

**BEFORE THE INSURANCE COMMISSIONER  
OF THE STATE OF ARKANSAS**

**IN THE MATTER OF LIMITED SCOPE MARKET  
CONDUCT EXAMINATION REPORTS/ADOPTION  
ORDERS (AID Orders No. 2007-077, 2007-078  
and 2007-079)**

**ARKANSAS SURGICAL HOSPITAL**

**PETITIONER**

**ARKANSAS BLUE CROSS BLUE SHIELD,  
QCA HEALTH PLAN, INC. ("QUALCHOICE"  
A/K/A "QCA") UNITED HEALTHCARE OF  
ARKANSAS, INC. AND UNITED HEALTH-  
CARE INSURANCE COMPANY**

**RESPONDENTS**

**THE SURGICAL HOSPITAL OF JONESBORO,  
LLC, OUACHITA REGIONAL DIAGNOSTIC  
& SURGERY CENTER OF HOT SPRINGS,  
INC. D/B/A HEALTHPARK HOSPITAL,  
SISTERS OF MERCY HEALTH SYSTEM AND  
ARKANSAS HOSPITAL ASSOCIATION**

**INTERVENORS**

**A.I.D. NO. 2010- 097**

**ORDER**

**On this 15<sup>th</sup> day of October, 2010, comes on for hearing the  
matter of alleged procedural errors made by the former  
Insurance Commissioner, Julie Benafield Bowman, in prior  
proceedings had herein; whereupon the undersigned, upon  
consideration of the errors alleged by Arkansas Surgical**

**Hospital, briefs filed by each of the parties, arguments of the parties and matters submitted subsequent to the hearing, from all of which finds and concludes:**

**1. On January 29, 2007, Arkansas Surgical Hospital (ASH) sent a letter to the Arkansas Insurance Department saying, among other things:**

**Our belief is that the Arkansas Patient Act of 1995 and recent "Any Willing Provider" legislation passed by the Arkansas State Legislature in 2005 (collectively "AWP Law" requires that insurers offer the same rates, discounts and/or methods of reimbursements to providers of the same class.**

**We questioned our provider representatives about the payment rates and we learned that our payments were not the same as major competitors in our market. We do not know what they are being paid for the same type of case, total knee replacement for example, but it has been confirmed that it is different.**

**Please consider this letter my formal complaint against Arkansas Blue Cross and Blue Shield, United HealthCare and QualChoice. We believe that the "AWP Law" is not being fully complied with and that we and many, if not most, other providers are being paid in a discriminatory manner. We believe that Arkansas consumers are at risk to have their choices limited because of these discriminatory payment practices.**

**We request that the insurance commission:**

**1. Request information from a diverse group of**

**hospitals of various bed size and geographical location concerning the amount they are paid for a selected list of procedures,**

- 2. Compare rates for the same procedures among various hospitals,**
- 3. If rates are in fact different, that insurance providers pay affected hospitals the incremental amount necessary to correct the discriminatory payment rates for all cases served “in network” retroactive to the contract beginning date,**
- 4. All rates should be made non-discriminatory on a prospective basis by each insurance provider. Rates paid should not be shared with the other competing insurance companies.**

**2. The Arkansas Insurance Department thereupon**

**conducted what it called a Limited Scope Market Conduct Examination of certain insurers. The Examination began April 30, 2007 and was completed on or about October 24, 2007. After reviewing the Examination results which included the responses of each health insurer, the Commissioner issued AID Orders No. 2007-077, 2007-078, and 2007-079 dated December 14, 2007, finding that the Petitioner was paid less for each procedure (with two exceptions) than the other surveyed in-network hospitals within each of the insurer’s networks, but the payment**

**differences, standing alone, were not a violation of the AWP Law. The Commissioner made no findings or conclusions at that time with respect to whether differences in payments made to ASH violated the AWP Law.**

**3. ASH modified its complaint urging the Commissioner to find that even if equal reimbursement rates are not mandated by AWP (which it denied), equal methodology for establishing those payment rates are.**

**4. The parties stipulated at the April 14, 2010, hearing that the reimbursement rates paid to various hospitals for the same procedure are different.**

**5. At the hearing of this matter ASH narrowed its argument to two broad categories:**

**(A). The Commissioner erred in failing to require the Respondents to provide the exact payment rates they make to named Arkansas Hospitals for a selected list of procedures.**

**(B). The Commissioner erred in failing to require the Respondents to fully provide its methodology in**

**determining the rates it pays to other named hospitals for a selected list of procedures.**

**REQUEST FOR EXACT PAYMENT RATES**

**Respondents contended in the prior proceedings that they were not required by law to provide to ASH the exact payment rates they contract to pay other hospitals for specific procedures for at least three reasons:**

- 1. The rates are confidential and proprietary information protected by trade secret laws.**
- 2. The rates are confidential, are not subject to subpoena and may not be made public pursuant to Ark. Stat. Ann., Sec. 23-61-207.**
- 3. The stipulation, the Adoption Orders and the AWP Law renders the exact rates paid to various hospitals irrelevant.**

**ASH counters alleging that Respondents did not offer any *evidence* at the prior hearing relating to trade secrets; that the insurance department obtained the rate information as a result of an *investigation*, not an *examination*, therefore Ark. Stat. Ann.**

**Sec. 23-61-207 is not applicable; that the Adoption Orders are not controlling in this case; and that the AWP Law requires exact reimbursement rate disclosure.**

**Upon Motions of Respondents, the Commissioner quashed subpoenas issued by ASH seeking exact in-network payment rates made by Respondents to other hospitals for specific procedures, and consistent therewith, denied ASH the opportunity to inquire about and develop evidence at the hearing regarding such rates. In doing so she held that “. . . the payment information acquired from the Survey. . . used by the Health Insurers to calculate payment amounts to hospitals {are} confidential information not subject to discovery or subpoena under Ark. Code Ann. Sec. 23-61-207, and {are} confidential, trade secret information which would, if disclosed, provide information advantageous to a competitor.”**

**The undersigned has searched the record of this case and has been unable to find any *evidence* supporting Respondents' claim that their rate information is a trade secret pursuant to Arkansas's Trade Secret Law. While the allegation was made**

numerous times before and during the hearing, Respondents were required to offer prevailing proof covering six elements in order to successfully meet their burden on this issue. See Con-Agra, Inc. v. Tyson Foods, Inc., 342 Ark. 672, 30 S.W.3d 725 (2000); City Slickers, Inc. v. Douglas, 73 Ark. App. 64, 40 S.W.3d 805 (2001). Those elements which an Arkansas Court will analyze when a business claims to possess a trade secret are:

- (1) The extent to which the information is known outside the business;
- (2) The extent to which the information is known by employees and others involved in the business;
- (3) The extent of measures taken by the business to guard the secrecy of the information;
- (4) The value of the information to the business and its competitors;
- (5) The amount of effort or money expended by the business in developing the information; and
- (6) The ease or difficulty with which the information could properly be acquired by others.

Statco Wireless, LLC v. Southwestern Bell Wireless, LLC, 80 Ark. App. 284, 95 S.W.3d 13 (2003). Respondents failed to offer *proof* on any of those elements and therefore are not entitled to rely upon trade secrets as a basis for denying the requested rate payment information.

**Ark. Stat. Ann., Sec. 23-99-803 provides that the Insurance Commissioner shall, among other things:**

- (1). Enforce the state's any willing provider laws using powers granted to the commissioner in the Arkansas Insurance Code; and . . .**

**The undersigned finds that the Commissioner was right in finding that Ark. Stat. Ann. Sec. 23-61-207 controls whether the exact rate payments made to hospitals should be released. That statute provides, in part:**

**All working papers, recorded information, documents, and copies produced by, obtained by, or disclosed to the Insurance Commissioner or any other person in the course of an examination made under this subchapter must be given confidential treatment and are not subject to subpoena and may not be made public by the commissioner or any other person, except to the extent provided in Sec. 23-61-205.**

**Section 23-61-205 is not relevant to this case. While ASH contends that the Insurance Department conducted an *investigation*, its allegation is not supported by proof. The Arkansas Insurance Department conducted an examination pursuant to ASH's request; the Commissioner called the proceeding an examination; and she had the right to call it an examination. Further, it is doubtful that any insurer or hospital**

would *voluntarily* provide its proprietary information to the Insurance Department if there was any possibility that the Department would divulge such information to third parties.

The Mississippi Supreme Court was recently faced with an issue similar to the one raised here. Kevin Buckel v. Mike Chaney, Commissioner of Insurance, (No. 2009-CA-01602-SCT 11/04/2010). There, an individual made a public-records request under the Mississippi Public Records Act to the Mississippi Insurance Department for specific data concerning homeowner insurance claims as a result of hurricane Katrina. He concluded his request by saying: "If this information is not available, I respectfully request your office compile this information for public consumption from the insurance companies that receive homeowner claims regulated by MID as a result of Hurricane Katrina". His request was denied and Buckel filed suit. A Mississippi Chancery Court found, among other things, that the request was improper under the Mississippi Public Records Act and that the Mississippi Code Section 83-5-209(7) (Rev. 1999) exempted from disclosure the records Buckel requested.

**The Mississippi Public Records Act provides:**

**The provisions of this chapter shall not be construed to conflict with, amend, repeal or supersede any constitutional or statutory law or decision of a court of this state or the United States which at the time of this chapter is effective or thereafter specifically declares a public record to be confidential or privileged, or provides that a public record shall be exempt from the provisions of this chapter.**

**Miss. Code Ann. Sec. 25-61-11 (Rev. 2010). Section 83-5-209(7) of the Mississippi Code provides:**

**All working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of an examination made under Sections 80-5-201 through 83-5-217 may be held by the commissioner as a record not required to be made public under the Mississippi Public Records Act.**

**The Supreme Court affirmed the Chancellor's decision saying at page 20:**

**. . . Section 83-5-209(7), as interpreted *in pari materia*, does create an exemption to the Public Records Act. The manner in which the Legislature determines the exemption to the Public Records Act is strictly within the power of the Legislature: “[t]he preferred policy of disclosing public records must cede to the Legislative-mandated exemptions thereto as ‘the wisdom or folly of the pertinent legislation is strictly within the constitutional power of the Legislature[.]’**

**In the case at bar, the Arkansas General Assembly has clearly directed that the records at issue are confidential and may not be released by the Commissioner. The undersigned therefore finds and concludes that the Commissioner was correct in refusing to permit ASH to subpoena or otherwise acquire the exact payment rates made by Respondents to the named hospitals.**

#### **EQUAL METHODOLOGY FOR ESTABLISHING RATES**

**ASH contends that it was not given a reasonable opportunity to inquire into the methodology used by the Respondents in establishing its in-network payment rates with other in-network member hospitals.**

**ASH acknowledges that the Commissioner allowed it to ask questions generally about the factors the Respondents consider in setting rates. It further recognizes that the Respondents testified both publicly and privately (*in camera*) that, in setting rates, they consider scope of services provided by hospitals, indigent care, teaching functions, quality of care, etc. ASH contends however, that such testimony skirts the real issue.**

**The real legal and factual issues ASH told the Commissioner at the April 4, 2008 hearing (TR page 71) are:**

- (a) Whether disparate rates are monetary penalties such that they affect patient choice;**
- (b) Whether disparate reimbursement rates are designed to maintain quality and to control costs; and**
- (c) Whether they are actions taken by insurance companies to maintain quality, enforce regulations or control costs.**

**ASH contended that the only way it could receive a “meaningful hearing” on those issues would be for the Commissioner to “. . . compel that we would at least get evidence of reimbursement rates and how they were calculated”. (TR, page 76). ASH also specifically told the Commissioner: “. . . the discovery of the precise rates of these six procedures from the six hospitals is what makes or breaks this case”. (TR, page 78).**

**The Commissioner was thus faced at that hearing, not with the question of methodology, but with whether she should**

**require evidence of the actual rate payments to be revealed. She answered that question holding that the rate information was confidential and protected, saying: “. . . I cannot and will not release that information” (TR, page 106). The remainder of the Transcript (pages 107-135) reflects a rather confusing discussion as to how the parties should prepare and proceed at the April 14, 2008, hearing. It is worth noting that Commissioner Bowman suggested to ASH that perhaps it should consider using hypotheticals if it genuinely felt that presenting payment rates was its only means of proving its case. ASH was not receptive to the idea. (TR, page 81).**

**An Order was entered on April 11, 2008, memorializing the Commissioner’s findings and conclusions from the April 4, 2008 hearing. Page 2, subparagraph C of that Order actually expands the Commissioner’s original decision by concluding:**

**The payment rates to hospitals, amounts, methodologies for calculating payments to hospitals (emphasis added), and information concerning hospital cost structures are trade secrets as defined by Arkansas Law. Additionally, this information is confidential under the Arkansas Insurance Code. Based upon these reasons, as well as the potential antitrust implications and competitive advantages and effects, the Commissioner hereby rules as**

**follows:**

1. . . .
2. . . .
3. . . .
4. **The Commissioner may consider questions submitted by counsel and may, if such questions are deemed confidential but relevant by the Commissioner, ask the questions of the witness *in camera* under a sealed record. No counsel may be present during such *in camera* questioning.**
5. **The scope of the April 14, 2008 hearing is hereby limited by the declaratory Order entered by the Commissioner on March 21, 2008.**
6. . . .

**ASH provided the undersigned, subsequent to the hearing had herein, a document titled “Record Cites Regarding Exclusion of Evidence and Denial of Access to Information and Documents”. An exhaustive review of the pages cited in that document reflects that objections sustained by the Commissioner related to:**

- (1). Requests for specific rates paid by the Respondents to other hospitals, and not to factors used by Respondents and weights, if any, given to those factors; and**
- (2). Requests for the numeric details of the way each insurer’s methodology for determining payment was specifically applied to each provider other than ASH; and**

- (3). Requests to look at the actual contracts to see if there are any substantial differences with anything other than the rates; and**
- (4). Requests to look at information in the Commissioner's examination files to test its consistency with witness testimony.**

**Respondents submitted extensive references to portions of the transcripts wherein ASH was permitted to question the Respondents about its methodology for setting rates with other hospitals.**

**The Transcript of the April 14, 2008, hearing reflects that the Commissioner did not necessarily follow her April 4, 2008 Order regarding methodology. For example, pages 285 (lines 15-25), 286 (lines 1-3 and 18-19) and 289 (lines 19-23) of the Transcript shows:**

**Q. (Mr. Gall) What are the factors that would affect a payment to Baptist to be higher under a DRG or lower?**

**A. (Mike Brown, Executive Vice President of Blue Cross Blue Shield) For one, we have a lesser-of-charge. That is that in some cases we're actually paying less than what would have been allowed.**

**Mr. Ridgeway (Blue Cross Blue Shield Attorney):  
Commissioner, I'm going to need to object to this line of questioning. Again, we're getting into some of the**

**specific methodologies. And certainly we're not talking about the exact numbers, but we are talking about methodologies and the way we compute payments to hospitals. And my understanding of the previous ruling was that this material was deemed as a trade secret, number one. Number 2, I'm still being a bore, I'm still talking about relevance.**

**HEARING OFFICER BOWMAN: I think we're going to have to have some generalities. I certainly don't want to get into specifics.**

**HEARING OFFICER BOWMAN; Well, I think that you can go into why they might be different, not how they're different, but why they might – why they're different, and I don't think you need to go into the specifics of the methodologies.**

**ASH was allowed to ask questions relating to specific**

**numerical values: (TR, page 674 Mr. Gall questioning United**

**Healthcare's Lawrence Nall)**

**Q. Do you assign any kind of numerical values to the various services that a hospital might provide?**

**A. Directly, no, we do not.**

**Q. So again, a subjective analysis of scope of services?**

**A. Yeah, we would be very familiar with what a provider provides as we enter negotiations.**

**Q. But it's a subjective analysis of those services, it's not a numeric weight-weighted system where you get three points for having obstetrics, five points for having a heart transplant unit, or whatever?**

**A. It is not.**

**In questioning QualChoice's President and CEO Michael Strock, Mr. Gall asked the following questions and received the following response at pages 543 and 544:**

**Q. Do you typically negotiate your contracts?**

**A. Yes, not me personally, the company does.**

**Q. The Company. So as a necessary result of that, there is no formula involved in establishing the payment rates for any hospital, correct?**

**A. Not a hard formula.**

**Q. Because you're going to negotiate it. That necessarily means that there is inconsistency between - -**

**A. I don't think we'd be able to get hospitals to agree to a hard formula.**

**Q. Well, whether you could or couldn't, the fact is that your testimony is you negotiated?**

**A. Correct.**

**Q. And the amount of the rates are affected to some extent by how bad you need someone in your system?**

**A. To some extent, yes.**

**Q. Okay. Do you know whether there were any negotiations with respect to the Arkansas Surgical Hospital contract?**

**A. I do.**

**Q. Were there?**

**A. Yes.**

**During the *in camera* portion of the hearing ASH's attorney was given an opportunity to question Michael Brown from Blue Cross Blue Shield. The first question asked was "When we digressed, the question I had asked is how the provider payment rates that were presented to ASH were determined. Can you explain that to us?" (TR, page 382) For the next 72 pages the Transcript reflects that Mr. Brown answered the questions asked by ASH's attorney and those asked by his own attorney relating to the methodology utilized by Blue Cross Blue Shield in establishing ASH's rate payments. In addition, a number of exhibits were admitted. The only objection the undersigned found that was sustained by the Commissioner was one asked by Mr. Gall: "Who were the other two hospitals?"**

**At the same hearing, ASH was afforded the opportunity to examine, *in camera*, Michael Strock, of QCA Health Plan, Inc. in regard to its methodology in fixing its payment rate to ASH. (TR. Pages 628 - 654) Strock was asked questions by ASH's attorney,**

**his own attorney and the Commissioner. In addition, certain exhibits were offered and received in evidence. The only objections which were sustained by the Commissioner pertained to Baptist and St. Vincent Hospitals' conversion rate and whether their rates were higher than ASH's.**

**ASH was also permitted to examine, *in camera*, Lawrence Nall and Paul Burnett of United Healthcare in regard to its methodology in establishing rates under its contract with ASH. (TR pages 751-793) Mr. Nall was questioned briefly by Mr. Gall and released. Mr. Burnett was questioned by Mr. Gall, his own attorney and by Booth Rand, chief counsel for the Arkansas Insurance Department. Exhibits were also introduced. No objections were sustained.**

**A huge portion of the extensive Transcripts is devoted to questions and answers regarding Respondents' methodology in fixing rates with the various hospitals. In the end, each of the insurers indicated that their rates were ultimately negotiated. Whether their methodology passes muster under the Any Willing**

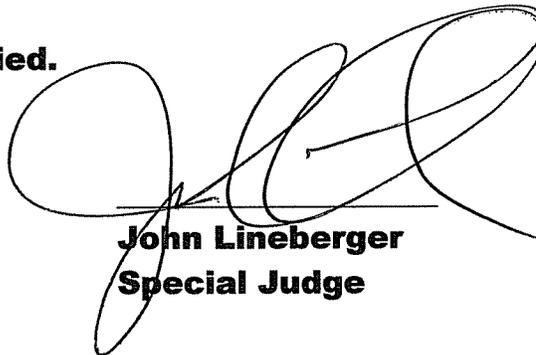
**Provider Act is not the subject of this hearing and will be considered at the next level.**

**It is the finding and conclusion of the undersigned that ASH was afforded a reasonable opportunity to question the Respondents regarding the methodologies they used in determining payment rates to the various hospitals. ASH has not demonstrated that procedural errors were committed in the prior proceedings.**

**RECOMMENDATIONS OF THE HEARING OFFICER**

**WHEREFORE, based upon the forgoing Findings of Fact, Conclusions of Law, and other matters before him, the Hearing Officer recommends:**

**That the Petition of ASH alleging that procedural errors were made by the former Insurance Commissioner, Julie Benafield Bowman, in prior proceedings had herein is without merit and should be denied.**



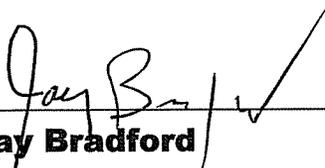
**John Lineberger  
Special Judge**

**CERTIFICATION**

**I, Jay Bradford, Insurance Commissioner for the State of Arkansas, do hereby certify that the above Findings of Fact, Conclusions of Law, and Recommendations of the Hearing Officer were made by and under my authority and supervision by John Lineberger as Special Judge appointed to appear in this proceeding. I hereby adopt the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendations in full and enter this Order.**

**Therefore, it is hereby ORDERED that the Petition of ASH alleging that procedural errors were made by the former Insurance Commissioner, Julia Benafield Bowman, in prior proceedings had herein is without merit, should be, and hereby is denied.**

**IT IS SO ORDERED THIS 13<sup>th</sup>, day of December, 2010.**

  
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**Jay Bradford**  
**Insurance Commissioner**  
**State of Arkansas**