



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 22, 2019

The Honorable Joe Moody
Speaker Pro Tempore
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0250

Re: Whether certain prompt-pay provisions in chapters 843 and 1301 of the Insurance Code apply to claims filed by out-of-network emergency care providers (RQ-0256-KP)

The Honorable Nicole Collier
Chair, Committee on Criminal Jurisprudence
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Dear Representative Moody and Representative Collier:

You ask whether the deadlines and penalties associated with prompt-pay provisions in chapters 843 and 1301 of the Insurance Code apply to claims filed by out-of-network emergency care providers.¹ Chapter 843 (governing health maintenance organizations, or “HMOs”) and chapter 1301 (governing preferred provider benefit plans, or “PPOs”) both contain prompt payment provisions establishing a timeframe for insurers to pay clean claims² submitted by health care providers and providing a penalty structure for violations of those provisions.³ *See* TEX. INS.

¹*See* Letter from Honorable Joe Moody, Chair, Comm. on Crim. Jurisprudence, Tex. House of Representatives, to Honorable Ken Paxton, Tex. Att’y Gen. at 3 (Nov. 26, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”). Although the request was originally submitted by Representative Moody as Chair of the House Committee on Criminal Jurisprudence, he was thereafter named Speaker Pro Tempore. Representative Collier, as the new Chair of the House Committee on Criminal Jurisprudence, thereafter confirmed her desire for this office to proceed with this request.

²A “clean claim” is one that complies with certain administrative requirements, such as use of the proper submission form and inclusion of specified information. *See* TEX. INS. CODE § 843.336 (governing claims submitted to health maintenance organizations); *see also id.* §§ 1301.101, .131 (governing claims submitted to preferred provider benefit plans).

³You refer to these provisions collectively as the Texas Prompt Pay Act or “TPPA.” Request Letter at 1. While no Texas statute contains the short title designation “Prompt Pay Act” or “Prompt Payment Act,” courts use such designations to refer to a variety of prompt payment provisions. *See, e.g., Emergency Health Centre at Willowbrook, L.L.C. v. UnitedHealthcare of Tex., Inc.*, 892 F. Supp. 2d 847, 851–52 (S.D. Tex. 2012) (referring to prompt pay provisions governing PPOs in chapter 1301 of the Insurance Code); *Billy Smith Enters. v. Hutchison Constr., Inc.*, 261 S.W.3d 370, 372–73 (Tex. App.—Austin 2008, pet. dism’d) (referring to provisions governing (continued...))

CODE §§ 843.338 (deadline for action on clean claims submitted to HMOs), 843.342 (penalties for violation of certain payment provisions by HMOs); *see also id.* §§ 1301.103 (deadline for actions on clean claims submitted to PPOs), 1301.137 (penalties for violation of claims payment requirements by PPOs). Each chapter addresses the applicability of its prompt-pay provisions to non-network emergency care providers. In relevant part, section 843.351 provides that

[t]he provisions of [subchapter J] *relating to prompt payment* by a health maintenance organization of a physician or provider and to verification of health care services *apply to* a physician or provider who:

(1) is not included in the health maintenance organization delivery network; and

(2) provides to an enrollee:

(A) care related to an emergency or its attendant episode of care as required by state or federal law;

....

Id. § 843.351(1)–(2)(A) (emphasis added). Similarly, section 1301.069 provides in relevant part that

[t]he provisions of [chapter 1301] *relating to prompt payment* by an insurer of a physician or health care provider and to verification of medical care or health care services *apply to* a physician or provider who:

(1) is not a preferred provider included in the preferred provider network; and

(2) provides to an insured:

(A) care related to an emergency or its attendant episode of care as required by state or federal law;

....

Id. § 1301.069(1)–(2)(A) (emphasis added). You tell us that “ambiguity in these laws has led to out-of-network emergency care providers dealing with claims . . . that are paid long after the TPPA requires, if they are paid at all.” Request Letter at 1. You argue that the phrase “provisions . . .

payment for goods and services by state and local governments in chapter 2251 of the Government Code); *Westcliffe, Inc. v. Bear Creek Constr., Ltd.*, 105 S.W.3d 286, 294 (Tex. App.—Dallas 2003, no pet.) (referring to provisions governing payment of contractors by certain real property owners in chapter 28 of the Property Code).

relating to prompt payment” necessarily includes provisions setting out deadlines and provisions providing for penalties and, as such, they apply to non-network emergency care providers pursuant to sections 843.351 and 1301.069. *Id.* at 2–3. The Texas Department of Insurance (the “Department”) disagrees, stating that “the deadlines for PPOs and HMOs to pay clean claims . . . apply to out-of-network provider emergency care claims,” but “penalties . . . for failure to timely pay clean claims do not apply to claims by out-of-network providers.”⁴ With this background, you ask about the meaning of the phrase “provisions . . . relating to prompt payment” as it relates to the applicability of deadlines and penalties to non-network emergency care providers pursuant to sections 843.351 and 1301.069. Request Letter at 3.

Our primary goal when interpreting a statutory provision is to effectuate the Legislature’s intent as expressed by the plain and common meaning of the words in the statute. *Hebner v. Reddy*, 498 S.W.3d 37, 41 (Tex. 2016). Courts presume that “the Legislature selected statutory words, phrases, and expressions deliberately and purposefully and was just as careful in selecting the words, phrases, and expressions that were included or omitted.” *In re Xerox Corp.*, 555 S.W.3d 518, 527 (Tex. 2018). The language must be analyzed “in context, considering the specific sections at issue as well as the statute as a whole.” *Centerpoint Builders GP, LLC v. Trussway, Ltd.*, 496 S.W.3d 33, 36 (Tex. 2016). Courts also presume that “the entire statute is intended to be effective” and that it may not be interpreted “in a way that renders any part of it meaningless.” *Randol Mill Pharmacy v. Miller*, 465 S.W.3d 612, 617 (Tex. 2015).

Sections 843.351 and 1301.069 make provisions relating to prompt payment applicable to non-network emergency care providers. *See* TEX. INS. CODE §§ 843.351, 1301.069. The Legislature did not define the phrase “related to prompt payment” but the word “prompt” is commonly understood to describe something “performed readily or immediately” or “given without delay or hesitation.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1816 (2002). The deadline provisions in sections 843.338 and 1301.103 establish the time by which an HMO or a PPO must pay on an eligible clean claim submitted by a provider. *See* TEX. INS. CODE §§ 843.338, 1301.103 (providing that non-electronic claims be paid “not later than the 45th day” after the HMO or PPO receives the claim or, in the case of electronically-submitted claims, “not later than . . . the 30th day” after receipt). Thus, the deadline provisions of sections 843.338 and 1301.103 relate to prompt payment and, therefore, apply to claims filed by out-of-network emergency care providers pursuant to section 843.351 or 1301.069. *See Emergency Health Centre at Willowbrook v. UnitedHealthcare of Tex., Inc.*, 892 F. Supp. 2d 847, 851–53 (S.D. Tex. 2012) (noting that the PPO deadline provisions of section 1301.103 would apply to an emergency care provider who was not a preferred provider if the care in question was required by state or federal law).

The penalty provisions require an HMO or PPO failing to pay an eligible clean claim by the deadline to pay “the contracted rate owed on the claim plus a penalty,” which is the lesser of a specified amount or an amount calculated using the contracted rate. TEX. INS. CODE §§ 843.342(a),

⁴Brief from Ms. Norma Garcia, Gen. Counsel, Tex. Dep’t of Ins. at 2 (Jan. 4, 2019) (“Department Brief”) (on file with the Op. Comm.). *See also* 28 TEX. ADMIN. CODE § 21.2823 (Tex. Dep’t of Ins., Applicability to Certain Noncontracting Physicians and Providers) (applying claim processing deadlines to non-network emergency care providers).

1301.137(a). When an HMO or PPO makes only a partial timely payment on an eligible clean claim but pays “the balance of the contracted rate” after the deadline, the penalty is the lesser of a specified amount or a percentage of the underpaid amount, which varies depending on how late the balance is paid. *Id.* §§ 843.342(d)–(e), 1301.137(d)–(e). The consequences of not paying in a timely manner may “relate to prompt payment.” However, the penalty structure depends, for its calculation, on the “contracted rate” of reimbursement owed to the provider on the claim. The Department advises that “[o]ut-of-network providers do not have a contracted rate, so penalties cannot be calculated for them.” Department Brief at 2. “In enacting a statute, it is presumed that . . . a result feasible of execution is intended[.]” TEX. GOV’T CODE § 311.021(4). In addition, a penalty statute “should be strictly construed.” *City of Houston v. Jackson*, 192 S.W.3d 764, 770 (Tex. 2006); *see also Brown v. De La Cruz*, 156 S.W.3d 560, 565 (Tex. 2004). Here, the Legislature could have specified the manner for calculating a penalty for non-network providers referenced in sections 843.351 and 1301.069, who do not have a “contracted rate,” but it did not. Courts endeavor to “read [the law] as written—in a manner faithful to what the law actually says—despite its imperfections.” *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017) (quotation marks omitted); *see also Marchbanks v. Liberty Ins. Corp.*, 558 S.W.3d 308, 315 (Tex. App.—Houston [14th Dist.] 2018, pet. filed) (applying this principle to other prompt-pay provisions in the Insurance Code). Under these presumptions, a court would likely conclude that the penalty provisions in sections 843.342 and 1301.137 cannot apply to claims filed by out-of-network emergency care providers pursuant to sections 843.351 or 1301.069.

You also ask about the authority of the Department “to promulgate rules setting alternatives” to any deadlines or penalties not applicable to non-network emergency care providers under sections 843.351 or 1301.069 and “what standards govern the timely payment and resolution of those emergency care claims.” Request Letter at 3. A state agency has only those powers “expressly conferred upon it and those implied powers” reasonably necessary “to carry out its statutory duties.” *See Tex. State Bd. of Exam’rs of Marriage & Family Therapists v. Tex. Med. Ass’n*, 511 S.W.3d 28, 33 (Tex. 2017). Accordingly, it can adopt only such rules as authorized by and consistent with its statutory authority. *See also id.* (explaining that a rule may not “(1) contravene[] specific statutory language; (2) run[] counter to the general objectives of the statute; or (3) impose[] additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions”). With respect to HMOs, the Legislature authorized the Commissioner of Insurance to “adopt reasonable rules as necessary and proper to . . . implement [chapter 843.]” TEX. INS. CODE § 843.151(1). Regarding PPOs, the Legislature directed the Commissioner of Insurance to “adopt rules as necessary to . . . implement [chapter 1301.]” *Id.* § 1301.007(1). The Commissioner also has broad authority to “impose an administrative penalty on a person licensed or regulated under [the Insurance Code] or another insurance law of this state who violates [the Insurance Code.]” *Id.* § 84.021. The Department takes the position that the “plain language of the statute precludes [Department] rulemaking that would apply the penalties of Sections 1301.137 and 843.342 to out-of-network providers.” Department Brief at 3. We agree. A penalty is a punishment imposed on a wrongdoer that goes beyond compensation and is intended to punish and label defendants as wrongdoers. *In re Xerox Corp.*, 556 S.W.3d at 530 (“the hallmark of a penalty is that it goes *beyond* compensating for a loss”). The Legislature already provided a penalty regime through sections 843.342 and 1301.137 for insurers who do not make

timely payments on eligible clean claims submitted to them. Thus, the Department cannot impose an additional penalty. However, the Department may enforce provisions of the Insurance Code, and the deadlines for payment on clean claims, which apply to non-network emergency care providers, are imposed by statute in sections 843.338 and 1301.103. Depending on the circumstances, a court could conclude that a particular enforcement action to compel the claim payment required by statute is not in the nature of a penalty and is within the Department's authority to implement.

S U M M A R Y

A court would likely conclude that the deadline provisions of sections 843.338 and 1301.103 of the Insurance Code relate to prompt payment and, therefore, apply to claims filed by out-of-network emergency care providers pursuant to section 843.351 or 1301.069 of that Code. However, a court would likely conclude that the penalty provisions in sections 843.342 and 1301.137 do not apply to claims filed by out-of-network emergency care providers pursuant to sections 843.351 or 1301.069.

The Legislature provided a penalty regime through sections 843.342 and 1301.137 of the Code for insurers who do not make timely payments on eligible clean claims submitted to them. Thus, the Department cannot impose an additional penalty. But depending on the circumstances, a court could conclude that a particular enforcement action to compel the claim payment required by statute to a non-network emergency care provider is not in the nature of a penalty and is within the Department's authority to implement.

Very truly yours,



KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee

BECKY P. CASARES
Assistant Attorney General, Opinion Committee