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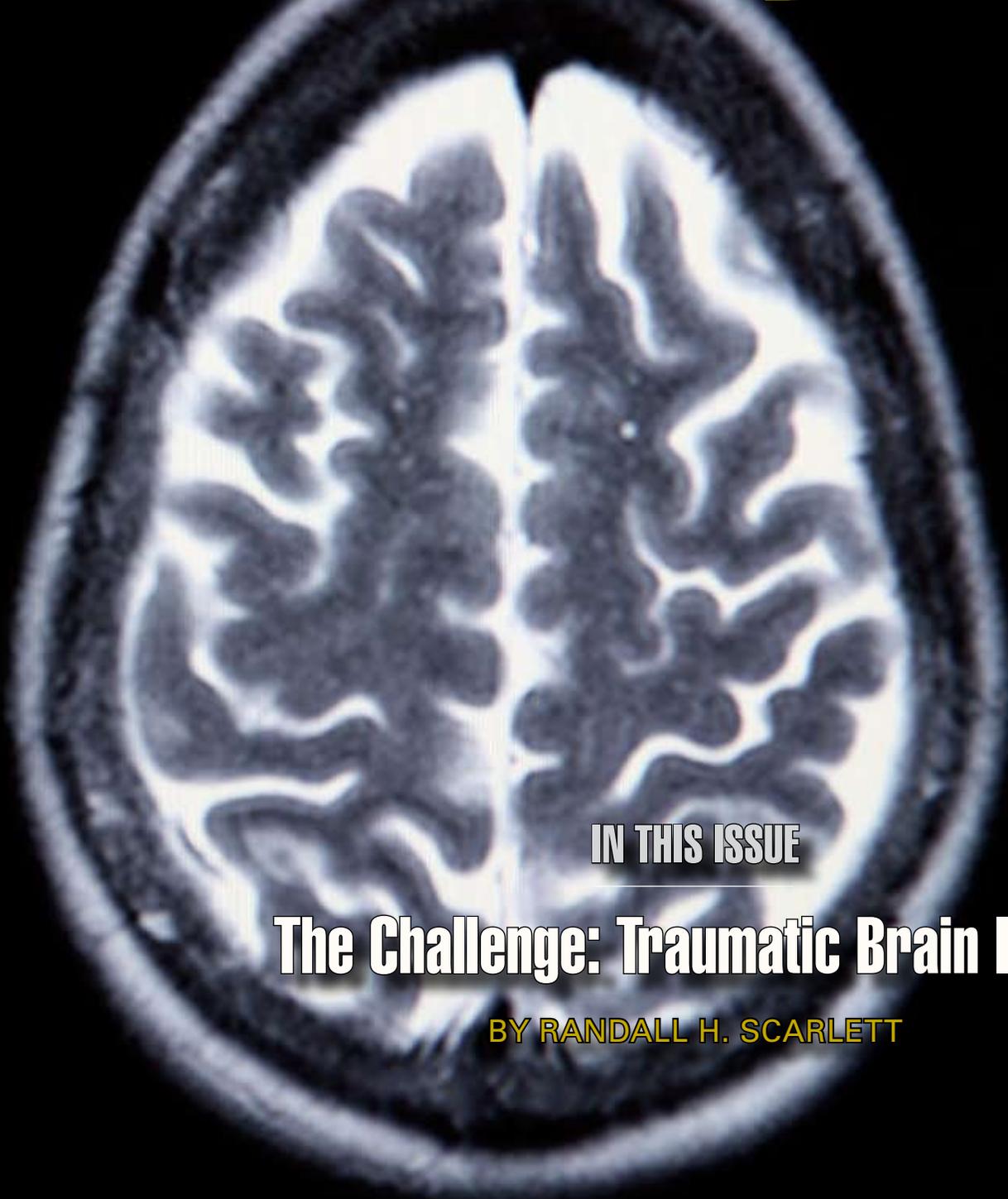
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IN THIS ISSUE

**The Challenge: Traumatic Brain Injury**

BY RANDALL H. SCARLETT

cium in the very first paragraph of the renal failure chapter. A delightful portion of the cross ensued.

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**Case: MICHAEL MOODY v. LIBERTY LIFE ASSURANCE COMPANY OF BOSTON**

**Court:** US District Court, Northern District, Case No. #C 07-01017 MHP; **Judge:** Hon. Justice Marilyn Hall Patel

**Plaintiffs' Counsel:** Terrence J. Coleman, Esq. and Brian H. Kim, Esq., Pillsbury & Levinson, LLP; Tel: (415) 433-8000

**Defense Counsel:** Pamela Cogan, Esq., Ropers, Majeski, Kohn & Bentley; Tel: (415) 543-4800

**Pertinent Summary:** On January 26, 2009, Judge Patel issued a published opinion in *Moody v. Liberty Life*, -- F.Supp.2d --, 2009 WL 192889, a rare win for a plaintiff in an ERISA disability insurance case under the "abuse of discretion" standard of review. In cases such as this, an insured cannot recover disability insurance benefits simply by proving his or her inability to work and entitlement to benefits under the policy. Rather, the plaintiff must prove the insurance company abused its discretion – acted arbitrarily and capriciously – in denying bene-

fits. This standard of judicial review, coupled with ERISA's pre-emption of California's insurance bad faith laws and compensatory and punitive damage remedies, has resulted in a system whereby plaintiffs in ERISA disability cases are routinely on the receiving end of widespread insurance company abuse.

Two of those abuses are reflected by the insurer's actions in this case; (1) the use of disreputable reviewing physicians to disagree with the treating physician's disability assessment, and (2) making unreasonably low settlement offers in the hope that a desperate insured will take pennies on the dollar of the contract benefits.

**Facts:** After a serious car accident in 2002, Michael Moody underwent two unsuccessful neck surgeries consisting of multi-level fusions and insertion of metal plates and screws. His nationally renowned treating physicians, Dr. Jeffrey Saal at SOAR, and Dr. Robert Hines at SpineCare Medical Group, certified his permanent disability due to Failed Surgery Syndrome and the resulting incapacitating pain, cognitive deficits, and limited mobility he was forced to endure.

Liberty Life Assurance Company of Boston paid benefits under his employer-sponsored group disability policy for just over a year. It denied further benefits in May of 2005 based upon a medical records review by Dr. L. Neena Madireddi. Dr. Madireddi did not examine Mr. Moody or speak with him or

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his doctors. Instead, she reviewed his medical records and concluded his only limitation was decreased mobility which would not interfere with his work capacity.

Mr. Moody's counsel was well aware of Dr. Madireddi. In another disability insurance case against Liberty (a non-ERISA bad faith claim) they successfully sued her for fraud and intentional interference with contract after performing an examination of an insured. (See, *Collins v. Liberty Life Assur. Co. of Boston* (N.D. Cal. 2007) 2007 WL 1430088.) In that case, she had also written a report disagreeing with the treating physicians, but further claimed she had thoroughly examined the insured and spent an entire "60 minutes face to face" with the insured. In fact, Liberty's investigators conducted surveillance of the insured on the day of the examination and actually videotaped him entering and exiting Dr. Madireddi's office in the span of just ten minutes.

In light of discovery limitations in ERISA cases, Plaintiff submitted Dr. Madireddi's deposition testimony from the Collins case to the Court at trial. The testimony revealed her significant ties to the insurance industry, including the fact that she performs as many as 20 so-called "independent" medical examinations in a day. Judge Patel commented at trial that Dr. Madireddi "gets around." Her written opinion was highly critical of Dr. Madireddi's and Liberty's disregard of Mr. Moody's consistent reports of pain and cognitive impairment.

Before trial, the most Liberty indicated it would pay in set-

tlement was \$200,000, even though the present value of benefits for the life of the policy was approximately \$1.5 million. Unlike in state-law bad faith claims, in ERISA cases, a plaintiff cannot recover the present value of future benefits. Rather, their claims are reinstated. Carriers use that fact, and the threat of ongoing investigation, to browbeat insureds to accept lowball settlement offers. Even with the hurdles ERISA plaintiffs must overcome to win at trial, they are rarely better off settling with such insurers. Attorneys' fee awards, calculated on a lodestar basis, can easily exceed \$200,000, and a stinging court opinion like Judge Patel's, will often inhibit a carrier from issuing similarly outrageous denials in the future.

**Result:** Plaintiff was awarded disability benefits for the 8 months remaining of Plaintiff's coverage for disability from his "own occupation"; case remanded to Liberty for determination of further benefits under the "any occupation" definition of disability. Disability benefits to present total \$220,000; benefits for the life of the policy (to age 67) exceed an additional \$1.2 million present value. Motion for attorneys' fees pending.

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