

## Ready for McCall in September?



All IADC members should mark their calendars and plan to attend the IADC 2005 Annual Meeting at the Whitetail Resort in McCall, Idaho on September 23-24, 2005. The 2006 annual meeting will be in Sun Valley on September 22-23, 2006. Great times, great associations, great learning, great place!!

## OFFICERS & DIRECTORS

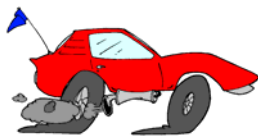
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## ISSUES OF INTEREST

### MEDICARE WRITE DOWNS

In *Dyet v. McKinley*, 139 Idaho 526, 81 P.3d 1236 (2003), the Idaho Supreme Court held that medical expenses which were mandatorily reduced by Medicare regulations and federal law (Medicare “Write-Downs”) were to be treated as a collateral source under Idaho Code § 6-1606. In its analysis, the Idaho Supreme Court held that the collateral source statute was clearly designed to prevent double recovery. The District Court in *Dyet* found that other jurisdictions with a similar collateral source statute held that “while Medicare write-downs are technically not payments from a collateral source, plaintiffs may not recover the amount of the write-down from a tortfeasor because it was not an item of damage for which the plaintiff ever became obligated.” The Idaho Supreme Court agreed. The Idaho Supreme Court held that by treating a Medicare write-down as a collateral source, the danger of prejudice contemplated in Idaho Rule of Evidence 403 was avoided and the jury was not influenced by the existence of Medicare. At the same time, the Court held that the policy of the collateral source statute to prevent a double recovery was also preserved. At trial, the District Court allowed *Dyet* to introduce the charges for the medical services but did not allow any evidence during the trial as to the amounts he actually paid for the services or the amount of any write-down required by Medicare. After the jury returned a monetary verdict in favor of the plaintiff, the District Court reduced the award by the amount of the write-downs required by Medicare.

In *Slack v. Kelleher*, Docket No. 29583, 2004, Ida. Lexis 212 (2004 Opinion No. 132), the Idaho Supreme Court recently was asked to review and overrule the decision in *Dyet*. **Continued on Page Two.**



## MEMBERSHIP DRIVE

Membership in the IADC is a great opportunity for learning, for sharing ideas and concerns, and for association with others whose practice is similar to yours. We all benefit from new members who bring their talents and abilities into this group. We should all be active in recruiting new members. Please look around you and encourage new membership. Applications are available from any board member.

Any IADC member who wishes to receive this newsletter by e-mail, please send an e-mail message to J. Michael Wheeler, [jwheiler@ida.net](mailto:jwheiler@ida.net) with your preferred e-mail address and your next issue will come by e-mail.



The Board would like to announce that they have hired Deborah Katz to serve as Executive Director for the Idaho Association of Defense Counsel. We extend a warm welcome to her.

### ISSUES OF INTEREST *Continued from Page One*

However, the Court held that it was not persuaded that the *Dyet* ruling was incorrect. The Court held that the District Court in *Slack* erred in denying Kelleher's motion to treat the write-downs as a collateral source and remanded the case to the District Court to reduce the judgment by the amount of the write-downs. However, it should be noted that write-downs taken by health care providers as a result of contracts with private carriers such as Regence BlueShield, may not receive the same collateral source treatment in workers' compensation cases before the Industrial Commission. *See, Sangster v. Potlatch Corporation*, IC 01-008322, Findings of Fact, Conclusions of Law, and Recommendation (November 16, 2004). Because the defendants denied the worker's compensation claim, the claimant's private health insurance paid most of the medical bills. The providers were paid only the private carrier's contractual rate and the claimant was responsible for co-payment. The Industrial Commission noted that when medical service providers enter into contracts with health insurance companies, they willingly accept reduced contract rate payments in return for other benefits. The Commission noted that doctors and hospitals do not have the same opportunity to bargain for a *quid pro quo* on workers' compensation claims. The Commission noted that when defendants refuse to reimburse medical providers for the difference between billing rates and contract rates, the providers suffer a loss for which they did not bargain and the surety enjoys a windfall that it did not earn.

### EXPERT FEES AND TREATING PHYSICIANS

There is a split of authority on whether a treating physician can require an expert witness fee when required to testify in a deposition or at trial. *See, Colman v. Brad Dydula*, 190 F.R.D. 320 (New York 1999); *Harvey v. Shultz*, 2000 U.S. Dis. Lexis 19815 (Kansas 2000); *Hoover v. United States of America*, 2002 U.S. Dis. Lexis 15648 (Illinois 2002), but *see Fisher v. Ford Motor Co.*, 178 F.R.D. 195 (Ohio 1998); *Mangla v. The University of Rochester, et al.*, 168 F.R.D. 137 (New York 1996). The Idaho Rule is not the same as the Federal Rule. As such, the federal cases are not exactly on point. Idaho Appellate Courts have yet to decide this issue. However, in *Clark v. Raty*, 137 Idaho 343, 345-346, 48 P.3d, 672 (2002), the Supreme Court concluded that treating physicians were non-I.R.C.P. 26(b)(4) expert witnesses. Rule 702 of the Idaho Rules of Evidence describes an expert as one who has "scientific, technical or other specialized knowledge [which] will assist the trier of fact to understand the evidence or to determine a fact in issue." Testimony regarding diagnosis, prognosis, or any determination relating to causation would be opinion testimony requiring medical expertise. *See, Clark & Smith v. Paiz*, 84 P.3d 1272 (Wyoming 2004). What distinguishes a treating physician when testifying as an expert from an expert retained in anticipation of litigation or for trial is not the content of his or her testimony, but the context in which he or she became familiar with the injuries that are ultimately the subject of litigation and which form the factual basis for the medical opinion. *Id.* Experts, such as treating physicians, who have information that was not developed or required in anticipation of litigation are subject to the general descriptive provisions of Rules 26(a) and 26(b)(1). *Id.*; *See also, Wirtz v. Kansas Farm Bureau Services, Inc.*, 2005 U.S. Dis. Lexis 1889 (Kansas 2005).