

APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES

In the matter between:

GENESIS MEDICAL SCHEME

Appellant

and

REGISTRAR FOR MEDICAL SCHEMES

First Respondent

D

Second Respondent

RULING

- 1 This is an appeal against a decision of the office of the registrar in which it found that the scheme's application of the "second opinion rule" prior to granting authorisation for a surgical procedure in the circumstances of this case was unreasonable.
- 2 The second respondent was admitted to the N1 City Hospital for a Laminectomy and Neuroplasty procedure without first obtaining authorisation. She says she had contacted the scheme with a view to obtaining authorisation but that she was told the computer systems were down. She then left the matter in the hands of the hospital, believing that since the hospital has a working relationship with

medical schemes it would resolve “this technical issue of receiving an authorisation number with no hassles”. She says it was the first time that she was claiming for this procedure.

- 3 The scheme submits that she should not have gone ahead with the procedure without first obtaining its authorisation and without first affording it the opportunity to case manage the event by way of obtaining a second opinion with a view to ensuring that the procedure was medically necessary. For this submission it points to its rules (annexure B rule 1.3.1) which provide as follows:

“All benefits under the private option are subject to the Scheme’s right to case manage each event in terms of generally accepted clinical protocols and guidelines. The trustees shall further have the right to insist that a member obtain a second opinion from a suitably qualified person nominated by the Scheme (at the Scheme’s cost), where the case is a non-emergency type case and where, in the opinion of the Trustees, more cost effective and more generally accepted medical practices or procedures are available, before embarking on a course of action. If the member ignores any such insistence no further benefits will be allowed for that particular illness, condition or event.”

- 4 That the registered rules of the scheme are binding not only on the scheme but also on the member and all those claiming under them is axiomatic. Section 32 of the Medical Schemes Act is unambiguous in this regard and the scheme cannot validly be ordered to act contrary to its registered rules.
- 5 The rule on which the scheme relies for repudiating the claim is equally unambiguous. It confers upon the scheme the right to demand a second opinion, in relation to all private option benefits,

- 5.1 from a suitably qualified person ,
- 5.2 nominated by the scheme,
- 5.3 in non-emergency cases, and
- 5.4 in cases where more cost effective and generally accepted alternative medical procedures are available.

6 If this right is not heeded by a claimant, then the scheme would not be liable for payment of a benefit in relation to that condition, illness or event.

7 As I understand it, the office of the registrar did not find that this rule is unreasonable. It found that its manner of application in the circumstances of this case is unreasonable. Mr Fagan for the scheme submitted at the hearing that the reasonableness or otherwise of application of the rule is not a proper standard by which the scheme's conduct ought to be considered. He submitted that if the rule itself is found to be reasonable, then *caedit quaestio*.

8 The scheme's position is straightforward. It says the rule confers on the trustees the right to insist on a second opinion before the procedure can be authorised. The second respondent did not afford the scheme the opportunity to obtain a second opinion. Therefore, the scheme is not liable to pay the claim.

9 Context, as provided by the facts, is everything. It is unlikely that the application of an otherwise reasonable rule (after all, it has been registered by the registrar) in an arbitrary or capricious or unreasonable manner would be constitutionally

defensible. But for purposes of this case one need hardly go that far because the answer lies in the rule itself.

- 10 The second opinion rule requires, among other things, that the case in issue be a non-emergency case and that there be other alternative medical procedure which is more cost effective and generally accepted. The scheme has not pointed to any medical procedure which is more cost effective and generally accepted than the procedure performed on the second respondent. It has also not denied the second respondent's averment that

“I was also advised by Dr Botha that should I not receive surgery, there may be damage to the nerve which may cause me to loose [sic] control over urinary functions. He did a test to ascertain nerve activity. Dr Botha was not available for surgery within the next week, and as the pain had now become unbearable and I was fearful for loosing control over urinary functions [sic], I went back to Dr Schutte to perform surgery.”

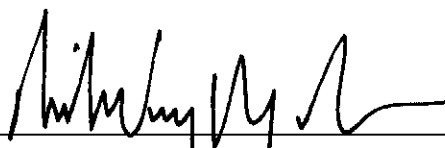
- 11 Thus, the emergency¹ nature of the case is not disputed by the scheme. The scheme has also not suggested any alternative medical procedure that is more cost effective and generally accepted.
- 12 Reliance was placed on an earlier ruling of this appeals committee for the proposition that the scheme is entitled to demand a second opinion before a medical procedure is embarked upon and that, failing that opportunity, the scheme would be within its right under the rules to decline a claim. But that case is clearly distinguishable on the facts because

¹ Not to be confused with an emergency medical condition for purposes of prescribed minimum benefits. Here we are concerned with a physical condition that requires (according to two suitably qualified persons of many years' experience) immediate intervention in contradistinction to a sudden and unexpected onset of a health condition.

- 12.1 the rule there in question was markedly different from the rule here in issue, focusing as it did on medical necessity or “lower level of care”;
 - 12.2 the surgeon in that case confirmed in writing that the procedure was not urgently required. In this case, both Dr Botha and Dr Schutte held the view that emergency intervention was required;
 - 12.3 the member proceeded with the procedure “knowing full well” that a second opinion was required. This has not been established in this case.
- 13 The second respondent was armed with the opinions of two specialist practitioners that surgery was the only reasonable intervention. The Neurosurgeon (Dr Botha) had 19 years’ experience. The Orthopaedic Surgeon (Dr Schutte) had 20 years’ experience. The scheme did not dispute this. It simply insists that the second opinion be given by a doctor of its choosing in circumstances where, it seems reasonable to assert, it is unlikely that the advice would have differed from that of specialists with combined experience and expertise of almost 40 years. This is unreasonable.
- 14 Furthermore, the appeals committee was of the opinion that the medical adviser failed to apply his mind to the MRI scan submitted for his consideration. Specifically, the scan showed a significant prolapse of the disc into the spinal canal that would most likely not have responded to conservative treatment.
- 15 In light of the answer lying in the rule itself, it is not necessary to decide the issue raised by Mr Fagan as regards whether the reasonableness of the

application of a rule is an appropriate standard where the rule itself is found to be reasonable. Nevertheless we touch on it in passing (*obiter*). The difference in facts between this case and those in the earlier ruling on which the scheme relies demonstrates precisely the need to consider the application of a rule in light of the facts in issue. Application of a rule without regard to the facts or merits of each case can only breed arbitrariness and capriciousness in decision-making.

16 In the result, the appeal cannot succeed.



VUYANI NGALWANA for Appeal Committee

For the Appellant: Mr E Fagan and Mr Coquelle

For the 2nd respondent: Mrs D

Date of hearing: 29 June 2010

Date of Ruling: 27 July 2010