

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDUSTRIAL MEDICAL GROUP,

No. 35231

Appellant,

vs.

DEPARTMENT OF BUSINESS AND  
INDUSTRY, DIVISION OF INDUSTRIAL  
RELATIONS, IIRS AND EMPLOYERS  
INSURANCE COMPANY OF NEVADA,

Respondents.

**FILED**

JUN 11 2001

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This appeal, from an underlying billing dispute between Employers Insurance Company of Nevada ("EICON") and Industrial Medical Group ("IMG"), concerns a determination by the Division of Industrial Relations ("the Division") that EICON properly disallowed payments for supplies used in certain medical procedures. IMG unsuccessfully appealed this determination to the Division and then sought judicial review from the district court. The district court subsequently denied judicial review.

IMG now argues to this court that the Division's action was a regulation and, therefore, invalid because it was unsupported by notice-and-comment rulemaking. The Division and EICON contend that the ruling was simply a reasonable interpretation of controlling regulatory language. For the following reasons, we conclude that the Division's action was a regulation and was, therefore, void.

FACTS

NAC 616C.138(1) requires EICON to reimburse physicians for all "[s]upplies and materials provided by the provider of health care over and above those usually included in a visit to his office or in other services rendered." The dispute in this case concerns whether the Division properly

determined that particular medical supplies -- namely, sterile trays, eye trays, and dressings -- were not "over and above those usually included in a visit" for certain kinds of out-patient procedures (so called "starred" procedures), and that EICON, therefore, has no obligation to provide compensation.

Since 1980, IMG has performed starred procedures on injured Nevada workers. For these procedures, IMG submitted bills to EICON listing the procedure itself, the office visit, and supplies used during the procedure. These supplies included sterile trays, eye trays, and dressings. Until 1993, EICON paid IMG for the supplies used in starred procedures.

Starting in May 1993, the Division instructed EICON to stop paying for sterile trays, eye trays, or dressings used in connection with starred procedures. The Division advised that, in such procedures, these supplies were considered to be "included in the office visit," not "over and above those usually indicated with the office visit."

EICON thereafter disallowed payment of IMG's bills for sterile trays, eye trays, and dressings used in starred procedures. On April 28, 1994, IMG contested the disallowance of the bills and formally requested that the Division review the matter.<sup>1</sup>

On November 23, 1994, the Division responded with a determination that EICON had properly disallowed the contested bills. The determination concluded that the regulatory language permitting compensation for supplies "over and above those usually included" in an office visit did not include sterile trays, eye trays, and dressings: "When interpreted literally, those supplies usually and customarily used in a

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<sup>1</sup>NAC 616C.027 lays out the procedure for a healthcare provider's administrative appeal of billing disputes.

procedure or office visit are not to be billed separately. Therefore, the cost of supplies and materials usually and customarily included with the office visit or other services rendered are" not separately billable.

On November 29, 1994, IMG timely appealed from the determination.<sup>2</sup> An assistant administrator heard testimony regarding the nature of the starred procedures and whether the contested supplies were "usually included" in the office visits for the procedures. The hearing officer rendered a decision in favor of the Division on January 7, 1999. IMG filed a petition of judicial review on January 29, 1999.<sup>3</sup> On August 31, 1999, the district court denied the petition, and IMG timely appealed to this court.

#### DISCUSSION

The function of this court in reviewing an administrative decision like this one is identical to the role of the district court.<sup>4</sup> NRS 233B.135(3) sets out the standard for review: "The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact." However, a court may reverse or remand the administrative decision when the decision is illegal, in excess of the agency's statutory authority, made upon unlawful procedure, affected by other error of law, clearly erroneous in view of the substantial evidence on the whole record, or arbitrary or capricious.<sup>5</sup>

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<sup>2</sup>See id.

<sup>3</sup>See NRS 233B.130.

<sup>4</sup>Riverboat Hotel Casino v. Harold's Club, 113 Nev. 1025, 1029, 944 P.2d 819, 822 (1997).

<sup>5</sup>NRS 233B.135(3).

On appeal, IMG asserts, inter alia, that the administrative judge's decision was affected by error of law.<sup>6</sup> IMG contends that the Division's disallowance of payment for the contested supplies was a regulation subject to the notice-and-comment requirements applicable to rulemaking under the Nevada Administrative Procedure Act ("NAPA").<sup>7</sup> Because the Division failed to adhere to the procedural requirements of the NAPA, IMG contends that this court must invalidate the Division's ad hoc regulatory action and void EICON's subsequent disallowance of the contested bills.<sup>8</sup>

EICON and the Division respond that there was no rulemaking in this case. They argue that the Division's ruling, that NAC 616C.138 does not require payment for the contested supplies simply interpreted and applied the regulation. Respondents argue that when an agency merely enforces or implements the requirements of existing law, rulemaking formalities are unnecessary.

The NAPA defines "regulation" as "[a]n agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy."<sup>9</sup> In contrast to such "regulatory" rulemaking, agency actions that simply construe how a statute or regulation operates in a specific

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<sup>6</sup>Because we conclude that the administrative judge in this matter reached an incorrect legal conclusion, we need not reach IMG's additional assignments of error.

<sup>7</sup>See NRS 233B.060-63.

<sup>8</sup>See Public Serv. Comm'n v. Southwest Gas, 99 Nev. 268, 273, 662 P.2d 624, 627 (1983) (holding that regulations unsupported by notice-and-comment are void).

<sup>9</sup>NRS 233B.038(1)(a).

context (so-called "interpretive rulings") are not regulations and are not subject to notice-and-comment rulemaking.<sup>10</sup>

The distinction between interpretive and regulatory rulings can be quite subtle. Nevertheless, certain principles aid our analysis. First, the agency's own label is not dispositive.<sup>11</sup> Second, an interpretive ruling "simply states what the administrative agency thinks the statute means, and only "reminds" affected parties of existing duties."<sup>12</sup> By contrast, if the agency action puts into effect agency policy and thereby creates new laws, rights, or duties, the agency action is properly considered a regulatory rule.<sup>13</sup>

With these principles in mind, we conclude that, under the unique facts of this case, the Division's action here is best characterized as a regulatory ruling. The Division's 1993 decision to reclassify sterile trays, eye trays, and dressings as "included in the office visit" changed EICON's uninterrupted, decade-long practice of reimbursing healthcare providers for these items. As such, the Division did not simply "remind" IMG of its existing duties under NAC 616C.138. Instead, it created a new obligation in IMG to pay for the contested items itself.

Due to the parties' long-standing adherence to a contrary interpretation of NAC 616C.138, we conclude that the Division's instruction to EICON to disallow payments for

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<sup>10</sup>State Farm Mut. v. Comm'r of Ins., 114 Nev. 535, 543, 958 P.2d 733, 738 (1998); K-Mart Corporation v. SIIS, 101 Nev. 12, 17, 693 P.2d 562, 565 (1985).

<sup>11</sup>General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984).

<sup>12</sup>Id. (quoting Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 n.153 (D.C. Cir. 1979)); see also State Farm, 114 Nev. at 543, 958 P.2d at 738.

<sup>13</sup>State Farm, 114 Nev. at 543, 958 P.2d at 738; Ruckelshaus, 742 F.2d at 1565.

sterile trays, eye trays, and dressings used in starred procedures was a regulatory ruling. Because the Division did not promulgate this regulation pursuant to the NAPA's notice-and-comment procedures, it is necessarily void. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court with instructions to grant the petition and vacate the agency's directive.

Young J.  
Young

Leavitt J.  
Leavitt

Becker J.  
Becker

cc: Hon. Mark W. Gibbons, District Judge  
Hardy & Hardy  
Shirley D. Lindsey, Associate General Counsel  
John F. Wiles  
Clark County Clerk