THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMININISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Case No. 11-ALJ-30-0232

Heather Vitaris..Respondent,

vs.

South Carolina Budget and Control Board,
Employee Insurance Program...Appellant

NOTICE OF APPEAL

The South Carolina Budget and Control Board, Employee Insurance Program appeals the decision of the Honorable Carolyn C. Matthews dated April 24, 2012. Appellant received a copy of this decision on April 25, 2012.

May 14, 2012

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MAY 15 2012
SC Court of Appeals

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal by depositing a copy in the United States Mail, postage prepaid, on May 14, 2012 addressed Respondent's attorney of record, Nathaniel W. Bax, the South Carolina Administrative Law Court, and the South Carolina Budget and Control Board, Employee Insurance Program as follows:

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May 14, 2012

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Heather Vitaris v. South Carolina Budget and Control Board,
Employee Insurance Program
Case No.: 11-ALJ-30-0232
Our File No.: 2115203

Dear Ms. Gee:

Enclosed for filing is an original and two (2) copies of the Notice of Appeal in the above-referenced case. Also enclosed are the following:

1) Proof of Service of the Notice of Appeal;
2) A copy of the Order which is to be challenged on appeal;
3) A filing fee of $100.

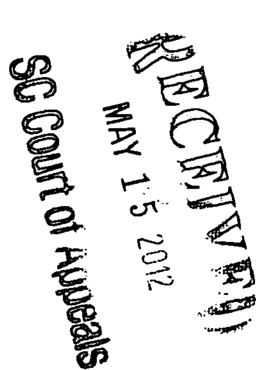
Please return filed stamped copies of the Notice of Appeal in the enclosed self-addressed postage prepaid envelope.

With kind regards,

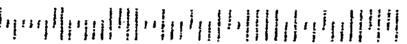
Yours very truly,

MONTGOMERY WILLARD, LLC

Theodore D. Willard, Jr.



TDW/tds
Enclosures
cc: Nathaniel W. Bax, Esquire (w/ enc.)
Kelly H. Rainsford, Attorney at Law (w/ enc.)
The Honorable Jana E. Shealy (w/ enc.)



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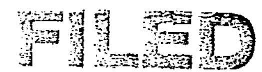

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SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Heather Vitaris, Appellant, v. South Carolina Budget and Control Board, Employee Insurance Program, Respondent.	)	Docket No: 11-ALJ-30-0232-AP **ORDER** April 24, 2012

Appearances: Nathaniel W. Bax, Esquire, for the Appellant
Theodore D. Willard, Jr., Esquire, for the Respondent

STATEMENT OF THE CASE

The above-captioned matter is before the Administrative Law Court (ALC or Court) pursuant to the appeal of Heather Vitaris (Appellant or Claimant) from the final decision of Respondent, South Carolina Budget and Control Board, Employee Insurance Program (EIP). EIP upheld BlueCross BlueShield's (BCBS) decision that Appellant did not provide adequate notice under the terms of the Plan within her first trimester of pregnancy and, thus, was penalized under the Maternity Management Program. The Court may hear this matter pursuant to S.C. Code Ann. § 1-23-600(D) of the Administrative Procedures Act (APA).

Based upon the Record, the parties' briefs, oral arguments, and applicable law, I reverse the final decision of EIP to impose the penalty under the Maternity Management Program, because Appellant provided adequate notice within the first trimester of her pregnancy under the terms of the Plan.

FACTUAL BACKGROUND

Appellant is covered by the State Health Plan ("Plan").[1] When she became pregnant in January, 2010, she began seeing Dr. Harvey Sikes, who practices obstetrics and gynecology. Dr. Sikes notified Appellant's carrier, BCBS, of the pregnancy via appropriate billing procedures

[1] At oral argument, neither counsel knew by whom Appellant was employed. The record contains one reference to the "Greenville School District" as Appellant's "group." Whether she is an employee of the district, the spouse or child of an employee is not contained in the record.

and standard billing codes in January 2010, which was within the first trimester (thirteen weeks) of Appellant's pregnancy.

The first Trimester of pregnancy ends at thirteen (13) weeks. On May 3, 2010, when Appellant was twenty (20) weeks pregnant, she telephoned Medi-Call and left a voice mail notifying Medi-Call of her pregnancy.[2] On May 4, 2010, Medi-Call mailed a letter to Appellant stating:

> The State Health Plan requires enrollment into the Coming Attractions maternity program within the first trimester of pregnancy. This information is documented in the State Health Plan Insurance Benefits Guide and Article 16 [sic], Paragraph 16.10 [sic][3] of the Plan of Benefits Document. Therefore, based on the contact date of 5/3/10, and your estimated delivery date, you have been assessed the maternity precertification penalty.

This penalty means that Appellant had to pay a $200.00 penalty per hospital admission related to her pregnancy and did not have an out-of-pocket maximum for her pregnancy related care; $2,000.00 is the normal out-of-pocket maximum. The letter further informed Appellant that she had six months to appeal the imposition of the penalty by submitting a written request to State Managed Care of BCBS.

On May 6, 2010, Appellant was hospitalized for premature contractions, was successfully treated and released May 9, 2010. On May 10, 2010, BCBS mailed Appellant a letter to confirm authorization for that hospitalization. On May 25, 2010, Appellant's former attorney sent a letter to BCBS's Managed Care Division, appealing the assessment of the maternity penalty. On May 28, 2010, Medi-Call sent Appellant a letter denying the appeal of the Maternity Penalty for failure to notify them during the first trimester. That letter gave Appellant ninety (90) days to appeal Medi-Call's decision.

On June 14, 2010, Appellant's attorney appealed to EIP. Appellant gave birth to her daughter on September 9, 2010. On March 23, 2011, the Health Appeals Committee issued its final decision, holding the penalty could not be waived. The Final Decision of Respondent's Appeals Committee recited all the details of Appellant's medical care during her pregnancy and

[2] The Record is silent regarding why Appellant telephoned Medi-Call on that date.

[3] The correct reference is Article 15, Paragraph 15.10. Article 16 is the Medicaid supplemental plan.

then denied her appeal, finding that both the Plan and the IBG required Appellant to notify Medi-Call personally. Thus, the financial penalties applied.[4]

In support of her position that notification of her pregnancy by her OB/GYN was sufficient, Appellant submitted an affidavit to EIP. Appellant's affidavit states, in part:

> 2. I became pregnant in January, 2010 and delivered my child on September 9, 2010. I have been advised by my insurer, the State Health Plan, that I am being penalized for allegedly not notifying the plan of my pregnancy in the first trimester of the pregnancy. Attached is a letter of May 28, 2010 from BlueCross BlueShield in which it asserts that Medi-Call was first notified of my pregnancy by me by May 3, 2010. It is true that May 3, 2010 was the first time that I, personally, spoke with Medi-Call or a representative from the State Health Plan concerning my pregnancy, but it is not true that the May 3, 2010 call by me was the first notice of my pregnancy to the State Health Plan or its representatives. In reality, Dr. Harvey Sikes' office had filed claims relating to the pregnancy with the State Health Plan before May 3, 2010 and during the first trimester. I had assumed that Dr. Sikes' office's contact with the State Health Plan which provided notice of my pregnancy during the first trimester was sufficient. Dr. Sikes' office provided notice to the State Health Plan of my pregnancy during the first trimester and such notice was unquestionably received by the State Health Plan during that period.
>
> 3. I am advised by my attorney that the relevant section of the State Health Plan states:
>
> 15.1.10
>
> A Covered person, upon becoming aware of pregnancy, shall notify the Utilization Review Agency. A maternity coordinator providing education and counseling for the mother shall monitor each case. The Covered Person shall be subject to the penalties described in 15.18A for failure to notify the Utilization Review Agency during the first trimester of the pregnancy or refusal to participate in the comprehensive maternity management program. This penalty shall be in addition to that in force for failure to notify the Utilization Review Agency of the hospital admission as described in 15.1.12 and 15.1.14.
>
> 4. I believe that I complied with the aforementioned plan term because Dr. Sikes' office notified the referenced agency of my pregnancy in the first trimester and that medical care was being rendered to me for my pregnancy. It is my hope that under those circumstances that I will not be penalized and that the remaining benefits that are due under the plan will be paid on my behalf.

[4] The Record does not contain any reference to how much Appellant was out-of pocket during her pregnancy and delivery, and neither counsel included that amount in the statement of facts contained in their Briefs.

Appellant appealed that decision and Respondent had Dr. Ashby Jordan review their decision to impose the penalty. Dr. Jordan stated, "Penalty should be upheld as patient did not notify Medi-Call as outlined in benefit guide. Having ICD9 codes submitted to claims does not justify notification as Medi-Call has no way of seeing this information unless there is a need for us to review the patient's claim history." Appellant appealed the denial and fully exhausted her administrative remedies. This appeal to the Administrative Law Court subsequently ensued.

STANDARD OF REVIEW

The APA states the following standard of review is to be used on appeal of an agency's decision:

> The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> a. in violation of constitutional or statutory provisions;
> b. in excess of the statutory authority of the agency;
> c. made upon unlawful procedures;
> d. affected by other error of law;
> e. clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> f. arbitrary or capricious as characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380 (5) (2010).

The APA establishes the "substantial evidence" rule as the standard for judicial review of agency decisions. Roper Hosp. v. Bd. of S.C. Dept. of Health & Envtl. Control, 306 S.C. 138, 410 S.E.2d 558 (1991); Lark v. Bi-Lo Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Under the substantial evidence standard of review, the Court may not substitute its judgment for that of the agency unless the agency's findings are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record. Wilson v. S.C. Budget & Control Bd. Employee Ins. Program, 374 S.C. 300, 648 S.E.2d 310 (Ct. App. 2007).

Substantial evidence is not a mere scintilla of evidence, but is evidence which, considering the record as a whole, would allow a reasonable mind to reach the conclusion the administrative agency reached to justify its action. Rogers v. Kunja Knitting Mills, Inc., 312

S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). See also Ruocco v. S.C. State Bd. of Registration for Prof'l Eng'rs & Land Surveyors, 314 S.C. 111, 441 S.E.2d 829 (Ct. App. 1994) (when reviewing an agency's decision under the APA to determine if substantial evidence exists, the record must be viewed as a whole to determine whether there is evidence that will allow reasonable minds to reach the conclusion of the agency). An abuse of discretion occurs when a factual ruling is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharp v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

DISCUSSION

The issue presented in this case is very narrow. The parties are in agreement that Appellant did not telephone Medi-Call during the first trimester of her pregnancy, nor did she provide notice through the EIP website.

The issue is simply whether Appellant's doctors' submitted claims constitute notice to the Utilization Review Agency ("URA") under the terms of the Plan. The Appellant argues that she did provide notice under the terms of the Plan. The Plan states that a covered individual must notify the URA. Medi-Call is a division of BCBS and is the URA for the Managed Maternity Program. The Plan, however, does not provide any clarification as to what method of notification should be used. Appellant contends that notice was given to BCBS by way of submitted claims that were subsequently approved and paid. Appellant maintains that Medi-Call, as an internal division of BCBS, received notice because BCBS received the claims related to Appellant's pregnancy and paid those claims during the first trimester.

Respondent argues that Appellant's notice was not sufficient. Respondent takes the position that Appellant did not notify Medi-Call, but instead submitted the claims to BCBS. Respondent contends that notice must be given by the covered person by telephone or internet according to the Insurance Benefits Guide (IBG). The IBG states "To preauthorize your pregnancy benefits, you must notify Medi-Call during the first trimester (three months) of your pregnancy...You can also notify Medi-Call of your pregnancy and enroll in 'Coming Attractions' online through the Personal Health Record's maternity screening program. Go to the EIP website, www.eip.sc.gov."(Id.)

This Court's review is governed by the substantial evidence standard. McCraw v. Mary Black Hosp., 350 S.C. 229, 235; 565 S.E.2d 286, 289 (2006) (quoting Tiller v. National Health Care Center, 334 S.C. 333, 338; 513 S.E.2d 843, 845 (S.C. 1999)). In this case, because there is not substantial evidence in the record to support Respondent's decision, its Final Determination is reversed and full coverage of normal maternity benefits is awarded to Appellant.

Examination of the Plan itself reveals that there is no mention of "Medi-Call" in Section 15.1.10. That Section provides in its entirety:

> "*15.1-10 Comprehensive Maternity Management*"
> A Covered Person, upon becoming aware of pregnancy, shall notify the Utilization Review Agency. A maternity coordinator providing education and counseling for the mother shall monitor each case. The Covered Person shall be subject to the penalties described in 15.1.8.A for failure to notify the Utilization Review Agency during the first trimester of the pregnancy or refusal to participate in the comprehensive Maternity Management Program. This penalty shall be in addition to that in force for failure to notify the Utilization Review Agency of the hospital admission as described in 15.1.2 and 15.1.4.[5]

Not only is the language inconsistent, referring to a pregnant woman both as a "covered person" and "the Mother" when the word "woman" would have been far more precise, but it does not require that the woman "personally notify" the URA. The "Utilization Review Agency" is not identified as "Medi-Call." Neither does it contain any reference to "Medi-Call" or provide any method of contacting Medi-Call. There is no telephone number or website contained in this paragraph or anywhere in the Plan.

Article 1.2 of the Plan provides that it became effective January 2010, the month Appellant became pregnant. Nothing in the Record establishes that Appellant was ever given a copy of this version of the Plan. There is no evidence she was told that she must inform Medi-Call **personally** via either telephone call or the website that she was pregnant during the first trimester in order to avoid being financially penalized.

As Appellant averred in the Affidavit she submitted to BCBS, she thought that Dr. Sikes' providing notice to BCBS of her pregnancy during the first trimester complied with the notice requirement of the Plan. BCBS does not dispute the fact that claims for payment of Appellant's

[5] The Court takes judicial notice that the State Health Plan now provides toll-free numbers for Medi-Call under the Maternity Management section of the current State Health Plan. It also contains specific instructions and the seven separate links required for notifying Medi-Call via the EIP website.

pregnancy related treatment were submitted by Dr. Sikes and paid during the first trimester; however, they contend that because Appellant did not **personally** contact Medi-Call by telephone or via the website, the monetary penalties apply.

Respondent further asserts that its Insurance Benefits Guide ("IBG") clearly requires that every pregnant woman covered by its policies personally notify Medi-Call during the first trimester. The relevant portions of the IBG provide:

> **Maternity Management**
> If you are a mother-to-be, **you must participate in the Maternity Management Program.** Medi-Call administers EIP's comprehensive maternity management Program, "Coming Attractions." The program monitors expectant mothers Throughout pregnancy and manages Neonatal Intensive Care Unit (NICU) Infants or babies with special needs until they are one year old. **To preauthorize Your pregnancy benefits, you must notify Medi-Call during the first trimester (three months) of your pregnancy.** You do not have to wait until you have seen Your physician.
>
> You can also notify Medi-Call of your pregnancy and enroll in "Coming Attractions" Online through the Personal Health Record's maternity screening program. Go To the EIP Web Site, www.eip.sc.gov. Under "Links," select "Medical (BlueCross/ Blue Shield of South Carolina)." At the site, select "My Health Toolkit" and then Log in and select "Personal Health Record." From there, select "Start Now," which Will take you to "My Activity Center." Then select "Coming Attractions."
>
> If you do not notify Medi-Call during the first trimester, or if you refuse to participate in the Maternity Management Program, you will pay a $200 penalty for each maternity-related hospital or skilled nursing facility admission. This penalty will be in addition to the Medi-Call preauthorization penalty, and there will not be a $2,000 limit on the amount of coinsurance you must pay. (emphasis added).

There is no evidence in the Record that Appellant was ever provided with a copy of the IBG. However, even if she was given an IBG when she first enrolled in the Plan, there is no evidence that she was given a copy of the Plan, which was amended and became effective January 2010 – the month she became pregnant.

Moreover, neither the above-quoted portions of the IBG **nor any other portion of the Plan or IBG specifies that personal notice by the insured person must be given.** A reasonable person could interpret these sections to mean that notice by her physician of pregnancy and related medical procedures in the first trimester complied with the requirements of the Plan and the IBG. Certainly there is no evidence that Appellant "refused to participate" in

the Maternity Management Program. Because she did call Medi-Call on May 3, 2010, the only reasonable inference is that when she was made aware of the requirement to inform Medi-Call, she did so.

Insurance contacts, as contracts of adhesion are "to be liberally construed in favor of the insured and strictly construed against the insurer." *American Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co.*, 378 S.C. 623, 628-29, 663 S.E. 2d 492, 495 (2008). Any ambiguity in an insurance contract "shall be construed most strongly against the insurer and favorably toward the insured." *Nationwide Mut. Ins. Co. v. Simmonds,* 315 S.C. 404, 406, 434 S.E. 2d 277, 278 (1993) (citing *Turkett v. Gulf Life Ins. Co.*, 279 S.C. 309, 313, 306 S.E. 2d 602, 603 (1983)). The requirement that the Utilization Review Agency be notified during the first thirteen weeks is ambiguous and could be interpreted as satisfied by the physician's billing for pregnancy-related claims.

Respondent's evidence consists of a mere recitation of provisions of the Plan and the IBG. There is no evidence that Appellant was ever given a copy of the Plan as amended in January 2010 or that she was given a copy of the current IBG. The entire record in this case does not contain substantial evidence to support Respondent's conclusion that only personal notice by the insured constitutes compliance with the Plan and the Insurance Benefits Guide.

ORDER

IT IS HEREBY ORDERED THAT the decision of the appeals committee of the Employee Insurance Program is **REVERSED.**

AND IT IS SO ORDERED.

CAROLYN C. MATTHEWS
Administrative Law Judge

April 24, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 24 day of April 2012

By: Paye P. Ayd
[illegible] Law Clerk