

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2007-D67

PROVIDER -

Rochester 02-03 MSA Wage Index Group
Rochester, New York

Provider Nos.: Various (See Attachment)

vs.

INTERMEDIARY -

BlueCross BlueShield Association/
Empire Medicare Services (n/k/a National
Government Services-NY)

DATE OF HEARING -

March 3, 2006

Federal Fiscal Year Ended -
September 30, 2003

CASE NO. 03-0522G

INDEX

Page No.

Issue.....	2
Medicare Statutory and Regulatory Background.....	2
Statement of the Case and Procedural History.....	2
Findings of Fact, Conclusions of Law and Discussion.....	3
Decision and Order.....	4
Dissenting Opinions of Suzanne Cochran, Esquire and Yvette C. Hayes.....	6

ISSUE:

Whether the Intermediary failed to properly adjust the wage data for Rochester General Hospital used in the calculation of the Federal Fiscal Year (FFY) 2003 Wage Index for the Rochester, New York Metropolitan Statistical Area (MSA).

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

This is a dispute over the amount of Medicare reimbursement due a provider of medical services.

The Medicare program was established to provide health insurance to the aged and disabled. 42 U.S.C. §§1395-1395cc. The Centers for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Administration (HCFA), is the operating component of the Department of Health and Human Services (DHHS) charged with administering the Medicare program. CMS' payment and audit functions under the Medicare program are contracted out to insurance companies known as fiscal intermediaries. Fiscal intermediaries determine payment amounts due the providers under Medicare law and under interpretive guidelines published by CMS. See, 42 U.S.C. §1395h, 42 C.F.R. §§413.20(b) and 413.24(b).

At the close of its fiscal year, a provider must submit a cost report to the fiscal intermediary showing the costs it incurred during the fiscal year and the proportion of those costs to be allocated to Medicare. 42 C.F.R. §413.20. The fiscal intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider and issues the provider a Notice of Program Reimbursement (NPR). 42 C.F.R. §405.1803. A provider dissatisfied with the intermediary's final determination of total reimbursement may file an appeal with the Provider Reimbursement Review Board (Board) within 180 days of the issuance of the NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835.

The Medicare statute, 42 U.S.C. § 1395ww(d)(3)(E), requires that, as part of the methodology for determining prospective payments to hospitals, the Secretary must adjust the standardized amounts for area wages based on the geographical location of the hospital compared to the national average hospital wage level. Beginning October 1, 1993, the statute required CMS to update the wage index annually. CMS bases the annual update on a survey of wages and wage related costs taken from cost reports filed by each hospital paid under the prospective payment system (PPS).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Rochester General Hospital (Provider) provided Empire Medicare Services (Intermediary) wage data that was used to calculate the Federal Fiscal Year 2003 Wage Index for the Rochester, New York MSA. The Provider believed that the Intermediary misinterpreted the data submitted, causing the wage index to be incorrect. The Provider therefore timely submitted a request for correction to the data used, specifically to

remove several categories of incorrectly included paid hours and to reapportion certain wage-related costs. The Intermediary refused to make the corrections, and the Provider timely requested CMS' intervention. CMS also refused to make the requested corrections. However, the parties have since agreed that all the issues in dispute have been resolved except for short-term disability hours which were originally included in the Wage Index data.

The parties stipulated to the following:

1. Rochester General Hospital (RGH) paid employees on short-term disability through its standard payroll system.
2. RGH did not contract with private insurance carriers to pay employees on short-term disability.
3. RGH reported its total paid hours for FY 1999 on Worksheet S-3, Part II, Line 1, Column 4 in its Cost Report for FY 1999, the year utilized to make the FFY 2003 wage index determination.
4. On February 6, 2002, RGH timely requested an adjustment to exclude 106,745.5 hours of employees on short-term disability paid through its standard payroll system.

Various Providers¹ in the Rochester MSA also appealed the Intermediary's determination to the Board, and their appeal meets the jurisdictional requirements of 42 C.F.R. §§405.1835-405.1841. The Providers were represented by Keith D. Barber, Esquire, of Hall, Render, Killian, Heath & Lyman, P.S.C. The Intermediary was represented by Arthur E. Peabody, Jr., Esquire, of Blue Cross Blue Shield Association. The estimated Medicare reimbursement amounts in dispute are \$509,000 for 2002 and \$1,527,000 for 2003.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After considering the Medicare law and guidelines, the evidence and the parties arguments, the Board majority finds and concludes that the short-term disability hours at issue should be included in the wage index used to calculate the FFY 2003 wage index for the Rochester, New York MSA. CMS' Program Instructions for cost report preparation require that salary and wages paid to hospital employees be included in the wage index calculation. See, HCFA Pub. 15-2 §3605.2. That section specifically requires that all paid time off (PTO) be included in the wage index calculation. The Board majority considers the short-term disability payment to be paid time off in light of the Hospital's direct payment of this benefit to its employees. The Hospital chose to use a pay-as-you-go or self-insurance mechanism to pay its short-term disability costs instead of having a commercial insurer underwrite its short-term disability program. The Hospital is thus bound by its decision to treat short-term disability as paid time off.

¹ See Provider Exhibit P-1.

The Board majority also concludes that if the short-term disability costs are required to be included in the wage index calculation, the hours related to these short-term disability costs should likewise remain in the wage index calculation. To do otherwise would create a mismatching of costs and their related hours and create an aberrance in the wage index calculation.

The Providers argue that the short-term disability should be treated as a fringe benefit with no hours included in the wage index calculation. The Board majority finds this argument without merit for two reasons. First, as addressed above, the HCFA Pub. 15-2 does not permit this hospital to treat its paid time off as a non-wage fringe benefit. Second, the treatment of the Hospital's short-term disability program as a fringe benefit would result an aberrance in the wage index calculation because relevant hours were directly paid by the hospital.

The Providers argue that uniformity is essential to hospital wage index comparability. Further the Intermediary asserted that the hours related to short-term disability payments were not reported by other hospitals. The Board majority agrees with these contentions in principle; however, in reality, the facts in this case dictate how the disability program should be treated. The Hospital had a self-funded, pay-as-you go program, whereas the majority of providers purchased an insurance policy from an independent insurer. As the Intermediary attests, the Hospital's program was unusual. However, the Intermediary had to deal with it as presented by the facts. Therefore, the Board majority finds no comparability or inconsistency problems in the wage index calculation for the Rochester MSA. For providers that purchased insurance to cover the short-term disability cost of their employees, the costs were treated as fringe benefit costs. However, because Rochester General Hospital chose to self-pay the costs of its short-term disability program, Program Instructions require inclusion of the hours and costs in the wage index calculation.

In reviewing the Hospital's Salary Continuation – Short Term Disability Policy and Procedures,² the Board majority notes that the Hospital's employees were subject to two categories of eligibility for disability payments: 1. 100% of pay for twenty-six weeks. 2. 100% of pay for thirteen weeks and 60% of pay for the remaining thirteen weeks. The Board observes that some hours relating to 60% of employees' pay may have been recorded as hours paid at 100% of pay. The Board majority finds that if that is true, an adjustment should be made to ensure that there is a proper matching of hours and costs. The hours that were paid at 60% of employees' wages should be reduced by 40%. The Board majority remands this sub-issue to the Intermediary for review and adjustment, if appropriate.

DECISION AND ORDER:

The Hospital's costs and the hours associated with its self-funded short-term disability program should remain in the Rochester Wage Index calculation. However, any hours relating to reduced payments (60%) after the first 13 weeks of receiving disability

² See, Provider Exhibit P-9.

payments should be reduced to reflect the reduced compensation received. The Intermediary's adjustments are modified.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire (Dissenting Opinion)
Gary B. Blodgett, D.D.S.
Elaine Crews Powell, C.P.A
Anjali Mulchandani -West
Yvette C. Hayes (Dissenting Opinion)

DATE: August 31, 1007

FOR THE BOARD

Suzanne Cochran
Chairperson

Rochester 02-03 MSA Wage Index Group

Dissenting Opinion of Yvette C. Hayes and Suzanne Cochran

We respectfully dissent with the Board majority's finding that short-term disability hours must be included in the wage index data used to calculate the FFY 2003 Wage Index for Rochester, New York MSA.

The question is whether the short term disability expense should be included as "salaries and wages" versus "wage *related* costs." Salaries and wages include direct compensation for employment. In addition, holiday, vacation, and sick pay are standard and customary forms of paid time off that are also typically included as salaries and wages. The salaries and wages and the associated hours are included in the wage index calculation so that an average hourly wage rate can be calculated. Typical wage *related* costs are payroll taxes and bonus pay, life and health insurance, workers compensation insurance and other fringe benefits.

According to the Provider Reimbursement Manual (PRM-II, §§1100ff), the Provider Cost Report Reimbursement Questionnaire, Form CMS-339, must be completed by all providers submitting cost reports to the Medicare intermediary under Title XVIII of the Social Security Act to assist with the preparation of an acceptable cost report. CMS Program Instructions for Form CMS-339, Exhibit 7, advises that wage related costs may be different from fringe benefits allowed under Medicare because Generally Accepted Accounting Principles (GAAP) are used in reporting wage related costs. In addition, some costs such as payroll taxes, which are reported as wage related costs on Exhibit 7, are not considered fringe benefits under Medicare principles.

On Exhibit 7, Part I – Wage Related Cost (Core List), Health and Insurance Costs specifically lists costs incurred for health insurance, accident insurance, disability insurance, long-term care insurance and workmen's compensation without regard to whether the insurance is purchased or self-funded as long as the employee is the owner/beneficiary.

Despite this specific reference to disability insurance as a wage related cost, the Board majority considers the short-term disability payment to be paid time off (PTO) and reportable in salaries and wages because of the hospital's direct payment of this benefit to its employees.

We agree that short-term disability pay is literally paid time off; the purpose is to compensate an employee for time off due to a non-work related injury or illness. However, the hospital's own policy makes a distinction between short-term disability and PTO/PDO.

Whether the short-term disability payment is made via accounts payable (AP) check issued by the hospital or an insurance carrier or via the hospital's payroll accounting, the employee is being directly compensated for their time off. We, therefore, disagree with

the Board majority that the method of payment has any bearing on how these costs should be reported for Medicare purposes.

Adjustments to the hospital payroll accounting system's data to properly reflect hospital wage index information is not unusual. For example, bonus pay is included in salaries and wages but the associated hours are excluded because they may not necessarily correspond to the amounts paid out, such as when the amount of payment is based on a percentage of an employee's salary.

We do agree with the Board majority that if the short-term disability payments are included as salaries and wages, the associated hours must also be included for proper matching. In accordance with CMS Pub. 15-2 §3605.2 - Part 2 – Hospital Wage Index Information, in relevant part, states:

Column 4 - Enter on each line the number of paid hours corresponding to the amounts reported in
Column 3 [for Salaries and Wages].

However, we do not agree that the inclusion of these amounts as salaries and wages is the proper treatment of these types of costs. On the contrary, these types of costs should be treated as wage related costs in accordance with the cost reporting instructions to ensure consistent treatment by all providers for the sake of uniformity and comparability.

The Board majority was not persuaded by the Provider's argument that the short-term disability should be treated as a fringe benefit with no hours included in the wage index calculation and deemed this argument meritless. We disagree with the Board majority because as long as both the short term disability pay/costs and hours are removed from Worksheet S-3, Part 2, Line 1, no aberrance would be created. Aberrance is created where one or the other is left in but, not both.

The Board majority made a distinction between providers based on their chosen method of payment by claiming that short-term disability payments should be classified according to how the payment is processed through the hospital's payroll or general accounting systems. This rationale creates a disparity in how these types of costs are treated and classified for wage index purposes depending on how providers chose to provide the benefit to its employees. Our position is supported by the decision in Sarasota Memorial Hospital, et. al. v. Shalala, 60 F.3d. 1507 (11th Cir, 1995), in which the Court found that the uniformity of the wage index is compromised if the Secretary does not classify the same items of costs as wages for all providers.

In summary, the fact that the Provider opted to pay an employee benefit through its payroll system does not change the nature or type of costs. Moreover, the classification of short-term disability as "wage related costs" is required according to CMS program instructions.

In this instant case, short-term disability pay and hours should be excluded from salaries and wages reported on Worksheet S-3, Part 2, Columns 3 & 4, Line 1 and reported on Worksheet S-3, Part 2, Column 3, Line 13 as wage related costs for calculation of the hospital's Medicare wage index.

Yvette C. Hayes

Suzanne Cochran