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CMS Miscalculated Hospitals' Wage Index by Improperly Including Short Term Disability Hours in Calculation

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Payment Group

Principals

Thomas W. Coons

Leslie Demaree Goldsmith

Carel T. Hedlund

S. Craig Holden

Julie E. Kass

Paul W. Kim

Leslie Demaree Goldsmith
410-347-7333
ldgoldsmith@ober.com

The United States District Court for the Western District of New York struck down CMS's wage index calculation for the Rochester, New York Metropolitan Statistical Areas (MSA), which included not only the short term disability payments but also the associated hours. *ViaHealth of Wayne Co. v. Johnson*, W.D.N.Y., No. 07-CV-6638T, April 14, 2009. The court found CMS acted arbitrarily and capriciously in including the hours for one hospital, when CMS did not include the hours for other hospitals. The court also held that such action contravened the Medicare statute, which requires CMS to create a wage index that treats the costs and hours of each hospital in the same manner, in order to make an accurate comparison of the hospitals with each other.

The plaintiffs in this case argued that, while CMS properly included the costs of short term disability benefits for all hospitals in the wage index calculation, it improperly treated the short term disability hours of Rochester General Hospital (RGH) differently than CMS treated these hours for other providers. Specifically, CMS included both the hours and cost of RGH's short term disability benefits, while CMS included only the cost and not the hours for other providers. Including the hours as well as the cost has the effect of reducing a hospital's average hourly wage. When one hospital's average hourly wage is reduced, it causes the wage index for all of the hospitals in that one hospital's geographic area to be reduced relative to the national average, and thus results in reduced Medicare reimbursement for all of the hospitals in that geographic area.

CMS argued that it was justified in treating RGH's short term disability benefits differently than it treated the benefit for other providers because RGH self-insured, paying its benefits directly out of its payroll, while all other providers in the Rochester, New York MSA and most other hospitals nationally used an outside insurer to cover this cost. CMS did not dispute that hospitals that used an outside insurer would have only the cost and not the hours included in their average hourly wage calculation.

The court struck down CMS's inconsistent treatment of hours as arbitrary and capricious. It also found CMS's actions failed to comply with the requirements of the governing statute which require that the wage index reflect the "relative hospital wage level in the geographic area of the hospital compared to the national average hospital wage level," *citing* 42 U.S.C. § 1395ww(d)(3)(E). Accordingly, the court stated that CMS "must treat the costs and the hours of

Robert E. Mazer
Christine M. Morse
Laurence B. Russell
Donna J. Senft
Susan A. Turner
Associates
Kristin C. Cilento
Joshua J. Freemire
Mark A. Stanley
Lisa D. Stevenson

each hospital in the same manner, so that the average hourly wage of all hospitals may be accurately compared against one another." The court further stated that CMS must be "accurate, consistent, and uniform" in calculating hospitals' wage levels for wage index purposes. Thus, CMS cannot treat the same benefit differently for two different hospitals solely because one hospital pays for it directly and another uses an outside insurer.

Ober|Kaler's Comments: This is a very good decision for providers, and the rationale for the decision (that the wage index statute requires CMS to treat costs and hours similarly for providers) can be applied to many wage index appeals. To treat costs or data dissimilarly results in an improper comparison between providers and inaccurate wage index payments. The government has until mid-June to appeal this decision before it becomes final.

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