

NO. A10-1930

State of Minnesota
 In Supreme Court

Ronald E. Troyer,

Employee,

vs.

Vertlu Management Company/
 Kok & Lundberg Funeral Homes and
 State Auto Insurance Company,

Employer and Insurer-Relators,

and

HealthEast Care System,

Respondent.

BRIEF OF AMICUS CURIAE FAIRVIEW HEALTH SERVICES

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STATEMENT OF THE CASE

Fairview Health Services submits this brief as an *Amicus Curiae* in support of Respondent HealthEast Care Systems position relative to Relators appeal in this matter.¹ Fairview Health Services is a healthcare provider with multiple hospitals in the Twin Cities metropolitan area. Fairview Health Services has a number of pending cases involving the same or identical issues as those presented by this appeal. (See, e.g., Relator's App. at A-29.) The undersigned's office also represented Fairview in the case of Buck Ulrick v. Tri-City Enterprises, 68 W.C.D. 210 (W.C.C.A., 2008) currently challenged by Relators' appeal.

Amicus agrees with the Statement of Case set forth in Respondent HealthEast's brief, which accurately sets for the background and procedural history of this case.

STATEMENT OF ISSUES

I. WAS HEALTHEAST CARE SYSTEM THE HEALTHCARE PROVIDER UNDER MINN. R. 5221.0700, SUBP. 2A(2)?

The Workers Compensation Court of Appeals held in the affirmative.

II. WHETHER MINN. STAT. § 176.136, SUBD. 1B(B) ESTABLISHES THE REASONABLE VALUE FOR LARGE HOSPITAL INPATIENT CHARGES AND DOES NOT GRANT A COMPENSATION JUDGE DISCRETION TO DETERMINE INDEPENDENTLY THE REASONABLENESS OF SAID CHARGES SUBJECT TO A CAP OF

¹ This brief was authored in its entirety by counsel for the amicus curia, Fairview Health Services, and no other party, person, or entity made monetary contributions to the preparation or submission of this brief. See Minn. R. Civ. App. P. 129.03.

**THE LESSER OF 85% OF USUAL AND CUSTOMARY CHARGES
OR 85% OF PREVAILING CHARGES?**

The Workers Compensation Court of Appeals held in the affirmative.

STATEMENT OF FACTS

Fairview relies on the Statement of Facts as outlined in the Relators' and Respondent's Briefs in this matter.

ARGUMENT

I. HEALTHEAST CARE SYSTEM WAS THE HEALTHCARE PROVIDER UNDER MINN. R. 5221.0700, SUBP. 2A(2).

A. Standard of Review

This Court's scope of review of the factual issues in this case is limited to determining whether, viewed in a light most favorable to the Workers' Compensation Court of Appeals decision, the factual findings are manifestly contrary to the evidence. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59 (Minn. 1984). As to questions of law decided by the Workers' Compensation Court of Appeals this Court is free to exercise its own independent judgment. Bruns, Jr. v. City of St. Paul, 555 N.W.2d 522 (Minn. 1996). However, this Court has long recognized, "the Workers' Compensation Court of Appeals is a specialized agency of the executive branch, its members selected for their experience and expertise, and entrusted with deciding, in consistent and appropriate fashion, 'all questions of law and fact arising under the workers'

compensation laws' brought to it on appeal." Hengemuhle, 358 N.W.2d at 358 N.W.2d at 61 ((citations omitted.)

B. The entity "actually furnishing" the service to the employee is the healthcare provider under Minn. R. 5221.0700, subp. 2A.

It is important to note that the Workers' Compensation Court of Appeals, a specialized agency of the executive branch, having particular experience and expertise in workers' compensation matters, has now considered this issue twice and arrived at the same conclusion. This issue was first presented to the Workers' Compensation Court of Appeals in Buck Ulrick v. Tri City Enterprises, 68 W.C.D. 210 (W.C.C.A. May, 2008).² In its Troyer decision, the Workers' Compensation Court of Appeals noted that the facts here are "essentially the same" as those in Buck Ulrick, and the "arguments made by appellants in this case mirror those made" in Buck Ulrick (Relators' App. at A-18.) Indeed, because the Relators ignored the Buck Ulrick decision and attempted to distinguish this nearly identical case from Buck Ulrick by alleging that the Workers' Compensation Court of Appeals did not fully consider the issues in the original case, the Workers' Compensation Court of Appeals did a thorough review of the issues and arguments below for the second time and arrived at the same result.

As in Buck Ulrick, most of the material facts received in evidence herein were stipulated to by the parties, and, as in Buck Ulrick, there was no dispute herein that the implant components were reasonable and necessary to cure or

² Amicus Fairview was the healthcare provider whose unpaid bill was at issue in that case. Amicus SFM was the insurer.

relieve the effects of, and causally related to, an admitted work injury. There was no dispute that the charges at issue herein were HealthEast's usual and customary charges. There was no dispute that HealthEast did not keep the implant components in stock and that it ordered them from the manufacturer, ANS, specifically for the employee's surgery at the direction of the employee's surgeon. There was no dispute that HealthEast's usual and customary charge included an undisclosed mark-up of the manufacturer wholesale price. Finally, there was no evidence that the manufacturer of the implant devices had any direct or indirect contact with the employee. (See Relators' App. at A7-A8; see also Findings and Order at Stipulations 1-8, 11.)³

██████████ whose deposition was offered into evidence by Relators, testified that she was not present at Mr. Troyer's surgery and she did not know whether representatives from ANS were present during said surgery participated in any way. (Ex. 10, Dep. of Rover at 19.) Judge Mesna indicated in the Memorandum to his Findings and Order that we were left to speculate about whether ANS representatives participated in the surgery and he properly declined to do so. (Relators' App. at A-5.) There is substantial evidence to support such a conclusion. (Ex. 10, Dep. of Rover at 19.)

Minn. R. 5221.0700, subp. 2A provides in pertinent part:

³ANS was, in reality, a manufacturer and supplier. Relators argue in their brief that: "ANS developed, tested and manufactured the medical implant component . . ." (Relators' Brief at 16.)

- A. Charges for services, articles, and supplies must be submitted to the payer directly by the healthcare provider actually furnishing the service, article, or supply. This includes but is not limited to the following:

2. equipment, supplies, and medication not ordinarily kept in stock by the hospital or other healthcare provider facility, purchased from a supplier for a specific employee;

(Emphasis added.)

Here, the Workers' Compensation Court of Appeals reiterated its position set forth in Buck Ulrick that Minn. R. 5221.0700, subp. 2A(2) must be read in conjunction with subpart 2A itself, which specifies that the charges are to be submitted by the healthcare provider "actually furnishing the service." (Relators' App. at A-17.), (Emphasis added.) This is consistent with sound rules of construction, which require that the language in rules and statutes be read in conjunction to give meaning and purpose to all parts. Minn. Stat. § 645.16. Furthermore, "general words are to be construed to be restricted in their meaning by preceding particular words." Minn. Stat. § 645.08(3).

Relators urge this Court to rewrite the rule by, in effect, ignoring the preceding particular words: "by the healthcare provider actually furnishing." The Workers' Compensation Court of Appeals properly rejected such a construction in this case as it did in Buck Ulrick. (Relators' App. at A-8.) The Court of Appeals read and construed the language of the entire rule, not just a select portion of the rule, as the Relators advocate, stating:

We cannot agree...that the sole determining criteria for determining whether the hospital or the manufacturer is the healthcare provider is whether a hospital does or does not keep in stock a particular piece of equipment, or a particular supply.

(Relators' App. at A-8.)⁴

The Workers' Compensation Court of Appeals concluded here, as it had in Buck Ulrick, that the implant components had no value to the employee standing alone until they were used at the hospital by the surgeon as part of the employee's surgical procedure. It stated, "Until used in the surgery, the components supplied by ANS could not cure or relieve the employee from the effects of his personal injury." (Relators' App. at A-8.) Relators argue that this statement improperly created a "totality of the surgical procedure test" that ignored Rule 5221.0700 subp. 2A(2). In reality, the Court of Appeals properly analyzed the language of the entire rule in light of the undisputed facts to apply the key, which is the "actually furnishing" language of the rule.

HealthEast's involvement in the process was direct and extensive. (See Respondents' Brief at 5-9.) HealthEast determined the necessary implants per the surgeon, ordered the implants, provided the operating facility, provided the surgical staff, achieved and maintained the sterile field, maintained the sterile

⁴ The definition of "healthcare provider" contained in Minn. Stat. § 176.011, subd. 24 does not include manufacturer. Similarly, the definition of "service" contained in Minn. R. 5221.0100, subp. 15 does not include manufacturer.

condition of the components, and presented the components to the surgeon in that sterile field for implant directly in the employee/patient (id.)

By contrast, ANS's efforts were those of a manufacturer and distributor. The litany of items cited by ANS to prove its involvement herein merely demonstrates that ANS was, and is, a manufacturer. It defies logic to argue, as ANS does, that its work as a manufacturer, for which it was paid, makes it a healthcare provider!

It cannot be said under this Court's limited scope of review of factual issues presented to the Workers' Compensation Court of Appeals that any of these facts were unsupported by substantial evidence or manifestly contrary to the evidence.

C. Rule 5221.0700, subp. 2A does not contemplate that every manufacturer of a medical device not kept in stock is the healthcare provider.

The Workers' Compensation Court of Appeals, as it had in Buck Ulrick, properly rejected Relators' position, noting that it would effectively "transform virtually every manufacturer of custom medical devices or surgical components not kept in stock by a hospital into a healthcare provider, subject to the rules and responsibilities of the workers' compensation system." (Relators' App. at 8.)⁵

Here, ANS did not "actually furnish" the surgical components to the employee within the meaning of the statute and rule. HealthEast did. Therefore the Workers' Compensation Court of Appeals properly held that HealthEast was

⁵ Minn. R. 5221.0700, subp. 2A(2) includes "medication" as well. Thus, adoption of the Relators' position would also transform pharmaceutical companies into Minnesota workers' compensation "healthcare providers."

the healthcare provider entitled to bill the insurer its usual and customary charges for the implant components.

D. Minn. R. 5221.0700, subp. 2 does not prohibit all so-called pass through markups.

Relators contend that Minn. R. 5221.0700, subp. 2A precludes all so-called pass through mark-ups involving articles or supplies not kept in stock and purchased for a specific employee. (Relators' Brief at 8.) The Workers' Compensation Court of Appeals categorically rejected such a construction of the rule, stating that the rule "does not prohibit a markup on medical supplies purchased by a hospital nor does it set a limit on the amount of a markup." (Relators' Brief at A-9.) Instead, the Court emphasized that

[T]he rule requires direct billing to the payer from the healthcare provider actually furnishing the article to the patient.

(Relators' App. at A-9.)

If, as Relators' contend, the rule was intended to prohibit all so-called pass throughs it could have said so. It does not. Nothing in the rule or the underlying SONAR contemplates the tortured construction urged by the Relators, whereby a manufacturer is converted for workers' compensation billing purposes into a healthcare provider by manufacturing and delivering its product to a hospital.

E. The surgical implant components involved in this case are not the problem that the SONAR contemplated.

The Relators assert that the Statement of Need and Reasonableness (SONAR) underlying the promulgation of Rule 5221.0700, subp. 2A was overlooked by the Workers' Compensation Court of Appeals. The Workers' Compensation Court of Appeals did, in fact, consider the SONAR and correctly concluded that it was not dispositive of the issue.⁶ The Court of Appeals concluded that the complicated surgical procedure performed by HealthEast was different from the "referral" services contemplated by the SONAR.

HealthEast did not refer the employee out to have the components implanted. It ordered the components from a manufacturer as a part of the employee's overall surgical procedure. This is unlike the lumbar brace discussed in the SONAR, which typically would come from an orthotics company to which the employee was referred and which, in turn, would have direct contact with the employee to custom fit a brace. Here, by contrast, ANS interacted with HealthEast only and not with the employee. ANS manufactured and delivered the components to HealthEast, but it did not "actually furnish" them to the employee.⁷

II. MINN. STAT. § 176.136, SUBD. 1B(B) ESTABLISHES THE REASONABLE VALUE FOR LARGE HOSPITAL INPATIENT

⁶ Amicus Fairview was the healthcare provider in Buck Ulrick and confirmed that the SONAR was in evidence before the compensation judge in that case, and it was addressed on appeal by the parties. The Workers' Compensation Court of Appeals "reconsidered" the SONAR arguments for the second time here. (See footnote 3 on page 6 of the Workers' Compensation Court of Appeals Decision in Relators' App. at A-19.)

⁷ The ANS components were not custom made for this employee. They were ordered from the manufacturer per the surgeon's instruction, just as a pair of shoes not in stock might be ordered.

CHARGES AND DOES NOT GRANT A COMPENSATION JUDGE DISCRETION TO INDEPENDENTLY DETERMINE THE REASONABLENESS OF SAID CHARGES SUBJECT TO A CAP OF THE LESSER OF 85% OF USUAL AND CUSTOMARY CHARGES OR 85% OF PREVAILING CHARGES.

- A. Minn. Stat. § 176.136, subd. 1b(b) does not authorize a compensation judge to make an independent determination of the economic reasonableness of a large hospital's charges apart from the lesser of 85% limitations in the statute.**

Relators argue that Minn. Stat. § 176.136, subd. 1b(b) provides an “explicit” grant of authority and discretion to compensation judges to make an independent factual determination of the economic reasonableness of large hospitals’ inpatient charges subject to a cap of the lesser of 85% of usual and customary charges or 85% of prevailing charges. The Workers’ Compensation Court of Appeals rejected Relators’ argument in this regard in all respects, declaring:

Nowhere in the statute do we find any implicit or explicit authority granted to a compensation judge to reduce the employer’s liability below the 85% limitation.

(Relators’ App. at A-25), (Emphasis added.)

“Explicit” is defined as “fully revealed or expressed without vagueness, implication, or ambiguity: leaving no question as to meaning or intent.” Merriam-Webster Online Dictionary. <http://www.merriam-webster.com/dictionary>. Explicit (2010). There is no fully revealed, unambiguous grant of authority to a compensation judge contained in Minn. Stat. § 176.136, subd. 1b(b). The Relators urge a tortured construction of the statute to establish their alleged “explicit” grant.

If the Legislature had intended, either upon the initial enactment of Minn. Stat. § 176.136, subd. 1b(b) in 1992 or when it was amended in 1995, to grant authority to the compensation judge as advocated by the Relators, it could have done so explicitly. It could have, for example, stated, “A compensation judge may make an independent determination of the economic reasonableness of a large hospital’s inpatient charges in an amount no greater than the lesser of 85% of the hospital’s usual and customary charge or 85% of the prevailing charge.” It did not. Not “explicitly.” Not in 1992. Not in 1995. Not at all.

The 1992 legislative changes repealed Minn. Stat. § 176.135, subd. 3 and replaced it with a combination of statutory limitations applicable to hospitals along with a legislative directive to establish a relative value fee schedule for various healthcare charges to effect an overall 15% reduction in gross costs. Minn. Stat. § 176.136, subd. 1a (1992).

Because of the complexity of inpatient hospital pricing and the myriad types of treatment, articles, and supplies provided by hospitals, the Legislature in enacting Minn. Stat. § 176.136 created a separate statutory scheme to govern hospital charges. That scheme is set forth in Minn. Stat. § 176.136, subd 1b(a) (for small hospitals of less than 100 beds) and subd. 1b(b) (for large hospitals of over 100 beds). The latter is at issue here.

The limitation to the lesser of 85% of usual and customary or 85% of prevailing charges is reflective of legislative intent to effect an overall 15% reduction in costs.

The establishment of a statutorily prescribed reasonable amount furthers the legislative objective expressed in Minn. Stat. § 176.136, subd. 1(b) to encourage providers to “develop and deliver services for the rehabilitation of injured workers.” Permitting providers to know what they are entitled to be paid for their services is a powerful means of encouraging the development and delivery of those services. Requiring hospitals to litigate the economic reasonableness of every line item charge for inpatient care without any guidance in order to be paid does not.

B. A plain reading of Minn. Stat. § 176.136, subd. 1b(b) supports the Workers’ Compensation Court of Appeals decision.

A plain reading of Minn. Stat. § 176.136, subd. 1b(b) makes it clear that the Workers’ Compensation Court of Appeals correctly applied the statute in accordance with the underlying legislative intent.

Relators place great reliance on the second sentence of Minn. Stat. § 176.136, subd. 1b(b) in their effort to re-write the statute to their liking. It reads, however:

On this basis, the commissioner or compensation judge may determine the reasonable value of all treatment, services, and supplies, and the liability of the employer is limited to that amount.

(Emphasis added.) The critical language, which Relators choose to ignore, is “On this basis,” which appears at the beginning of the sentence.⁸ General words are construed to be restricted in meaning by preceding particular words. Minn. Stat. § 645.08(3) (2008). “On this basis” plainly refers to the preceding sentence in that paragraph. By referring to the preceding sentence, and the alternatives it designates, the “basis” for determining reasonableness is restricted to a simple alternative choice between the lesser of 85% of usual and customary or 85% of prevailing charges. The statute unambiguously defines and restricts the “basis” on which a compensation judge may determine the reasonable value of treatment, services, or supplies to the lesser of the two expressly stated statutory alternatives. The Workers’ Compensation Court of Appeals so concluded, declaring unambiguously: “The phrase ‘on this basis’ can refer only to the two alternate standards for the liability of the employer.”

(Relators’ App. at A-25.)

If the Legislature had in fact intended to provide an “explicit” grant of broad discretion to compensation judges for determining economic reasonableness other than the expressed choice between the lesser of 85% of the usual and customary or prevailing charges, it could have said so. It did not. Instead of “on this basis,” referring to and limiting the preceding clause, the Legislature could

⁸ The untenable nature of Relators’ argument is evidenced by their willingness to pluck sections of the statute out of context and craft arguments that ignore those portions of the statute that do not support their position. See Relators’ Brief at 35 quoting the “on this basis” clause, but conveniently omitting the words “on this basis”. This Court should be wary of such arguments.

easily have said something like “in addition to or in lieu of” the lesser of 85% of usual and customary or prevailing charge. But it did not. Not when the statute was originally passed in 1992, or when it was amended in 1995.

In fact, the Legislature did provide for such an explicit grant of authority in the preceding subsection governing payment to small hospitals, Minn. Stat. § 176.136, subd. 1b(a). That provision states, ... unless the charge is determined by the commissioner or a compensation judge to be unreasonably excessive....

(Emphasis added.) There is no such provision in subdivision 1b(b) for inpatient charges of large hospitals, and the Legislature adopted a different scheme for large hospitals. Under Minn. Stat. § 176.136, subd. 1b(b) the large hospital’s entitlement is designated by the statute as the lesser of 85% of the usual and customary charges, subject to the check of the “market based” prevailing charge. The Legislature could have easily used similar language in 1b(b) to that in 1b(a), but since it did not one cannot assume that it intended to do so. Such an interpretation is consistent with the canon of statutory construction “*expressio unius exclusio alterius*,” meaning the expression of one thing indicates the exclusion of another.

The importance of the “On this basis” phrase can be seen if one hypothetically contemplates what meaning would attach to the statute if the language preceding the phrase “On this basis” and did not exist. The statute would make no sense without the preceding clause to which “On this basis” refers. One would be left to speculate “On what basis?” Fortunately, the Legislature did

not fail to enact the preceding clause, and there is no ambiguity as to how reasonableness is determined.

C. The commissioner has not established by rule the reasonable value in lieu of the 85% limitations.

In 1995, Minn. Stat. § 176.136, subd. 1b(b) was amended to provide rulemaking power to the Commissioner to “establish the reasonable value of a service, article, or supply in lieu of the 85 percent limitation.” (Emphasis added). “In lieu of” is commonly defined as “instead of or in place of.” Merriam-Webster Online Dictionary, [http://www.merriam-webster.com/dictionary/in lieu](http://www.merriam-webster.com/dictionary/in%20lieu) (2010). This Legislative amendment was an invitation to the Commissioner to promulgate rules as to the reasonable value of a service, article, or supply “instead of” the 85% limitations. If the 85% limitations were merely a cap below which a compensation judge already possessed broad and unfettered discretion to determine economic reasonableness, the “in lieu of” language would not be necessary. This amendment to grant rulemaking authority makes clear that the Legislature still intended the 85% limitations in 176.136, subd. 1b(b) to constitute the statutory reasonable charge, and the Commissioner was being granted rulemaking authority to replace it, if he so chose.⁹ The Commissioner has had ample opportunity in the 16 years since the amendment in 1995 authorizing him to promulgate rules in lieu of the 85% limitations. He has not.

⁹ The Legislature chose to make promulgation of such rules discretionary on the part of the Commissioner by the word “may” in contrast to its mandatory directive of “shall” in 1992. See Minn. Stat. § 176.136, subd. 1b(b) (1992) and Minn. Stat. § 176.136, subd. 1b(b) (1995)

D. The alleged deficiency of the prevailing charge safeguard does not warrant judicially rewriting the statutory scheme set forth in Minn. Stat. § 176.136, subd. 1b(a) and 1b(b).

Relators argue that the Legislature cannot have intended that the prevailing charge alone is an adequate check against unreasonable usual and customary charges by large hospitals. (Relators' Brief at 29.) This Court should reject the Relators' wholly speculative, reckless, and unfounded arguments about hospitals conspiring to rig or set usual and customary charges. Relators have stipulated that HealthEast's charges are their usual and customary charges. Given the definition of usual and customary and prevailing charges contained in Minn. R. 5221.0500, subp. 2B(1) and 2B(2), any alleged price fixing would have to be massive and involve all charges to all patients of all involved hospitals. There is not a shred of evidence to support such inflammatory rhetoric, and this Court should not judicially legislate based upon such wild and unfounded assertions.

The prevailing charge defense to usual and customary charges provides a "market based" safeguard. It is difficult to establish, for good reason, and deliberately so. However, that does not permit this Court to judicially re-write the law.

E. The position advocated by Relators would emasculate the legislative and rule changes effected in 1992 and render moot the provisions of Minn. Stat. § 176.136, subd. 1b(b).

Minnesota law regarding construction of statutes warns that consideration of "the consequences of a particular interpretation" may be used to ascertain the intention of the Legislature. In considering the intent of the Legislature courts

must assume the Legislature did not intend an absurd result and that it intended that the entire statute be effective and certain. See Minn. Stat. § 645.17(1), (2); see also Owens v. Water Gremlin Co., 60 W.C.D. 16, 28 (W.C.C.A. 1999)

The argument advanced by Relators violates these fundamental principles of statutory construction, since it would effectively emasculate Minn. Stat. § 176.136, subd. b(b). If the law is rewritten as Relators urge, employers and insurers will have little or no incentive to pay a large hospital's usual and customary charges for inpatient services or to do the work to establish a prevailing charge defense. Instead they will be free to deny unilaterally the charges on virtually any pretext as unreasonable, forcing the hospital to prove otherwise before a compensation judge with unfettered discretion to adjudicate an economically reasonable charge.¹⁰ This Court, in ascertaining legislative intent, is compelled to assume that the Legislature did intend consequences.

If the law is rewritten as Relators' urge, it may have toxic impact on the entire statutory and rules scheme enacted in 1992. The term "limited to" is found throughout the statutory scheme of Minn. Stat. § 176.136, including the provisions of the section authorizing the promulgation of the relative value fee schedule.¹¹

¹⁰ This Court must be mindful that such a position will not be limited to implant charges, but will apply to every line item on a large hospital's bill.

¹¹ Minn. Stat. § 176.136, subd. 1a provides in pertinent part: "The liability of an employer and insurer for services included in the medical fee schedule is limited to the maximum fee allowed by the schedule" (Emphasis added.)

F. Rewriting the law as Relators urge will result in a flood of litigation over what constitutes economically reasonable charges for medical and hospital services provided to injured workers.

This Court should be clear on what it is that Relators urge in this matter. They contend that not only a compensation judge, but the employers and insurers themselves, have the unlimited power to make factual determinations as to the economic reasonableness of a large hospital's inpatient charges, subject only to the "cap" of the lesser of 85% of usual and customary or prevailing charges.

Relators focus on a compensation judge's alleged power to make factual determinations as to whether large hospital charges are "economically reasonable." Implicit in such a position is that initially the employers and insurers themselves will have the unfettered power to deny bills as economically unreasonable on virtually any pretext. That power will be unlimited by any statute, rule or case law defining what is economically reasonable. That is simply not what the Legislature intended with the scheme it enacted in 1992.

It is further important for this Court to recognize that Relators advocate for unfettered power to determine the economic reasonableness of a large hospital's usual and customary charges for its services but not whether those services are medically reasonably required to cure or relieve the employee of the effects of a personal injury (a factual determination that compensation judges are historically experienced and well-equipped to make).¹²

¹² Relators' arguments about markups presuppose a simplistic "cost-plus" analysis that fails to take into account the complexities of hospital economics and pricing.

However, if this Court rewrites the law as Relators' urge, it will usher in a sea change in workers' compensation litigation. Disputes over the economic reasonableness of usual and customary charges will mushroom into evidentiary disputes about the complex economics of hospital administration and price structuring that the workers' compensation system is neither intended nor equipped to undertake. Hospitals will be forced into litigation complete with thorny discovery issues, disputes over proprietary information, the need for protective orders, and expert testimony of economists and hospital administrators just to receive payment for the medically reasonable and necessary services they provide to injured workers.¹³ Such disputes will extend to every item on a hospital's bill. Penalty provisions in the law for non-payment will be of little avail since, without an established standard as to what is economically reasonable, nobody will be able to say a denial is improper. The allowable price of medical services could become a subject for debate and litigation in virtually every case.

If this Court rewrites the law as Relators request, uniformity of payment will be difficult to obtain, and without any guidance in the law as to what constitutes an economically reasonable charge, different judges will reach different conclusions for the same treatment or service depending on the evidence

This issue was not tried or argued before the Compensation Judge and is a policy issue subject to either rulemaking or legislative prerogative but not litigation.

¹³ The Konczal case (Relators' App. at A-29), is a prime example. Following an initial hearing, a second two-day hearing was scheduled, and multiple discovery issues, possible depositions, and issues of protective orders arose over a \$5,446.05 Spaeth balance. That hearing was postponed pending the outcome of this appeal.

presented. This is not what the Legislature intended in enacting Minn. Stat. § 176.136.

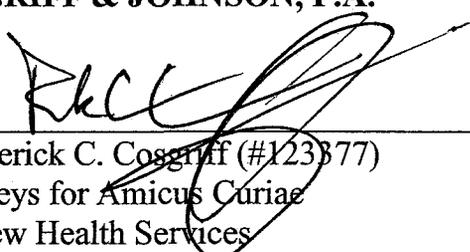
CONCLUSION

This Court should not rewrite either Minn. R. 5221.0700, subp. 2A or Minn. Stat. § 176.136, subd. 1b(b) as Relators urge., Rather it should affirm the decision of the Workers Compensation Court of Appeals in all respects. If the Court holds as Relators urge, it will wreak havoc with the carefully crafted statutory and rulemaking scheme that has stood for 19 years, before Relators' quixotic attempt to rewrite it because they simply do not like the law.

Dated: January 6, 2011

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Certification

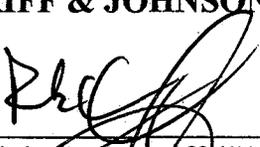
I hereby certify that this brief conforms to the requirements set forth in Minn. R. App. P. 132.01, subd. 3 with regard to number of pages, word, count, and lines of text. The length of the brief is 5,562 and 20 pages.

A copy of this certificate has been served with the brief on the Court and all parties.

Dated: January 6, 2011

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