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SC Court of Appeals

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STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

SC ADMIN. LAW COURT

CareAlliance Health Services d/b/a Roper St. Francis Healthcare,  
Petitioner,  
v.  
South Carolina Department of Revenue,  
Respondent.

Docket No. 12-ALJ-17-0405-AP

**ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR RECONSIDERATION**

This matter is before the South Carolina Administrative Law Court (“the ALC” or “the Court”) pursuant to CareAlliance Health Services d/b/a Roper St. Francis Healthcare’s (“Petitioner’s”) Contested Case Filing concerning a final decision of the South Carolina Department of Revenue (“the Department”). The Department’s final decision denied Petitioner’s request for a refund of sales and use taxes paid on the purchase of orthopedic and cardiovascular prosthetics and blood derivatives between August 1, 2007, and November 30, 2010. Petitioner and the Department filed cross motions for summary judgment. On May 20, 2014, this Court issued an Order granting in part and denying in part each party’s summary judgment motion.

Subsequently, on May 30, 2014, Petitioner and the Department filed motions requesting the Court to reconsider its decision. Petitioner asks this Court to reconsider its determinations that (1) the prescription cardiac devices at issue do not replace a missing part of the body, and (2) the blood derivatives at issue are subject to sales and use taxes. Petitioner argues there is a factual dispute as to whether prescription cardiac devices replace a missing part of the body, and, therefore, this issue was inappropriate for summary judgment. Regarding the blood derivatives, Petitioner argues the “true object” of the sale was to provide services and, as such, the transaction was not subject to sales and use taxes. Moreover, Petitioner claims there is no reason to distinguish between the blood derivatives at issue and other forms of blood, such as whole blood and plasma, which are not taxed.

In contrast, the Department asks this Court to reconsider its determinations that (1) the sale of prescription prosthetics at issue was a sale by prescription as defined by this Court, and (2) “other bone, muscle and tissue implants” replace a missing part of the body. The Department

contends a sale is not a “sale by prescription” unless the purchaser is required to use a prescription in order to obtain the device. Further, the Department maintains this Court erred in its adoption of a definition of “prescription.” Regarding the “other bone, muscle and tissue implants,” the Department asserts there were no facts in the record to support this Court’s decision.

Initially, I grant Petitioner’s request for a hearing on whether the prescription cardiac devices at issue replace a missing part of the body. Furthermore, upon review, I grant a hearing on whether the blood derivatives at issue are subject to sales tax.

Regarding the Department’s argument that this Court erred in finding the sale of prescription prosthetics was a sale by prescription, after considering the facts of this case and Petitioner’s and the Department’s Motions for Reconsideration, the Court finds its Order granting Petitioner’s motion for summary judgment on this issue must stand. The Department argues this Court failed to address or misapprehended the first prong of the Home Medical test; specifically, whether a prescription is required for the sale of the prosthetics at issue. See 382 S.C. 556, 677 S.E.2d 582 (2009). This is a novel issue and, upon review, the Court finds it necessary to amend and clarify its finding in this regard.

The first two prongs of Home Medical overlap in that they both intimate the same requirement: the sale of the device must require and be made with a prescription for the tax exemption to apply. 382 S.C. at 563-64, 677 S.E.2d at 586-87. However, the word “actually” in the second prong implies the two prongs are distinct. The second prong implies there are situations in which a prescription is required for sale, but the sale is not actually accomplished by prescription. Having distinguished between the two prongs, I return to the application of the first prong in this case: did the sale of the prosthetic devices at issue require a prescription?

As the Department duly notes, this Court determined a “prescription” is not strictly necessary for all sales under section 801.109 of Title 21 of the Code of Federal Regulations, because this regulation allows devices to be sold to *or* on the prescription *or* other order of a physician for use in the course of his or her professional practice. 21 C.F.R. § 801.109(a)(2) (emphasis added). However, this Court also noted that the over-arching purpose of the regulation is to require a gate-keeper to protect consumers from purchasing potentially dangerous products. I find too strict a reading of the federal regulation, specifically parsing out the language, defeats the statute’s purpose, especially as applied to Home Medical. Specifically, if a

distinction is made between “prescription” and “order” in the federal regulation, then no device would ever *require* a prescription for sale – an order could always suffice. Consequently, the first prong of Home Medical would never be satisfied and no devices would ever be tax exempt. Presumably, our legislature did not craft the exemption with the intent it would never apply. Therefore, I interpret the federal regulation broadly to find “order” and “prescription” are synonymous in the context of the purpose of the federal regulation. Accordingly, I find the prosthetic prescription devices at issue require a prescription to be sold, and they satisfy the first prong of Home Medical.<sup>1</sup>

Next, whether the devices at issue were *actually* sold by prescription and satisfy the second prong of Home Medical depends on the definition of “prescription.” As previously discussed in this Court’s order, “prescription” is not defined for the purposes of our tax code. Accordingly, this Court must look outside the tax code for guidance. In defining prescription in its order, this Court did not examine the South Carolina Pharmacy Code for guidance. The Department argues this Court misapprehended the Supreme Court’s admonishment in Home Medical not to look to the South Carolina Pharmacy Practice Act (“Pharmacy Act”) for a definition of a term in the context of a tax case. Upon review, the Court agrees with the Department that the admonishment only applied because “medicine,” unlike “prescription,” was already defined in the tax code. 382 S.C. at 566 n.7, 677 S.E.2d at 588 n.7. Therefore, I now review the definition of “prescription” in the Pharmacy Act for guidance.

The Pharmacy Act defines “prescription drug order” as “a lawful order from a practitioner for a drug or device for a specific patient, issued for a legitimate medical purpose within the prescriber’s course of legitimate practice and including orders derived from collaborative pharmacy practice.” S.C. Code Ann. § 40-43-30(47). I now adopt this definition, which does not affect my overall finding that the devices at issue were actually sold by prescription.

The Department contends the devices were not sold by prescription, but were sold by “chart order,” which is separately defined as:

a lawful order from a practitioner for a drug or device for patients of a hospital or extended care facility, or such an order prepared by another person and signed by

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<sup>1</sup> The Court realizes that under the broad interpretation it has adopted, prescription prosthetics will always require a prescription to be sold and, therefore, the first prong of Home Medical will always be satisfied. The Court finds this to be a less absurd result than the alternative interpretation.

a practitioner either immediately or at another time, issued for a legitimate medical purpose within the practitioner's course of legitimate practice and including orders derived on behalf of a practitioner from a practitioner approved drug therapy management.

S.C. Code Ann. § 40-43-30(5).

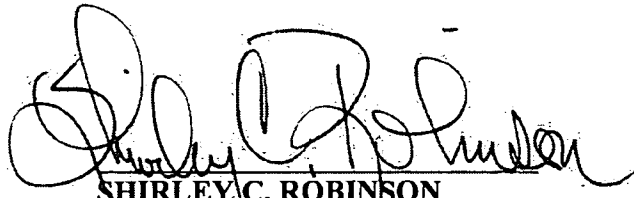
The Department contends the terms "prescription drug order" and "chart order" are mutually exclusive, which suggests lawful orders from physicians in a hospital setting are never prescriptions. I disagree. The important difference between the definition of "prescription drug order" and "chart order" is the word "specific" in the definition of "prescription drug order" and "hospital or extended care facility" in the definition of "chart order." I find that while the format of the sale is better represented by the definition of "chart order", a chart order can constitute a prescription as in this case.

Specifically, here, although the sales presented like a chart order because the physician signed off on the requisition sheet, it is important to note that at all times the device was procured for a specific patient. A physician initially contacted the vendor for a specific patient, the physician lawfully ordered the device for the specific patient in the operating room, patient-specific information followed the device on the requisition sheet, and the device was issued for a legitimate medical purpose. This process meets the definition of prescription. Accordingly, the hospital purchased the prosthetic devices by prescription.<sup>2</sup>

Finally, I deny the Department's motion concerning the "other bone, muscle, and tissue implants." This was presented to the Court as a "catch-all" category of devices, and the Court declines to now address the items individually.

**THEREFORE, IT IS HEREBY ORDERED** that Petitioner's Motion for Reconsideration and Respondent's Motion for Reconsideration are **GRANTED IN PART** and **DENIED IN PART**.

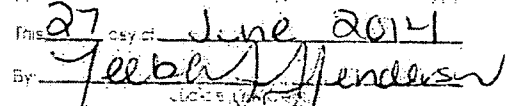
**AND IT IS SO ORDERED.**

  
**SHIRLEY C. ROBINSON**  
Administrative Law Judge

June 27, 2014  
Columbia, South Carolina

<sup>2</sup> This is consistent with my finding that the bulk sales of trauma devices were subject to sales and use taxes because they were not actually sold by prescription. This finding likewise stands.

CERTIFICATE OF SERVICE  
This is to certify that the undersigned has on this date served the order in the above-entitled action upon all parties to the case.  
In the United States the postage paid for the foregoing Mail Service addressed to the party(ies) or their attorney(ies).

This 27 day of June 2014  
By:   
Tebeba Henderson