

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2018-D15

PROVIDER–
Nassau Suffolk FFY 2007, 2008, 2009 Wage
Index Calculation Groups

HEARING DATE –
November 4, 2015

Provider Nos.: Various – See Appendix A

Cost Reporting Periods Ended –
December 31, 2003; December 31, 2004;
December 31, 2005

vs.

MEDICARE CONTRACTOR –
National Government Services, Inc.

CASE NOS.: 07-1589G, 08-1344G and
09-1283G

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ISSUE:

Whether the Medicare Contractor¹ should have excluded the aberrant wage index data from Brunswick Hospital Center (“Brunswick”) when calculating the Nassau-Suffolk Core-Based Statistical Area (“CBSA”) wage index calculations for fiscal years (“FYs”) 2007, 2008 and 2009.²

DECISION:

After considering the Medicare law and program instructions, the evidence presented and the parties’ contentions, the Provider Reimbursement Review Board (“Board”) finds that the Centers for Medicare & Medicaid Services (“CMS”) properly included the wage index data for Brunswick when calculating the Nassau-Suffolk CBSA Wage Index for FYs 2007, 2008 and 2009.

INTRODUCTION:

This is a consolidated case involving three group appeals. There are 27 hospitals in the 2007 Wage Index Group, 18 hospitals in the 2008 Wage Index Group and 21 hospitals in the 2009 Wage Index Group (“Hospitals” or “Providers”). These Hospitals are located in Nassau, Suffolk and Orange Counties in New York and New Haven County in Connecticut. To calculate the wage index for the Hospitals, CMS used wage index data from all hospitals that were in the Nassau-Suffolk CBSA at that time, including Brunswick.

CMS calculated the 2007 Wage Index for all providers in the Nassau-Suffolk CBSA using 2003 wage data and published its final determination in the Federal Register on October 11, 2006.³ CMS calculated the 2008 Wage Index for all providers in the Nassau-Suffolk CBSA using 2004 wage data and published its final determination in the Federal Register on August 22, 2007.⁴ Likewise, CMS calculated the 2009 Wage Index for all providers in the Nassau-Suffolk CBSA using 2005 wage data and published its final determination in the Federal Register on October 3, 2008.⁵

The Hospitals claim the published wage index was understated due to the inclusion of aberrant data from Brunswick in the Nassau-Suffolk CBSA wage index calculation. The Hospitals timely appealed the wage index determination to the Board and met the jurisdictional requirements for a hearing. The Board conducted a hearing on November 4, 2015. Roy Breitenbach of Garfunkel Wild, P.C. represented the Hospitals. Edward Lau of Federal Specialized Services represented the Medicare Contractor.

¹ The Hospitals’ assigned Medicare Contractor during the time at issue was National Government Services, Inc. (herein referred to as the “Medicare Contractor”). Medicare Contractors perform payment and audit functions for CMS.

² Transcript (“Tr.”) at 5-6. Transcript of the November 4, 2015 hearing is attached to Providers’ Joint Post-Hearing Brief, Exhibit P-35.

³ See 71 Fed. Reg. 59886 (Oct. 11, 2006).

⁴ See 72 Fed. Reg. 47130 (Aug. 22, 2007).

⁵ See 73 Fed. Reg. 57888 (Oct. 3, 2008).

STATEMENT OF FACTS:

Medicare pays hospitals predetermined, standardized amounts per patient discharge, subject to certain payment adjustments. One of these adjustments, the wage index adjustment, reflects local wage variances, which CMS updates annually using a survey of wage data submitted on the hospitals' Medicare cost reports.

To ensure that hospitals timely submit wage data, CMS establishes a detailed timetable for submitting and reviewing wage data, which is used to establish an accurate wage index. Data are flagged for potential aberrancy, verified or removed from the data file.⁶ Hospitals may appeal to the Medicare Contractor and/or CMS at various times throughout the process.⁷

Brunswick, located in Amityville, New York, experienced financial difficulties beginning in 2003, filed for Chapter 11 bankruptcy and was brought into receivership. In 2005 Brunswick closed.⁸ Consistent with CMS' procedure for wage data submission for the FY 2007 Wage Index, the Medicare Contractor⁹ contacted Brunswick regarding questions about its wage data submission.¹⁰ Brunswick provided some information, but failed to respond to other questions.¹¹

Brunswick did not contest the wage data that was published by CMS according to the timetable. The Hospitals do not contend that there were mistakes in Brunswick's wage data. Rather, the Hospitals contend that Brunswick's wage data was aberrant and the Medicare Contractor should have excluded the data from the Nassau-Suffolk CBSA wage index calculation.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW:

The Hospitals contend that the inclusion of Brunswick's wage data depressed the average hourly wage for the entire CBSA and reduced their Medicare reimbursement. According to the Hospitals, Brunswick's financial difficulties caused its wage data to be vastly lower than the rest of the hospitals in the geographic area in two ways. First, the average hourly wage at Brunswick was lower than the average hourly wage at any other hospital in the group by a significant margin.¹² Second, Brunswick's wage data dropped precipitously during the relevant time

⁶ 71 Fed. Reg. 47870, 48015 (Aug. 18, 2006), 72 Fed. Reg. 47130, 47317 (Aug. 22, 2007) and 73 Fed. Reg. 48434, 48581-82 (Aug. 19, 2008).

⁷ Medicare Contractor's Final Position Paper, Exhibits I-1 for FY 2007, I-8 for FY 2008 and I-15 at 7 for FY 2009.

⁸ Providers' Joint Final Position Paper at 2, 10. See Providers' Joint Final Position Paper, Exhibit P-29.

⁹ Empire Medicare Services was the Medicare Contractor responsible for the Nassau-Suffolk CBSA hospitals at the time.

¹⁰ Medicare Contractor's Final Consolidated Position Paper, Exhibits I-2, I-3, I-4, I-5, I-6.

¹¹ Medicare Contractor's Final Consolidated Position Paper at 3-9.

¹² In FY 2003, Brunswick's average hourly wage was \$26.27 – a full 18.82% less than the next lowest hospital's average hourly wage of \$32.36 (Providers' Joint Final Position Paper, Exhibit P-4). The FY 2004 average hourly wage reported by Brunswick was \$28.17, which is 19.81% less than the next lowest average hourly wage of \$35.13 (*Id.* at Exhibit P-5). The FY 2005 average hourly wage reported by Brunswick was \$22.69, which is 31.03% less than the next lowest average hourly wage of \$32.90 (*Id.* at Exhibit P-6).

period.¹³

The Hospitals also argue that the Medicare Contractor should have excluded Brunswick's data as aberrant for all three fiscal years at issue.¹⁴ The Hospitals believe that failing to exclude the data violates CMS' stated policies and regulations, which anticipates potential aberrations and creates a procedure for their exclusion.¹⁵ The Hospitals argue that the Medicare Contractor was aware that Brunswick's data was aberrant because Brunswick's financial and management difficulties were longstanding and well-publicized.¹⁶

The Hospitals acknowledge that while every wage index group has one hospital with the lowest wages, low wages paired with publicized financial distress should be a clear indicator that the wages are aberrant for the region. In addition, the Hospitals assert Brunswick's difficulties call into question the accuracy and reliability of its wage data, particularly when that data yields an average hourly rate significantly lower than the rates at other geographically proximate institutions. The Hospitals believe the data was clearly not representative of the wage data for the entire CBSA, and thus should not have been used to adjust the CBSA's geographic wage and labor costs.¹⁷

The Hospitals summarized the average hourly wage ("AHW") for the record, providing the following historical wage data for Brunswick.¹⁸

Fiscal Year	AHW	% Change
2000	\$24.74	
2001	\$24.54	-0.79%
2002	\$25.99	5.90%
2003	\$25.5405	-1.74%
2004	\$26.2954	2.96%
2005	\$26.0150	-1.07%
2006	\$25.5597	-1.75%
2007	\$26.2719	2.79%
2008	\$28.1788	7.26%
2009	\$22.6885	-19.48%

The Board's review of this data shows that Brunswick's AHW remained relatively stable until FY 2009. This data appears to indicate that Brunswick may have always been one of the "low wage" hospitals in the CBSA--not that wages decreased sufficiently (until FY

¹³ The Hospitals state that when looking from 2003 to 2005, it was evident, at the aggregate level, that the average hourly wage of hospitals in the CBSA, other than Brunswick, increased while Brunswick's data decreased by 13.64% ($\$26.2719 - \$22.6885 = \$3.5834$; $\$3.5834 / \$26.2719 = 13.64\%$).

¹⁴ Providers' Joint Post-Hearing Brief at 10-11.

¹⁵ *Id.* at 3.

¹⁶ Providers' Joint Final Position Paper at 9-10.

¹⁷ Providers' Joint Post-Hearing Brief at 17-18.

¹⁸ Providers' Joint Final Position Paper, Exhibit P-26 and Providers' Post-Hearing Brief, Exhibit P-34 at 4.

2009) to become aberrant to that in prior years.¹⁹ Specifically, with respect to the years of data that would have affected the FYs 2007-2009 wage indices, that is, 2003-2005 data, the evidence in the record does not support a determination that Brunswick's data was aberrant and that the Medicare Contractor should have excluded Brunswick's data from the Nassau-Suffolk CBSA wage index calculation.²⁰ While the summary wage data table may suggest that Brunswick's wage data was low as compared to other hospitals in the CBSA, it does not necessarily indicate that any of the applicable years' data is aberrant when compared to Brunswick's prior years' data. Both parties seemed to agree that a swing of *less* than 10% from one year to the next does not necessarily mean that the data is aberrant.²¹ Using this 10% threshold the AHW for all years except 2009 is below the threshold and not aberrant.

While FY 2009 AHW did exceed the 10% threshold, the Hospitals did not establish that Brunswick was comparable to the 37 hospitals that CMS did exclude from the FY 2009 wage index calculation.²² Absent such evidence, the Board is unable to conclude that CMS' decision not to exclude Brunswick's data was arbitrary and capricious or otherwise violated CMS' policy regarding exclusion from the wage data calculations.

Finally, the Board is unpersuaded that the Medicare Contractor should have, on its own, recognized Brunswick's wage data as aberrant given Brunswick's widely publicized financial difficulties. The record indicates that the Medicare Contractor contacted Brunswick's Director of Finance by telephone and email requesting explanations regarding wage information, but got no response or a belated one. Testimony from the President and Chief Executive Officer of the Nassau-Suffolk Hospital Council indicated that the Nassau-Suffolk Hospital Council knew of Brunswick's financial difficulties and potential impact on the wage index, but failed to contact the Medicare Contractor or review the public use files published by CMS to determine whether Brunswick's wage data would significantly impact the other 23 hospitals in the region.²³ The Board finds no compelling evidence in the record to indicate that the Medicare Contractor failed to carry out its responsibility.

¹⁹ The Board notes that in its decision in *Battle Creek, MI MSA FY 2006 Wage Index Group v. Wisconsin Physicians Service*, PRRB Dec. No. 2013-D12 at 9-11 (April 25, 2013), the Board concluded that one element of the Medicare Contractor's desk review process should have identified significant year-to-year variance in the bankrupt provider's wage data which exceeded CMS' threshold and, if identified, would likely have resulted in an exclusion from the MSA's wage index. In the present case, as indicated in the table above, Brunswick had a very small wage variance until FY 2009. Therefore, the Board does not find the facts in this case comparable to those in *Battle Creek*.

²⁰ See Medicare Contractor's Final Consolidated Position Paper, Exhibit I-23.

²¹ A provider witness testified that CMS' threshold for aberrant data was secret, but he believed it to be 10%. See Providers' Joint Post-Hearing Brief, Exhibit P-35, Tr. at 151-54. The Medicare Contractor referred to the 10% threshold as a flag for when data required further analysis and not a presumption of aberrancy. See Medicare Contractor's Post Hearing Brief at 6.

²² 73 Fed. Reg. at 48581. Similarly, in the FY 2008 Final Rule, 72 Fed. Reg. at 47317, CMS notes that it excluded 30 hospitals from the FY 2008 wage index calculation because the verification of their wage data was "questionable" or the data received was "too aberrant." *Id.* The Final Rule also states that the FY 2004 wage data was used even for those hospitals that have "since terminated their participation in the program as hospitals, as long as those data do not fail any of our edits for reasonableness." *Id.* The Final Rule can be found at Medicare Contractor's Post Hearing Brief, Exhibit I-2.

²³ Providers' Joint Post-Hearing Brief, Exhibit P-35, Tr. at 26, 59-61 and 83-85.

DECISION AND ORDER:

After considering the Medicare law and program instructions, the evidence presented and the parties' contentions, the Board finds that CMS properly included the wage index data for Brunswick when calculating the Nassau-Suffolk CBSA Wage Index for FYs 2007, 2008 and 2009.

BOARD MEMBERS PARTICIPATING:

L. Sue Andersen, Esq.
Charlotte F. Benson, CPA
Gregory H. Ziegler, CPA, CPC-A

FOR THE BOARD:

/s/
L. Sue Andersen, Esq.
Chairman

DATE: January 19, 2018

APPENDIX A**CASE NO. 07-1589G**

	Provider No.	Provider Name	FYE
1	33-0393	Stony Brook University Hospital	12/31/2003
2	33-0107	Peconic Bay Medical Center	12/31/2003
3	33-0401	St. Catherine of Siena Medical Center	12/31/2003
4	33-0088	Eastern Long Island Hospital	12/31/2003
5	33-0043	Southside Hospital	12/31/2003
6	33-0045	Huntington Hospital	12/31/2003
7	33-0181	North Shore University Hospital at Glen Cove	12/31/2003
8	33-0185	John T. Mather Memorial Hospital	12/31/2003
9	33-0198	South Nassau Communities Hospital	12/31/2003
10	33-0246	St. Charles Hospital	12/31/2003
11	33-0286	Good Samaritan Hospital Medical Center	12/31/2003
12	33-0331	North Shore University Hospital at Plainview	12/31/2003
13	33-0372	Franklin Hospital Medical Center	12/31/2003
14	33-0259	Mercy Medical Center	12/31/2003
15	33-0332	New Island Hospital	12/31/2003
16	33-0167	Winthrop University Hospital	12/31/2003
17	33-0225	Long Beach Medical Center	12/31/2003
18	33-0141	Brookhaven Memorial Hospital Medical Center	12/31/2003
19	33-0340	Southampton Hospital	12/31/2003
20	33-0264	St. Luke's Cornwall Hospital	12/31/2003
21	07-0005	Waterbury Hospital	12/31/2003
22	07-0016	Saint Mary's Hospital	12/31/2003
23	07-0022	Yale-New Haven Hospital	12/31/2003
24	07-0031	Griffin Hospital	12/31/2003
25	07-0001	Hospital of Saint Raphael	12/31/2003
26	07-0039	Masonic Healthcare Center	12/31/2003
27	07-0019	Milford Hospital	12/31/2003

CASE NO. 08-1344G

	Provider No.	Provider Name	FYE
1	33-0393	Stony Brook University Hospital	12/31/2004
2	33-0107	Peconic Bay Medical Center	12/31/2004
3	33-0401	St. Catherine of Siena Medical Center	12/31/2004
4	33-0088	Eastern Long Island Hospital	12/31/2004

5	33-0043	Southside Hospital	12/31/2004
6	33-0045	Huntington Hospital	12/31/2004
7	33-0185	John T. Mather Memorial Hospital	12/31/2004
8	33-0246	St. Charles Hospital	12/31/2004
9	33-0286	Good Samaritan Medical Center	12/31/2004
10	33-0141	Brookhaven Memorial Hospital Medical Center	12/31/2004
11	33-0340	Southampton Hospital	12/31/2004
12	33-0264	St. Luke's Cornwall Hospital	12/31/2004
13	07-0005	Waterbury Hospital	12/31/2004
14	07-0016	Saint Mary's Hospital	12/31/2004
15	07-0022	Yale-New Haven Hospital	12/31/2004
16	07-0031	Griffin Hospital	12/31/2004
17	07-0001	Hospital of Saint Raphael	12/31/2004
18	07-0019	Milford Hospital	12/31/2004

CASE NO. 09-1283G

	Provider No.	Provider Name	FYE
1	33-0141	Brookhaven Memorial Hospital Medical Center	12/31/2005
2	33-0088	Eastern Long Island Hospital	12/31/2005
3	33-0286	Good Samaritan Hospital Medical Center	12/31/2005
4	07-0031	Griffin Hospital	12/31/2005
5	33-0185	John T. Mather Memorial Hospital	12/31/2005
6	33-0225	Long Beach Medical Center	12/31/2005
7	33-0259	Mercy Medical Center	12/31/2005
8	33-0027	Nassau University Medical Center	12/31/2005
9	33-0332	New Island Hospital	12/31/2005
10	33-0107	Peconic Bay Medical Center	12/31/2005
11	33-0401	St. Catherine of Siena Medical Center	12/31/2005
12	33-0246	St. Charles Hospital	12/31/2005
13	33-0182	St. Francis Hospital	12/31/2005
14	33-0264	St. Luke's Cornwall Hospital	12/31/2005
15	07-0016	Saint Mary's Hospital	12/31/2005
16	33-0198	South Nassau Communities Hospital	12/31/2005
17	33-0340	Southampton Hospital	12/31/2005
18	33-0393	Stony Brook University Hospital	12/31/2005
19	07-0005	Waterbury Hospital	12/31/2005
20	33-0167	Winthrop University Hospital	12/31/2005
21	07-0022	Yale-New Haven Hospital	12/31/2005