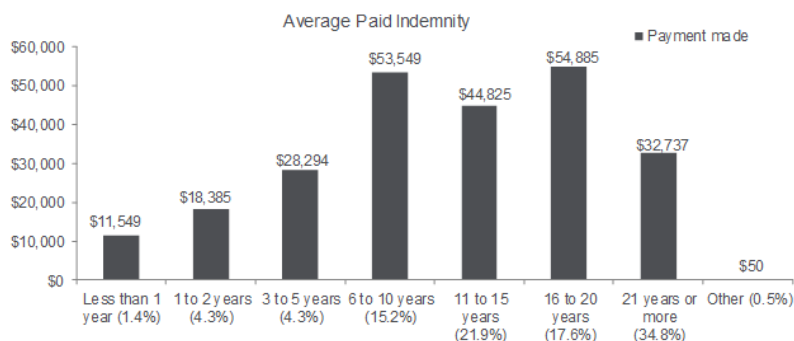
Work Profile Survey: One of the questions we asked in our follow-up survey was how many years the therapist was licensed at the time of the incident. We were hoping to determine if claims happen more often for newly licensed PTs or those who were more established?

Survey Q: Years of Practice at the Time of the Incident

Claims Q: At the time of the incident, how many years have/had you practiced physical therapy?

Non-claims Q: How many years have you been a licensed physical therapist/physical therapist assistant?

	Claims	Non-claims
Less than 1 year	1.4%	5.5%
1 to 2 years	4.3%	8.8%
3 to 5 years	4.3%	13.1%
6 to 10 years	15.2%	17.2%
11 to 15 years	21.9%	13.4%
16 to 20 years	17.6%	11.9%
21 years or more	34.8%	30.1%
Other	0.5%	0.0%



From the information in the figure, as therapists are getting up to the period of eleven to fifteen years of being in the profession, the likelihood of experiencing a claim increases. The bar chart shows that as the number of years of practice increases, so does the average paid indemnity. What might be driving this? Perhaps as a therapist becomes more experienced in the profession, the therapist might see more patients, supervise others at the clinic, and take on more acute care patients.

Case Study 2

- This case involves a ten-year-old child and the patient’s mother who were in a motor vehicle accident.
- The child was brought via ambulance to the nearest hospital and diagnosed with a fracture of the left femur.
- Later that same day, the child was placed in an immobilizer and transferred to the nearest children’s hospital, which was 100 miles away.
- When the patient arrived at the hospital, the left leg was placed in a cast and traction was applied for approximately forty-eight hours. Afterward, the patient underwent surgery for an external fixation of the left femur.
- Approximately nine weeks after the accident, the orthopedic surgeon removed the external fixation device and referred the patient to physical therapy.
- The referral was written for therapy to the left leg involving range-of-motion exercises for the knee.
- The patient was evaluated by the PT one week after removal of the patient’s external fixation device. The PT told the patient and patient’s mother that the plan of care was to begin therapeutic exercises and that the referring practitioner ordered weight-bearing as tolerated.
- The child seemed eager to start therapy and agreed to begin the following day.
- On that same day, the PT had a telephone conversation with the referring practitioner confirming the patient’s plan of care.
- The PT felt it was a little premature to begin therapy nine weeks after a child suffered a long bone fracture and was concerned about the child’s ability to safely bear weight on the affected leg.

- The practitioner confirmed that it was fine for the child to bear weight as tolerated, because the radiology exams confirmed that the bone had healed.
- At the first physical therapy session, the child was instructed to perform standing hip abduction to 25° or 30°. The exercise was demonstrated, and then the child was instructed to go 30° and no farther. The first repetition was fine.
- On the second repetition, the patient began to bend to the right. The patient was instructed to stand straight, go slower, and not to go too high.
- According to PT's notes and testimony, the PT was standing right behind the patient while guarding the patient.
- On the third rep, the child lifted the left leg approximately 45 degrees and bent to the right.
- The PT immediately told the patient to stop and bring the left leg down because it had gone too high.
- As the patient was bringing the leg down, a pop was heard. The patient screamed and dropped into the PT's arms and onto the mat.
- Although other PTs and PTAs were present, as was the mother, no one actually witnessed the accident.
- Eighteen months after the incident occurred, the patient's mother filed a claim against the insured PT, who owned the PT practice.

Allegations included improper performance using therapeutic exercise and failure to monitor the patient during treatment.

What the Experts Said

- The PT claimed that to be simply following the orders of the referring practitioner, who was also the co-defendant.
- The PT verified the order via a telephone call to the practitioner, who told the PT that weight-bearing exercises for the child were fine as tolerated during physical therapy.
- Defense experts agreed that orders for physical therapy with weight-bearing as tolerated were premature, in that the fracture was not fully healed at the time of the referral.
- They also concluded that it is not the responsibility of the therapist to assess the weight-bearing capacity of the patient

Resolution

- Indemnity payment: \$0.00
- Expense payment: greater than \$160,000
(Amounts represent only the payments made on behalf of our physical therapist and do not include any payments that may have been made from any co-defendants. Amounts paid on behalf of the multiple co-defendants named in the case are not available).

While a settlement would've been a lot cheaper, we felt it was necessary to go to trial and defend the physical therapist. The trial to defend the claim took longer than six years. We have had claim trials that have lasted ten years. So, as a health care provider, know that the suit is not likely to be completed in two or three weeks, a month, or even a year; it can be a very long time.

Risk Control Recommendations for the Treating PT

- Know and comply with state laws regarding scope of practice. PTs are responsible for knowing and understanding the regulations governing the practice of physical therapy in each state where they practice, as well as the policies and protocols of their employers and the facilities where they provide services.
- Contact the referring practitioner for clarification if referring protocol appears premature or beyond the patient's abilities.
- Be vigilant about protecting patients from the most common types of injuries.
- Practice active listening skills and teach back to ensure that patients understand directions and instructions.
- Refrain from documenting subjective opinions or conclusions, as well as making any derogatory statements about patients or other providers in the record.

PT Claim Metrics

Severity by Injury

Injury	Percentage of closed claims	Total paid indemnity	Average paid indemnity
Paralysis	0.3%	\$1,000,000	\$1,000,000
Death	0.8%	\$1,747,500	\$582,500
Loss of use of limb	2.2%	\$3,358,500	\$419,813
Nerve injury/damage	0.8%	\$890,000	\$296,667
Bleeding/hemorrhage	0.6%	\$525,000	\$262,500
Herniated disc	6.9%	\$4,053,555	\$162,142
Cerebrovascular accident/Stroke	0.8%	\$360,000	\$120,000
Traumatic brain injury	0.6%	\$222,788	\$111,394
Amputation	0.6%	\$210,266	\$105,133
Fractures	31.9%	\$11,571,824	\$100,625

Physical injury resulting from abuse/assault	1.1%	\$359,000	\$89,750
Increase or exacerbation of injury/symptoms	14.4%	\$4,445,033	\$85,481
Dislocation	3.0%	\$932,500	\$84,773
Pain and suffering	0.3%	\$62,500	\$62,500
Burns	18.8%	\$3,561,859	\$52,380
Muscle/ligament damage	7.2%	\$1,307,273	\$50,280
Neurological - peripheral and all other	0.6%	\$100,000	\$50,000
Infection/abscess/sepsis	0.8%	\$140,000	\$46,667
Pressure ulcer	0.6%	\$82,500	\$41,250
Loss of organ or organ function, including hearing	1.7%	\$218,468	\$36,411
Sprain/strain	1.9%	\$250,000	\$35,714
Bruise/contusion	1.1%	\$142,750	\$35,688
Cracked/broken tooth	0.3%	\$27,500	\$27,500
Abrasion/irritation/laceration	2.5%	\$194,218	\$21,580
Additional procedure required	0.3%	\$20,000	\$20,000
Overall	100.0%	\$35,783,034	\$99,122

Closed Claims below \$100,000 average paid indemnity

As a reminder, there were 443 claims in this research. There is a large list of injuries, some ranging from low frequency but with high total paid indemnity and some with high frequency with lower total paid indemnity. The most frequent injuries are fractures at 31.9 percent, and then burns at 18.8 percent. Many PTs report that they're not using hot packs as much anymore, but there continues to be a lot of burns from hot packs.

When we looked at all of the injuries, we also looked to see if there was a re-injury. About a third of the claims were that the patient had an injury, underwent surgery, came in for physical therapy, and through the course of physical therapy ended up injuring the same body part. Be aware of post-surgical patients — be sure to monitor their complaints of pain and soreness and keep from pushing them too hard.

PT License Defense

License Defense claims are different from malpractice claims because anyone can report a complaint to the licensing board and the complaint could be for a clinical issue or a nonclinical issue, such as unprofessional conduct. The claims and allegations that we see are when a complaint to the board and triggers the insurance coverage. Our coverage reimburses the insured PT for their legal representation at the board hearing.

License Defense Paid Claim by Allegation Class

	Percentage of paid claims	Total paid	Average paid
Improper management over the course of treatment	38.2%	\$204,645	\$3,721
Inappropriate behavior	36.1%	\$305,962	\$5,884
Fraudulent billing	9.0%	\$76,495	\$5,884
Failure to supervise	9.0%	\$70,753	\$5,443
Improper performance using a biophysical agent	3.5%	\$19,019	\$3,804
Failure to test/treat	2.1%	\$12,628	\$4,209
Improper performance using therapeutic exercise	2.1%	\$5,663	\$1,888
Total	100.0%	695,165	\$4,828

Improper management over the course of treatments is the most frequent allegation. Most of the claims against the board were clinical, but as we get into these next categories, they become nonclinical in nature, such as inappropriate behavior and fraudulent billing.

Improper Management over Course of Treatment: Detail

	Percentage of paid claims within allegation class	Percentage of paid claims	Average paid
Failure to follow referring practitioner orders	29.1%	11.1%	\$4,339
Improper performance of a test	27.3%	10.4%	\$2,153
Documentation issues	23.6%	9.0%	\$3,892
Failure to complete proper assessment	12.7%	4.9%	\$4,152
Improper treatment	3.6%	1.4%	\$7,815
Failure to cease treatment	1.8%	0.7%	\$5,858
Lack of informed consent	1.8%	0.7%	\$1,783
Total	100.0%	38.2%	\$3,721

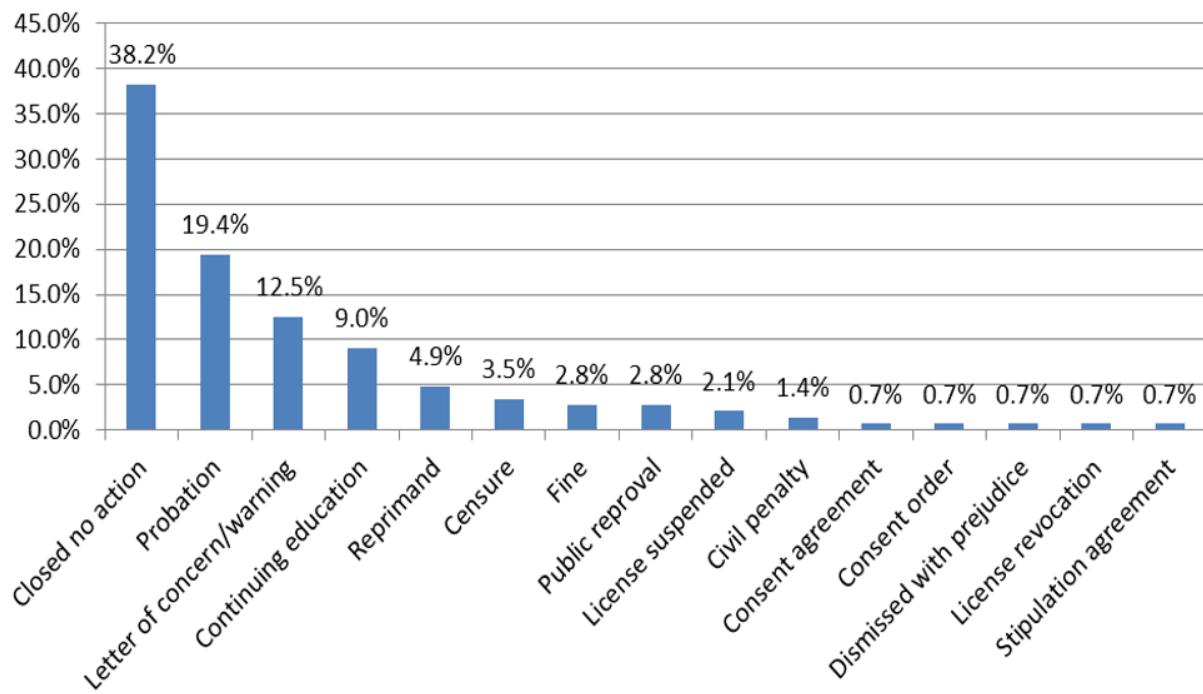
Notice that what is driving many of these improper management claims are documentation issues, improper assessment issues, and not following practitioner orders.

Inappropriate Behavior: Detail

	Percentage of paid claims within allegation class	Percentage of paid claims	Average paid
Physical, sexual, emotional abuse	46.2%	16.7%	\$7,472
Failure to follow policy	19.2%	6.9%	\$3,915
Practitioner functioning outside of scope of practice	13.5%	4.9%	\$3,920
Substance abuse	9.6%	3.5%	\$7,763
Breach of confidentiality or privacy	5.8%	2.1%	\$4,010
Criminal allegations	5.8%	2.1%	\$3,065
Total	100.0%	36.1%	\$5,884

When we looked at inappropriate behavior, we saw many of these are physical, sexual, and emotional abuse. As insurers of other professionals, we find that when there are professions that physically touch a person, there are increased claims in the area of harassment and abuse. Some substance abuse claims also fall into this category of inappropriate behavior.

Board Outcomes



When reviewing the board outcomes, the good news for PTs is that in about 38 percent of claims, the board action was closed with no action. Severe sanctions such as licensure suspension or even revocation represented just under 3 percent of the claims.

Case Study 3

- The PT was an independent contractor working for the PT practice in a home health setting.
- The PT was practicing for nine years as of the date of the first incident.

Patient A

- For approximately six months, the physical therapist provided treatment to Patient A in

their home. A complaint was filed by a family member of Patient A, which alleged that over a three-month period the PT exhibited unwanted and inappropriate behavior toward the patient's relative.

- Behaviors included suggestive gestures and comments on three separate occasions with the first two instances involving casual touching of the relative. The third instance was a telephone call to the relative making lewd comments.
- After the third incident, Patient A requested the agency send a different therapist for her treatments. The complaint allegations also included statements by Patient A that the PT constantly used his personal cellular telephone during her treatments.

Patient B

- During the same time period, while providing treatment to Patient B, the PT behaved inappropriately towards the patient's relative by walking away from the patient during treatment to make suggestive comments.
- Patient B also reported instances where the PT was using his personal cellular telephone for calls and texting during her treatment.
- The complaint included an allegation that while Patient B was performing exercises, the physical therapist failed to supervise.

Actions by the Board

- Because of the allegation of repeated use of the PT's personal cellular telephone during treatment times, the State physical therapy licensing board issued a subpoena to the PT's telecommunications provider for cellular telephone activity during treatment periods.
- The board compared billing records with the cellular telephone activity logs and concluded that the PT was using his cellular telephone phone during most of if not all of Patients A and B therapy times.

Findings of the Board

- A failure to maintain standard of care because of repeated cellular telephone usage diverting focus from direct treatment to patients
- Fraudulent billing for the time not deducted for telephone usage when physical therapist was to be providing care
- Negligence because of failure to supervise patients performing exercises
- Failure to use sound and professional judgment by engaging in inappropriate behavior with relatives of patients

Final Board Decision

- Probation for three years
- Must work in a supervised setting
- Must have supervising PT sign off on treatment to patients
- Must have a co-worker present during treatment
- **Cost to defend: \$16,700**

HPSO has created a self-assessment checklist that PTs can download to measure risk. HPSO has partnered with the FSBPT to accept the Jurisprudence Assessment Modules (JAM) courses as part of the 10 percent risk management discount that you can get of your professional liability policy.

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