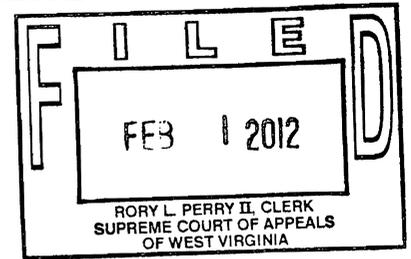


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1299



WHEELING HOSPITAL, INC.,

Petitioner,

v.

**CRAIG A. GRIFFITH, WEST VIRGINIA
TAX COMMISSIONER,**

Respondent.

**Circuit Court of Ohio County
Civil Action No. 10-CAP-15**

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES AMICUS CURIAE BRIEF IN SUPPORT OF THE
RESPONDENT, CRAIG A GRIFFITH, WEST VIRGINIA TAX COMMISSIONER AND
AFFIRMANCE OF THE ORDER BELOW**

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I.

Identity of the Amicus Curiae

The Bureau for Medical Services (“BMS”), is the single state agency responsible for administering the West Virginia Medicaid program and the West Virginia Department of Health and Human Resources (“DHHR”) oversees BMS. The taxes at issue in this case were collected pursuant to the health care provider tax statute (“HCPT”), W. Va. Code § 11-27-1 et seq., and deposited into the Medicaid state share fund in the state treasurer’s office. W. Va. Code §11-27-32. In turn, these state funds were then used to draw down the federal funds required to run the West Virginia Medicaid program and used to compensate health care providers who rendered Medicaid services to the indigent. W. Va. Code § 11-27-33. BMS, as a state agency, may file an amicus curiae brief without the consent of the parties or leave of the court pursuant to Rule 30 of the Rules of Appellate Procedure.

II.

Argument

In 1993, the HCPT was enacted to raise state share to provide adequate compensation for the provision of Medicaid services. W. Va. Code § 11-27-1(b). Under the HCPT, the gross receipts of enumerated health care services were taxed and put in a Medicaid state share fund. Among the various services to be taxed were inpatient, outpatient and physician services. W. Va. Code §§ 11-27-9, -15, and -16. The tax on physician services has been phased out, but the inpatient and outpatient services continue to be taxed. W. Va. Code § 11-27-36(j). The taxes collected during the relevant time period were used to draw the Federal share for the Medicaid program to provide health care for West Virginians who were not physically, mentally or economically able to provide for their own care.

“Medicaid is a cooperative federal-state share program through which the federal government provides financial assistance to states so that they may furnish medical care to needy individuals.” *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). States do not have to participate, “but if they do they must comply with requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services.”

Prester v. Lawton, 111 F.Supp.2d 768, 773 (S.D.W.Va. 2000). “[I]f a State’s per capita income is equal to the national average per capita income, the Federal share is 55 percent.” 42 C.F.R. § 433.10(b). However, if the State’s per capita income is less than the national average, then the Federal share may go up to 83 percent. *Id.* Generally in West Virginia, 75% of the Medicaid program is comprised of federal money; the remaining 25% is provided by the state.

In the instant case, Wheeling Hospital submitted claims to Medicaid for inpatient and outpatient services and received reimbursement for those allowable claims. Wheeling Hospital also filed Broad Based Health Care Tax returns for fiscal years 2003, 2004, 2005 and 2006, but subsequently, filed amended Broad Based Health Care Tax returns for those years. The refund sought by the hospital is based on a reclassification by the Petitioner of the medical services taxed. Specifically, Wheeling Hospital sought to reclassify inpatient and outpatient services, which were provided by the hospital, as physician services. The inpatient and outpatient services were taxed at a higher rate than the physician services, and therefore, Wheeling Hospital decided years later to simply reclassify the services and seek a refund. Notably though, Wheeling Hospital did not notify Medicaid of the change in classification.

A. Inpatient Services Cannot Be Reclassified As Physician Services.

When a patient is admitted to a medical institution as an inpatient and receives room, board and professional services in the institution for a period of 24 hours or longer, that patient is an

inpatient as defined by 42 C.F.R. § 440.2(a)(1). Inpatient hospital services are those ordinarily provided in a hospital for the care and treatment of inpatients and are furnished under the direction of a physician. 42 C.F.R. § 440.10(a)(1) and (2). Physicians' services are those services provided by a physician regardless of whether they are provided in the office, a hospital, a skilled nursing facility, or elsewhere.¹ 42 C.F.R. § 440.50(a).

In this case, the inpatient services were provided to an inpatient in the hospital by the hospital under the direction of a physician and therefore, were properly classified as inpatient services rather than physician services. The hospital staff were under the direction of the physician when they assisted the physician in providing the services to the inpatients, but were not under the physicians' supervision. The facility, supplies and equipment used to treat the inpatients were provided by the hospital, not the physician. These services could not by definition be classified as physician services as they were provided in the hospital, by the hospital, not by the physician. Therefore, any attempt to reclassify these inpatient services as physician services must fail.

B. Outpatient Services Cannot Be Reclassified As Physician Services

A patient of an organized medical facility who is at the facility for less than 24 hours is considered an outpatient. 42 C.F.R. § 440.2(a). Outpatient hospital services are services provided by a hospital to outpatients by or under the direction of a physician. 42 C.F.R. § 440.20(a)(2) and (3). Again, physicians' services may be provided in a hospital or elsewhere, by the physician. 42 C.F.R. § 440.50(a). Once again, the staff, facility, supplies and equipment for these outpatient services were provided by the hospital to outpatients in the hospital, and were not provided by the

¹When a physician provides services in the hospital, the physician is reimbursed for those services by submitting a bill to Medicaid. That bill is separate from the one submitted by the hospital for providing the facility, staff, supplies and equipment.

physician; therefore, they cannot be classified as physicians' services when they were provided by the hospital.

If the hospital is claiming these services were physician services provided by the hospital, the hospital would be reimbursed only if the physician were an employee of the hospital²; otherwise, the physician bills Medicaid for those services directly. The Medicaid program uses the same procedural coding system for reimbursing the facility component and the physician services component for a procedure, but the reimbursement rates differ. The facility is reimbursed for the facility, staff, supplies and equipment, while the physician is reimbursed a different rate for those services provided by a physician. For example, certain codes for outpatient services provided in the emergency room by the hospital reimburse at a higher amount than the physician services provided by the physician.

The following is an example of codes³ that reimburse at a higher amount for outpatient services provided by the hospital than physicians' services:

Hospitals are reimbursed:	Physicians are reimbursed:
99281- \$20.00	99281- \$14.31
99282- \$50.00	99282- \$28.88
99283- \$97.75	99283- \$43.71
99284- \$191.80	99284- \$83.52
99285- \$580.30	99285- \$122.29

²In some cases, the physician may request their payment be sent to the hospital instead of the physician, but it is still the non-employee physician who is being reimbursed.

³These codes are for emergency services based on the complexity of the medical decision making.

Therefore, when Wheeling Hospital improperly reclassified these services for tax purposes, the new classification would also affect their Medicaid reimbursement. However, despite the attempt to reclassify these services for tax paying purposes, Wheeling Hospital has not attempted to return any alleged overpayment for the new classification to Medicaid. Wheeling Hospital has not even notified BMS that it reclassified these services several years ago. However, BMS has not audited the services because it is the position of BMS that the services were properly classified initially: they were provided by the hospital in the hospital and therefore, cannot be classified as physicians' services. However, if the Court were to find otherwise, BMS would audit the services.

C. Because These Services Were Classified Correctly Initially, BMS Does Not Have to Perform An Audit

The broad based tax on the provider services has been in effect since 1993. During that time, the provider taxes have been collected and used to draw the federal share to provide medical care to West Virginia's indigent population. At the same time, Wheeling Hospital submitted claims to BMS for payment of inpatient and outpatient services provided to that population and characterized those services the same way in their initial tax returns. However, since amending the tax returns to characterize those services as physicians' services instead of inpatient and outpatient services to incur a lower tax bill, Wheeling Hospital has not notified BMS of a change in the billing for those services as a result of the change in classification. This change could result in lower Medicaid reimbursements to the hospital for those services. However, Wheeling Hospital has not changed the Medicaid billings because the services were properly classified initially and the hospital billed for the services as inpatient/outpatient services.

Pursuant to 42 C.F.R. § 433.57, the Centers for Medicare and Medicaid Services ("CMS") has discretion to reduce a state's medical assistance expenditures, used to calculate federal share,

by the revenues from any provider taxes that are not uniform and broad based as required by 42 C.F.R. § 433.68. West Virginia's medical assistance expenditures have not been reduced.

If this Court were to find the services were improperly classified initially, BMS would audit Medicaid reimbursements to the hospital to determine if there were overpayments and recover them. Wheeling Hospital should not be allowed to pay a lower tax on services by characterizing them one way and collect a higher Medicaid reimbursement by characterizing them another way. However, an audit is not necessary as the services were properly classified initially.

D. Conclusion

The original tax returns properly classified these services as inpatient and outpatient services as the hospital provided the services, and should be upheld.

Respectfully Submitted,

Bureau for Medical Services

By Counsel

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Supreme Court No. 11-1299

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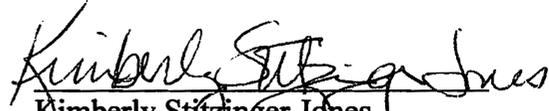
CERTIFICATE OF SERVICE

I, Kimberly Stitzinger Jones, Assistant Attorney General, hereby certify that on, February 1, 2012, I served a true and accurate copy of the foregoing **WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES AMICUS CURIAE BRIEF IN SUPPORT OF THE REPENDENT, CRAIG A. GRIFFITH, WEST VIRGINIA TAX COMMISSIONER AND AFFIRMANCE OF THE ORDER BELOW** by mail on:

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