

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT**

In the Matter of:)	Master Case No. M2013-614
)	
DETERMINATION OF REVIEWABILITY)	PREHEARING ORDER NO. 2:
#13-30 REGARDING THE AMBULATORY)	ORDER ON SUMMARY
SURGERY FACILITY EXEMPTION FOR)	JUDGMENT
PROVIDENCE MEDICAL PARK IN)	
SPOKANE VALLEY)	
)	
ROCKWOOD HEALTH SYSTEM d/b/a)	
VALLEY HOSPITAL,)	
)	
Petitioner.)	
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APPEARANCES:

Petitioner, Rockwood Health System, d/b/a
Valley Hospital (Rockwood Health), by
Law Offices of John F. Sullivan, per
John F. Sullivan, Attorney at Law

Department of Health Certificate of Need Program (Program), by
Office of the Attorney General, per
Richard A. McCartan, Assistant Attorney General

Intervenor, Providence Health & Services – Washington, d/b/a
Providence Physician Services Company (PPSC), by
Perkins Coie LLP, per
Brian W. Grimm, Attorney at Law

PRESIDING OFFICER: John F. Kuntz, Review Judge

The Program, Rockwood Health, and PPSC each filed a Motion for Summary Judgment regarding the Program's Determination of Reviewability #13-03 (Determination). The Program and Rockwood Health each seeks an order setting aside the Determination and require PPSC's proposed ambulatory surgical center facility to

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obtain a certificate of need (CN) for its facility. PPSC seeks an order affirming the Program's initial decision (Determination of Reviewability #13-03) that no CN is required for the operating rooms at PPSC's Medical Park Spokane Valley facility.

PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 On August 21, 2012, PPSC requested the Program make a determination of reviewability that PPSC's proposed ambulatory surgical facility at Providence Medical Park Spokane Valley was exempt from CN review under WAC 246-310-010(5). PPSC is a physician group in Spokane, Washington, that was founded more than 30 years ago. The sole shareholder of PPSC is Providence Health Care Ventures, Inc.; the sole shareholder of Providence Health Care Ventures, Inc. is Providence Health Services – Washington (Providence). PPSC currently consists of 27 surgeons. PPSC proposes that these surgeons will perform surgery on an exclusive basis in the operation rooms at the PPSC location. As proposed, other surgeons employed by Providence will not be permitted to use the PPSC facility.

1.2 On March 26, 2013, the Program issued its Determination and concluded that PPSC's proposed ambulatory surgery center would be exempt from the CN review process so long as the use of the PPSC's operating rooms located at Providence Medical Park Spokane Valley were used exclusively by PPSC's surgeons.

1.3 On April 18, 2013, Rockwood Health d/b/a Valley Hospital (an interested and affected person)¹ filed a Request for Adjudicative Proceeding re Determination of Reviewability #13-03 with the Adjudicative Service Unit. Rockwood Health argued the

¹ See WAC 246-310-010(2) ("affected person") and (34) ("interested persons").

Program's Determination incorrectly granted a WAC 246-310-010(5) exemption to PPSC. In support of its argument, Rockwood Health referred to the only administrative decision that addressed the issue. See *In re MultiCare*, Docket No. 06-07-C-2001CN (dated January 29, 2007) (*MultiCare*).²

1.4 On July 24, 2013, PPSC was permitted to intervene in the adjudicative proceeding. See Stipulation and Order for Intervention by Providence.

1.5 On December 31, 2013, the Program filed a Motion for Summary Judgment with the Adjudicative Service Unit, in which it argued that PPSC did not qualify for the WAC 246-310-010(5) exemption.³

1.6 On December 31, 2013, Rockwood Health filed a Motion for Summary Judgment with the Adjudicative Service Unit. Rockwood Health argued that the PPSC project did not qualify for the WAC 246-310-010(5) exemption and was required to apply for a CN before proceeding with its ambulatory surgery center.

1.7 On December 31, 2013, PPSC filed a Motion for Summary Judgment with the Adjudicative Service Unit. PPSC argued that the Presiding Officer should affirm the Program's Determination and find that PPSC was not required to obtain a CN review so long as the use of the Providence Medical Park Spokane Valley operating rooms were limited to surgeons employed by PPSC.

² The *Multicare* decision was upheld by the Thurston County Superior Court on November 29, 2007. It was subsequently vacated by the Court of Appeals on jurisdictional grounds. See *MultiCare Health System v. Department of Health*, No. 37157-0-II, 2008 WL 4868881, at #6 (Wash. App. November 12, 2008) (Unpublished).

³ This was a change of position for the Program. See Paragraph 1.2.

II. CONCLUSIONS OF LAW

2.1 The presiding officer, at appropriate stages of the proceeding, shall give all parties full opportunity to submit and respond to motions. RCW 34.05.437(1); see *also* WAC 246-10-403(1). The presiding officer's decision, not the Program's evaluation, is the final decision in the matter.⁴ See *DaVita v. Department of Health*, 137 Wn. App. 174, 181 (2007). The presiding officer shall:

- (a) Apply as the first source of law governing an issue those statutes and rules deemed applicable to the issue;
- (b) If there is no statute or rules governing an issue, resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington Constitutions, statutes, rules and court decisions; and
- (c) Not declare any statute or rule invalid.

WAC 246-10-602(3).

Summary Judgment

2.2 Administrative tribunals are vested with the authority to rule by summary judgment. *ASARCO v. Air Quality Coalition*, 92 Wn. 2d 685 (1979). Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Washington State Superior Court Civil Rules (CR) 56(c).

2.3 A material fact is one upon which the outcome of the litigation depends. *Tran v. State Farm Fire & Casualty Company*, 139 Wn. 2d 214, 223 (1998). Summary

⁴ The Program's change of position in this matter is immaterial. Once there was a timely appeal of the Program's Determination, the Presiding Office's decision will resolve the issue.

judgment is not proper if “reasonable minds could draw different conclusions from undisputed facts, or if all of the facts necessary to determine the issues are not present.” *Tran v. State Farm Fire & Casualty*, 125 Wn. 2d at 223. In performing a summary judgment analysis, the evidence is not weighed for the truth of the matter; the only question is whether there is a genuine issue of material fact. *Arreygue v. Lutz*, 116 Wn. App. 938, 940-941 (2003). In considering a summary judgment motion, all facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Fawn Lake Maintenance Commission v. Aldons Albers et.al.*, 149 Wn. App. 318, 323 (2009) (citations omitted).

2.4 There are no genuine issues of material factual in this case. PPSC is owned by Providence. Only PPSC surgeons can use the Providence Medical Park Spokane Valley ambulatory surgical facility. The only question is one of law, namely whether PPSC qualifies for the WAC 246-310-010(5) exemption.

Certificate of Need Exemption

2.5 A CN means a written authorization by the Program for a person to implement a proposal for one or more undertakings. WAC 246-310-010(11). A certificate of need is required for the construction, development, or other establishment of a new health care facility. RCW 70.38.105(4)(a); *see also* WAC 246-310-020(1)(a). An ambulatory surgical center is a health care facility. RCW 70.38.025(6); *see also* WAC 246-310-010(26). An ambulatory surgical center is defined as:

[A]ny free-standing entity, including an ambulatory surgery center that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. *The term does not include a facility in the offices of private physicians or dentists, whether for individual*

or group practice, if the privilege of using the facility is not extended to physicians or dentists outside the individual or group practice.

WAC 246-310-010(5) (emphasis added). The terms “private physicians” and “group practice” are not defined in either chapters 70.38 RCW or 246-310 WAC.

2.6 The interpretation of a regulation is an issue of law. See *May v. Robertson*, 153 Wn. App. 57, 73 (2013). In interpreting WAC 246-310-010(5), the rules of construction apply. *Department of Revenue v. Nord NW Corp.*, 164 Wn. App. 215, 230-31 (2011).

2.7 A statute shall not be construed so as to create an absurd result. *Burton v. Lehman*, 153 Wn. 2d 416, 423 (2005). Here PPSC defines “private” and “group practice” too broadly and essentially renders the term “private” as meaningless. See Judge Caner’s decision in *Multicare*, Paragraph 2.12. Moreover, a court should interpret a statutory provision in a way that would further the purpose of the underlying statutory scheme and intent of the Legislature. See *Budget Rent A Car Corp., v. Department of Licensing*, 144 Wn. 2d at 900. The legislative intent is set forth in RCW 70.38.015, which requires accessible health services while controlling increases in costs. See RCW 70.38.015(1). Costs are controlled by ensuring better utilization of existing institutional health services and major medical equipment; those health care providers wishing to establish or expand facilities or acquire certain types of equipment are required to obtain a CN. See *St. Joseph Hospital and Health Care Center v. Department of Health*, 125 Wn.2d 733, 736 (1995).

2.8 So in considering the goal of cost control, the Legislature created a detailed CN process for the creation of new health care facilities (which includes

ambulatory surgery centers). See RCW 70.38.105 and RCW 70.38.115. The Legislature did not create a specific exemption in RCW 70.38.111 for ambulatory surgery centers. This exemption was created by the Program in WAC 246-310-010(5). Related statutory provisions are interpreted in relation to each other and all provisions harmonized. See *City of Olympia v. Drebeck*, 156 Wn. 2d 289, 295 (2006) (citations omitted). So considering the detailed CN process for a new health care facility, along with the lack of a statutory exemption, the Presiding Officer concludes the reading of the exemption language in WAC 246-310-010(5) should be construed narrowly.

2.9 PPSC argues that only the 27 surgeons who are a part of PPSC may use the proposed facility. The Presiding Officer concludes that if the 27 PPSC surgeons owned the proposed ambulatory surgery center rather than Providence, PPSC would qualify for the WAC 246-310-010(5) exemption and not be required to file a CN. But a narrow reading of the exemption means that Providence's corporate ownership of PPSC's ambulatory surgery center does not qualify for an exemption from the CN process. Any other reading eviscerates the CN process. The Presiding Officer therefore sets aside Determination of Reviewability #13-03.

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, it is ORDERED:

3.1 The PPSC Motion for Summary Judgment is DENIED. The Determination of Reviewability #13-03 granted to PPSC on March 26, 2013 does not apply and PPSC does not qualify for an exclusion use exemption under WAC 246-310-010(5).

- 3.2 The Rockwood Health Motion for Summary Judgment is GRANTED.
- 3.3 The Program's Motion for Summary Judgment is GRANTED.

Dated this 20 day of February, 2014.

_____/s/_____
JOHN F. KUNTZ, Review Judge
Presiding Officer

NOTICE TO PARTIES

When signed by the presiding officer, this order shall be considered an initial order. RCW 18.130.095(4); Chapter 109, law of 2013 (Sec. 3); WAC 246-10-608.

Any party may file a written petition for administrative review of this initial order stating the specific grounds upon which exception is taken and the relief requested.

WAC 246-10-701(1). A petition for administrative review must be served upon the opposing party and filed with the adjudicative clerk office within 21 days of service of the initial order. WAC 246-10-701(3).

"Filed" means actual receipt of the document by the Adjudicative Clerk Office. RCW 34.05.010(6). "Served" means the day the document was deposited in the United States mail. RCW 34.05.010(19). The petition for administrative review must be filed within 21 calendar days of service of the initial order with:

Adjudicative Clerk Office
Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to the opposing party. If the opposing party is represented by counsel, the copy should be sent to the attorney. If sending a copy to the Assistant Attorney General in this case, the mailing address is:

Department of Health
Office of Legal Services
P.O. Box 47873
Olympia, WA 98504-0109

Effective date: If administrative review is not timely requested as provided above, this initial order becomes a final order and takes effect, under WAC 246-10-701(5), at 5:00 pm on _____. Failure to petition for administrative review may result in the inability to obtain judicial review due to failure to exhaust administrative remedies. RCW 34.05.534.

Final orders will be reported to the National Practitioner Databank (45 CFR Part 60) and elsewhere as required by law. Final orders will be placed on the Department of Health's website, and otherwise disseminated as required by the Public Records Act (Chap. 42.56 RCW) and the Uniform Disciplinary Act. RCW 18.130.110. All orders are public documents and may be released.

For more information, visit our website at:

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