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AUG 06 2012

**OPINION COMMITTEE**



FILE # ML-47107-12  
I.D. # 47107

JOHN J. CARONA  
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COMMITTEES:  
CRIMINAL JUSTICE  
EDUCATION  
JURISPRUDENCE  
SELECT COMMITTEE ON  
REDISTRICTING

August 1, 2012

The Honorable Greg Abbott  
Attorney General of Texas  
209 W. 14th Street  
Austin, TX 78701

**RQ-1075-GA**

Dear General Abbott:

As chair of the Senate Committee on Business and Commerce, I respectfully request a formal opinion from you regarding whether the Medicaid reimbursement methodology imposed by 1 T.A.C. Section 354.1143, to the extent of its applicability to ambulance services, impermissibly conflicts with Section 32.050(c), Human Resources Code, and is therefore void to the extent of that conflict.

Section 32.050(c), Human Resources Code, states:

(c) For an ambulance service provided to an individual who is eligible under the medical assistance program and Medicare, the medical assistance program shall pay the Medicare deductibles and coinsurance.

Section 1, Chapter 710 (H.B. 897), Acts of the 76th Legislature, Regular Session, 1999, added Subsection (c) to Section 32.043, Human Resources Code, which was renumbered as Section 32.050, Human Resources Code, by that legislature. With the exception of that renumbering, Subsection (c) has remained unchanged since its enactment. According to the Office of House Bill Analysis's analysis of H.B. 897, prior to the 76th Legislature, Regular Session, there was a shortfall between the cost of ambulance services and what Medicare would pay for those services. Because many Medicare clients also qualify for Medicaid, the purpose of the bill was to make up for the shortfall by requiring the Medicaid program to pay the Medicare deductibles and coinsurance for ambulance services provided to individuals who are dually eligible under both programs ("dual eligibles"). Accordingly, Section 32.050(c), Human Resources Code, allowed ambulance service providers, who are required by law to respond to all emergency calls, to be sufficiently reimbursed for providing services to Medicare recipients and has shielded those providers from having to absorb or pass on the amount of the shortfall those providers faced before enactment of Section 32.050(c).

The Honorable Greg Abbott  
August 1, 2012  
Page 2

In 2011, the 82nd Legislature, Regular Session, enacted the General Appropriations Act for the 2012-2013 state fiscal biennium. A rider contained in the special provisions relating to all health and human services agencies following the Article II appropriations to those agencies identified "Medicare Equalization" as a cost containment initiative for the agencies. *See* Section 17(c)(3), Article II, Special Provisions Relating to All Health and Human Services Agencies (page II-109), Chapter 1355 (H.B. 1), Acts of the 82nd Legislature, Regular Session, 2011 (the General Appropriations Act). In response to that rider, the Health and Human Services Commission made revisions to 1 T.A.C. Section 354.1143 and conforming changes to 1 T.A.C. Sections 354.1041 and 354.1149 to limit payments for Medicare Part B services (physician and outpatient services), including ambulance services, provided to dual eligibles. *See* 36 Tex. Reg. 7057-7061 (2011); 36 Tex. Reg. 9282-9284 (2011). The rule amendments went into effect January 1, 2012. 1 T.A.C. Section 354.1143(b) now provides in relevant part:

(b) ... the payment of the Medicare ... Part B ... deductible and coinsurance is based on the following.

(1) If the Medicare payment amount equals or exceeds the Medicaid payment rate, HHSC does not pay the Medicare deductible and coinsurance on a crossover claim.

(2) If the Medicare payment amount is less than the Medicaid payment rate, HHSC pays the Medicare deductible and coinsurance on a crossover claim, but the amount of payment is limited to the lesser of the deductible and coinsurance or the amount remaining after the Medicare payment amount is subtracted from the Medicaid payment rate.

In short, the rule amendments limit payments for a Medicare Part B service for a dual eligible to no more than the Medicaid payment amount for the service, and limit payments for Medicare deductibles and coinsurance to not more than the difference between the Medicaid rate and the Medicare rate.

After the Health and Human Services Commission received feedback that this new payment methodology was impairing the ability of some Medicare Part B service providers to provide medical care to dual eligibles, 1 T.A.C. Section 354.1143 was further amended to authorize the Medicaid program to pay higher amounts for Medicare Part B services provided to dual eligibles if the commission determines that the higher payments are necessary to ensure that such individuals have adequate access to medical care. *See* 37 Tex. Reg. 2819-2821 (2012); 37 Tex. Reg. 4575-4577 (2012). These most recent rule amendments went into effect July 1, 2012.

To the extent that 1 T.A.C. Section 354.1143 (and 1 T.A.C. Sections 354.1041 and 354.1149) relieves the Medicaid program of the duty to pay all or part of the Medicare deductibles and coinsurance for ambulance services provided to dual eligibles, it appears that the rules conflict with Section 32.050(c), Human Resources Code, which clearly states the requirement that the Medicaid program pay those amounts. Although the rules were amended pursuant to the

The Honorable Greg Abbott  
August 1, 2012  
Page 3

Medicare Equalization cost containment initiative in the 2012-2013 General Appropriations Act, it is well established that general laws, like Section 32.050(c), Human Resources Code, cannot be adopted, repealed, or amended by a rider in a general appropriations act. A rider that would have that effect is invalid because its inclusion in the act violates the one-subject requirement of Section 35, Article III, Texas Constitution. *See Strake v. Court of Appeals*, 704 S.W.2d 746, 748 (Tex. 1986); *Moore v. Sheppard*, 192 S.W.2d 559, 561-562 (Tex. 1946); *Linden v. Finley*, 49 S.W. 578, 579 (Tex. 1899); Op. Tex. Att'y Gen. Nos. MW-585 (1982), MW-51 (1979), V-1254 (1951). *See also* Op. Tex. Att'y Gen. Nos. DM-116 (1992) (rider may not require Department on Aging to "use the service standards, systems, billing and audit procedures, and provider bases used by the Department of Human Services") and JC-0178 (2000) (rider may not change formula for allocation of funds for distribution of emergency medical services and trauma care funds where statute sets formula). Furthermore, the rules of an administrative agency must be consistent with the constitution and statutes of this state. *See Gerst v. Oak Cliff Sav. & Loan Ass'n*, 432 S.W.2d 702, 706 (Tex. 1968). An agency rule is void if it conflicts with a statute. *See Liberty Mut. Ins. Co. v. Griesing*, 150 S.W.3d 640, 648 (Tex. App.--Austin 2004, pet. denied); *Employees Ret. Sys. v. Jones*, 58 S.W.3d 148, 154 (Tex. App.--Austin 2001, no pet.).

It appears clear that the January 1, 2012, changes to 1 T.A.C. Section 354.1143 limiting the Medicaid program's duty to pay Medicare deductibles and coinsurance on Medicare Part B services, including ambulance services, if the Medicare payment amount is equal to or greater than the Medicaid payment amount are irreconcilable with the Medicaid program's duty to pay for Medicare deductibles and coinsurance for ambulance services under Section 32.050(c), Human Resources Code. Moreover, although the July 1, 2012, changes to 1 T.A.C. Section 354.1143 allow the Medicaid program under certain circumstances to pay the Medicare deductibles and coinsurance for Medicaid Part B services, including ambulance services, the rule appears to still conflict with Section 32.050(c), Human Resources Code, to the extent that the rule does not require those payments to be made under all circumstances for ambulance services provided to dual eligibles.

Thank you in advance for your consideration of this matter. Please do not hesitate to contact me if you need any additional information regarding this request.

Sincerely,



Senator John Carona  
Chair, Senate Committee on Business and Commerce