Legal Briefs

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Pennsylvania Blue Shield agrees to reimburse nurse anesthetists

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As a result of a lawsuit brought by four CRNAs, Pennsylvania Blue Shield has agreed to reimburse CRNAs who are independent contractors and are not supervised by an anesthesiologist. Pennsylvania Blue Shield has reversed its policy of not paying for CRNA anesthesia services unless supervised or administered by an anesthesiologist or a doctor other than the operating surgeon or assistant surgeon. It is our understanding that Pennsylvania Blue Shield will also reimburse all Pennsylvania CRNAs in the same position.

A. Wayne Lauver, CRNA; Michael C. Smith, CRNA; Jeffrey H. Swingholm, CRNA; and Arthur M. Antel, Jr., CRNA, were the only anesthesia providers at a Pennsylvania hospital. Until June 1989, the CRNAs were hospital employees. In the spring of 1989, the CRNAs, after having discussed their plans with the hospital, contacted a representative of Pennsylvania Blue Shield to discuss the possibility of becoming independent contractors and billing Blue Shield directly. The representative of Blue Shield advised the CRNAs that he saw no problem with their becoming independent contractors and billing Blue Shield directly.

Insurance Payment to Registered Nurse Law

Logically, it is not surprising that the representative of Pennsylvania Blue Shield should have believed this. Pennsylvania had passed a statute known as the Insurance Payment to Registered Nurse Law (40 P.S. 3021 at seq., 1988), which provided that, "*When a service is performed by a certified registered nurse anesthetist... certified by the State Board of Nursing... and lawfully permitted to perform that service... and a policy, contract or certificate provides for reimbursement for that service, the insured or any other person covered shall be entitled to reimbursement either to the insured or to the registered professional nurse providing that service.*"

Reimbursement by Pennsylvania Blue Shield was important in the decision to become independent because 30-35% of the CRNAs' patients were Blue Shield subscribers, about 40% were under Medicare, 15-20% had independent insurance coverage and about 10% received medical assistance. Relying on the assurances of the representative of Pennsylvania Blue Shield, the CRNAs left the employ of the hospital and became independent.

At first, things seemed to go as expected. Blue Shield assigned the CRNAs with provider numbers and the CRNAs began to bill Blue Shield and receive payments. However, in the fall of 1989, the CRNAs began to have billing problems. Blue Shield became inconsistent in paying for their cases. One of the CRNAs called Blue Shield and was informed during that telephone conversation that the CRNA claims for payment were being sent to Blue Shield's medical policy division for clarification "*... concerning the legality of [the CRNAs'] practice. And, therefore, [the CRNAs] would not be paid.*"

Pennsylvania Blue Shield later gave as its justification for refusing to pay the CRNAs its policy that, *"Pennsylvania Blue Shield does not pay for anesthesia services unless supervised or administered by a professional provider who is not also the operating surgeon, assistant surgeon or attending professional provider."*

It was ironic that Blue Shield should have been concerned with the legality of the CRNAs' practice. Blue Shield had been paying for anesthesia services by the same group of four CRNAs with the same degree of supervision when they were hospital employees without any apparent concern. Moreover, Blue Shield was also the administrative agent for Medicare payment and, even though Blue Shield was so concerned about the "legality" of the CRNAs' practice that it withheld payments from Blue Shield, Blue Shield was seemingly unconcerned with the "legality" of the CRNAs' practice when it made Medicare payments which continued even when Blue Shield payments were halted.

Regulations support legality of CRNA practice

Legality of CRNA practice in Pennsylvania is supported by regulations issued by the Department of Health and by the Board of Nursing. Regulations issued by the Board of Nursing provide that CRNAs are *"authorized to administer anesthesia in cooperation with a surgeon or dentist. The nurse anesthetist's performance shall be under the overall direction of the chief or director of anesthesia services. In situations or health care delivery facilities where these services are not mandatory, the nurse anesthetist's performance shall be under the overall direction of the surgeon or dentist responsible for the patient's care."* (49 Pa. Code 21.17.)

Regulations issued by the Department of Health provide that, *"Anesthesia care shall be provided by a qualified physician, anesthesiologist, resident physician in training, dentist anesthetist, qualified nurse anesthetist under the supervision of the operating physician or anesthesiologist..."* (28 Pa. Code 123.5.) Neither the Department of Health nor the Board of Nursing regulations require supervision by a physician other than the operating surgeon.

The CRNAs and their attorney, William Hebe, tried to negotiate with Pennsylvania Blue Shield. They also sought help from the Pennsylvania Insurance Commissioner and the Department of Health. When these efforts proved unproductive, they filed a class action antitrust suit in federal court. Of course, litigation is a slow and expensive process. It also does not substitute for the cash flow loss from not being paid for 30-35% of their practice. While the suit was pending in federal court, the CRNAs' attorney filed a request in the local Pennsylvania State Court for an injunction ordering Pennsylvania Blue Shield to pay the CRNAs for services rendered. On August 2, 1990, the Court of Common Pleas of Tioga County, Pennsylvania, ordered Pennsylvania Blue Shield to make payments to the CRNAs *(Lauver, et al. v. Medical Service Association of Pennsylvania,* No. 140 Civil Division 1990, Civil Action-Equity, Court of Common Pleas of Tioga County, Pennsylvania, August 2, 1990.)

In considering the arguments of the case, the court noted that there was no data to suggest that supervision of CRNAs by a physician other than the operating surgeon resulted in any better patient care. In fact, one of the court's findings was that, *"The major cause of anesthesia mishap is not lack of education, but lack of attention on the part of the person administering anesthesia."* (Opinion, page 9.) The trial court held that, *"The Defendant's [Pennsylvania Blue Shield] basis of refusing to pay Plaintiffs [CRNAs] for covered services is neither supported by the evidence, statute, policy or regulations."* (Opinion, page 16.)

Administrative remedies

At trial, Pennsylvania Blue Shield had tried to convince the trial judge not to grant the injunction because the CRNAs had not exhausted their "administrative remedies." In general, in areas of the law which are regulated by an administrative agency (as nursing is regulated by a Board of Nursing or the insurance industry is regulated by an Insurance Commissioner), the courts will not hear lawsuits in the areas of the administrative agency's jurisdiction until the plaintiffs have tried every avenue of relief in the administrative process. The theory is that court cases are very expensive, and it is best to let less expensive methods of dispute resolution have a chance to work. A related reason, and one of the reasons that court cases are so expensive, is that courts are a forum of last resort. When all else fails, you go to court. As a result, courts have no particular expertise. In every case, you must provide the court with the facts of the case and the law and regulations which are relevant.

Consequently, courts like to give administrative agencies a chance to resolve disputes before the courts have to step in. In fact, the statute which governed Pennsylvania Blue Shield provided that disputes concerning professional health services rendered by health service doctors would be considered and determined only by health service doctors selected in a manner prescribed in the bylaws of Blue Shield. Even though CRNAs were "health service doctors" for this purpose, the review committee consisted entirely of physicians. Blue Shield's bylaws made no provision for disputes concerning Certified Registered Nurse Anesthetists. *"Since there is no Medical Review Committee available to Plaintiffs and therefore no ensuing decision, the Plain-*

tiffs' only option was to seek relief with this Court." (Opinion, page 22.)

Pennsylvania Blue Shield also claimed that it had various policies which it claimed prohibited payment to CRNAs. The court found that the policies only prohibited operating surgeons from demanding payment for supervising the administration of anesthesia. The policies did not prohibit Blue Shield from paying CRNAs. The court held that Pennsylvania Blue Shield's policy of denying reimbursement to CRNAs unless anesthesia was administered under the direct supervision of a professional provider other than the surgeon was in direct conflict with valid existing regulations issued by the State Board of Nursing.

Finally, Blue Shield argued that the Insurance Payment to Registered Nurse Law required that before Blue Shield could make payments directly to CRNAs, the Insurance Commissioner had to adopt procedures for payment. Blue Shield had filed a petition with the insurance department on March 28, 1990, during the pending litigation, requesting the department to issue regulations under the Insurance Payment to Registered Nurse Law Act. The insurance department dismissed the petition stating, "... *Blue Shield does not now have a draft of comprehensive proposed regulations to submit to the insurance department nor does it now have a draft of any proposed regulations concerning the Insurance Payment to Registered Nurse Law that it has submitted to the insurance department.... The term direct supervision is not, however, defined anywhere in the contract forms Blue Shield has submitted to the insurance department for approval."* (Opinion, paragraph 69, page 14.)

Blue Shield's position inconsistent

The court said that Blue Shield had made payments to CRNAs before and that if there was any argument that the matter should be delayed for Insurance Commissioner action, Blue Shield had waived it by its prior action. The court stated that, *"We find the Defendant's [Blue Shield] position inconsistent in that it insists that the Plaintiffs [the CRNAs] be compelled to abide by all of the regulations and policy statements when it has failed to follow the statutes and regulations in adopting these regulations and policy statements."* (Opinion, page 27.)

Pennsylvania Blue Shield appealed from the trial court's decision, as did the CRNAs. Blue Shield was, of course, unhappy with the requirement that it be forced to pay CRNAs, and the CRNAs objected to the amount of compensation which the court ordered Blue Shield to pay. On September 25, 1990, all legal actions were stopped, and the parties entered into a settlement agreement in which Pennsylvania Blue Shield agreed to pay all claims submitted by the CRNAs from June 1989 and to pay bills submitted in the future. Moreover, the CRNAs and Blue Shield agreed to jointly petition the insurance department for approval of policies regarding the supervision of CRNA anesthesia services.

Although this decision may not be legally binding on Blue Cross/Blue Shield in other states, it should be helpful for CRNAs seeking reimbursement, especially in states which have statutes mandating reimbursement. Pennsylvania Blue Shield raised the arguments that Blue Cross/Blue Shield plans in other states are likely to raise and was unsuccessful. While courts in other states could theoretically come to different conclusions, the judge in Pennsylvania was rational and well informed. Blue Cross/Blue Shield plans in other states should understand that their courts are likely to come to the same conclusion.