COMMONWEALTH of VIRGINIA

R. FERRELL NEWMAN, Chairman
WESLEY G. MARSHALL, Commissioner
ROBERT A. RAPAPORT, Commissioner

WORKERS' COMPENSATION COMMISSION
333 East Franklin Street
Richmond, Virginia 23219
www.workcomp.virginia.gov
(877) 664-2566 • (804) 823-6945 Fax

JAMES J. SZABLEWICZ
Chief Deputy Commissioner

EVELYN MCGILL
Executive Director

JASON QUATTROPANI, Clerk

Policy Statement

Subject: Inquiry from the Regulatory Advisory Panel:

With the first mandated review of the Medical Fee Schedule (MFS), we have been called upon by the Regulatory Advisory Panel (RAP) to interpret the following statutory language:

> The Commission shall review Virginia fee schedules during the year that follows the transition date and biennially thereafter and, *if necessary, adjust the Virginia fee schedules in order to address (i) inflation* or deflation as reflected in the medical care component of the Consumer Price Index for All Urban Consumers (CPI-U) for the South as published by the Bureau of Labor Statistics of the U.S. Department of Labor . . . ."[1] Va. Code § 65.2-605(D) (emphasis added)

Two questions are posed, both relating to the periods in which the statutorily defined inflation factor will be considered for the purposes of potential adjustments to the MFS. The questions are as follows:

1. In contemplating adjustments for the review following the transition date, will the Commission limit consideration of inflation to the period since January 1, 2018 or, should inflation be considered for the additional years of 2016 and 2017?
2. As regards to the biennial reviews, should inflation be considered for the two preceding years or just one?

Various representatives of the RAP have submitted comments with their respective positions, predictably falling along party lines. That is, the medical providers argue for the application of inflation in a manner anticipated to maximize its impact on reimbursements for services rendered. Representatives of the payors advance arguments for contrary results. We have reviewed all the submissions and considered their arguments.

---

[1] The statutory language continues: "(ii) access to fee scheduled medical services; (iii) errors in calculations made in preparing the Virginia fee schedules; and (iv) incentives for providers." Item (ii), generically referred to as "access to care" is addressed in some of the correspondence received. Items (iii) and (iv) are not relevant to the questions before us.

The questions implicate rules applicable to statutory interpretation and our duty to divine, as much as is possible, legislative intent from the plain meaning of the language employed. See Halifax Corp. v. First Union Nat'l Bank, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001) (quoting Watkins v. Hall, 161 Va. 924, 930, 172 S.E.445, 447 (1934)). Lacking express direction contained in the words of the statute, "[we] must 'apply the interpretation that will carry out the legislative intent behind the statute.'" Chacey v. Garvey, 291 Va. 1, 8, 781 S.E.2d 357, 360 (2015) (additional citations omitted).

A fundamental element of the MFS is what has come to be known metaphorically as the "haircut." Lacking a better metaphor, we will employ it in this letter. The representatives of the medical providers have conceded that the MFS will effect some reduction in the amounts their constituents would be paid for services provided to workers' compensation patients. From the language of § 65.2-605(C) as drafted by the interest groups and as enacted by the General Assembly, this element of the MFS was implemented by means of the reimbursement objective which was "derived from data on all reimbursements and other amounts paid to providers for fee scheduled medical services . . . during 2014 and 2015 . . . ."

A final word on statutory interpretation is in order. It is our job to give effect to the intention of the legislature by what the statute says and not by what we think it should have said. Carter v. Nelms, 204 Va. 338, 346, 131 S.E.2d 401, 406-07 (1963). That the legislature intended the "haircut" is clear. It is equally clear that the haircut was effectuated by providing that 2018 services be paid based on 2014 and 2015 data. Consequently, our role in considering the impact of inflation when conducting the statutorily mandated reviews, is to preserve as much as possible the reduction in payments as that reduction existed on January 1, 2018. By this we mean that our consideration of inflation when performing our statutorily mandated reviews, should endeavor to maintain the impact of the haircut as originally enacted. Fidelity to this ideal dictates that we not apply inflation for periods that will increase or decrease the burden or benefit of the discount on providers and/or payors. It is through this lens that we view the questions presented.

1. The years for which we consider the impact of inflation for the initial, post-transition date review.

For our initial review of the MFS we will limit consideration of inflation to the year 2018. To do otherwise and consider the intervening years of 2016 and 2017 would necessarily reduce, possibly eliminate, the intended "haircut" implemented by basing 2018 payments on 2014/2015 data. Applying inflation for years 2016 and 2017 as advanced by some raises a more fundamental question: why enact a 2018 MFS based upon 2014/2015 data if, upon first review, it is adjusted for inflation over all intervening years? We find no answer to this question apparent from the language of § 65.2-605. Rather, we deem limiting consideration of the impact of inflation to 2018 will better preserve the haircut as originally created and comport with § 65.2-605's express intent.

2. The application of interest for one or two years during the biennial review.

To revisit the operative statutory language, "The Commission shall review (the MFS) during the year that follows the transition date *and biennially thereafter* and, if necessary, adjust the (MFS) in order to address . . . inflation . . . ." (emphasis added) The question posed is whether, during such reviews, we consider the impact of inflation during the two preceding years or only the year before the review.

As stated above, our goal is to preserve the discount as it existed on January 1, 2018. Meeting that goal requires that during each biennial review, we consider the impact of inflation during the intervening two years. To do otherwise would retard increases in the MFS in relation to the benchmark CPI-U. Nothing we see expressly or by implication in the language of § 65.2-605 suggests such an intention.

In conclusion, we have attempted to limit this Policy Statement to the specific questions posed. Because inflation is the rule and not the exception, we have avoided reference to deflation. However, as to question #2, we will view the impact of inflation and/or deflation during both years covered by the biennial review.

Expiration Date

This policy will remain in effect until revised or rescinded.

Appendix:

None.

Approval: R Ferrell Newman
Chairman (Printed Name)

Chairman (Signature)

Date Approved: 1/15/19