

# PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2015-D6

**PROVIDER –**  
Santa Cruz, CA 03-05 MSA Hospital Wage  
Index Group

Provider Nos.: Various  
See Appendix I

vs.

**INTERMEDIARY –**  
Noridian Healthcare Solutions, LLC/  
Blue Cross and Blue Shield Association

**DATE OF HEARING -**  
January 29, 2014

Cost Reporting Periods Ended - Various  
See Appendix I

**CASE NO.** 04-0492G

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**ISSUE:**

Whether the Medicare Contractor and the Centers for Medicare and Medicaid Services (“CMS”) properly determined the Santa Cruz, California Metropolitan Statistical Area (“MSA”) Wage Index for Federal Fiscal Year (“FFY”) 2004.<sup>1</sup>

**DECISION:**

After considering the Medicare law and regulations, the parties’ contentions, and the evidence submitted, the Board finds that the Medicare Contractor and CMS properly determined the Santa Cruz, CA MSA Wage Index for FFY 2004. Accordingly, the Medicare Contractor’s adjustments to Watsonville’s FFY 2004 Wage Index are affirmed.

**INTRODUCTION:**

Dominican Hospital and Sutter Maternity and Surgery Center (collectively the “Hospitals”) appealed CMS’ determination of the wage index applicable to them in FFY 2004.<sup>2</sup> The Hospitals are located in the Santa Cruz, California MSA (“Santa Cruz MSA”) and are paid for services provided to Medicare patients through Medicare’s inpatient prospective payment system (“IPPS”). Under IPPS, Medicare pays hospitals predetermined, standardized amounts per discharge, subject to certain payment adjustments including a wage adjustment reflecting the wage index for the MSA in which the hospital is located. This wage index adjustment factor is updated annually using a survey of wage data submitted by hospitals on their Medicare cost reports.<sup>3</sup>

The FFY 2004 Wage Index was based on cost report data submitted by hospitals for cost reports beginning in FFY 2000 (*i.e.*, cost reports beginning on or after October 1, 1999 but before October 1, 2000) and this cost report data will be referred to as the “FFY 2004 wage index data.” Watsonville Community Hospital (“Watsonville”) is another hospital located in the Santa Cruz MSA. The Hospitals contest wage index adjustments made to the FFY 2004 average hourly wage rate for Watsonville by United Government Services, the Medicare contractor for Watsonville at the time (“Medicare Contractor”). The Hospitals have had their Medicare payments reduced because the Medicare Contractor’s adjustments to Watsonville’s FFY 2004 average hourly wage rate adversely affected the FFY 2004 wage index for the Santa Cruz MSA.

A Hearing was held by the Provider Reimbursement Review Board (“Board”). The Hospitals were represented by Keith D. Barber, Esq. of Hall, Render, Killian, Heath & Lyman, P.C. The Medicare Contractor<sup>4</sup> was represented by Brendan Stuhan, Esq., of the Blue Cross and Blue Shield Association.

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<sup>1</sup> Transcript (“Tr.”) at 6.

<sup>2</sup> Appendix I lists the Hospital’s fiscal years that are impacted by their appeal of the FFY 2004 wage index.

<sup>3</sup> See 42 U.S.C. § 1395ww(d)(3)(E).

<sup>4</sup> Mr. Stuhan also represented Noridian Healthcare Solutions, LLC (“Noridian”) as Noridian succeeded United Government Services as the designated MAC for Watsonville and the Hospitals.

## **STATEMENT OF THE FACTS**

As part of the process of determining the wage index for the Santa Cruz MSA, the Medicare Contractor conducted a wage index desk review audit of Watsonville's FFY 2004 wage index data. On November 11, 2002, the Medicare Contractor sent a letter to Watsonville proposing adjustments to Watsonville's FFY 2004 wage index data. Specifically, the Medicare Contractor reduced Watsonville's average hourly wage from \$26.78 to \$23.02 "pending an explanation from the Provider."<sup>5</sup> Watsonville did not respond to this letter.<sup>6</sup>

Federal policy requires Medicare contractors (*i.e.*, fiscal intermediaries and Medicare administrative contractors (collectively "MACs")) to send a letter to the relevant State hospital association if a hospital within an MSA fails to respond to questions regarding the hospital's wage rates.<sup>7</sup> The Medicare Contractor asserts that it followed this policy and mailed a letter to the California Hospital Association ("CHA") on December 13, 2002<sup>8</sup> notifying CHA of Watsonville's failure to respond. However, CHA maintains that it did not receive the letter and questions whether it was ever sent.<sup>9</sup> Subsequently, by letter dated January 6, 2003, the Medicare Contractor informed Watsonville that CMS had published FFY 2004 preliminary wage index public use files and noted that any requests for changes to the wage index data must be submitted "on or before February 10, 2003."<sup>10</sup>

On May 30, 2003, CHA sent a letter to the Medicare Contractor complaining that it had not received the required notice regarding Watsonville's noncompliance as required under CMS policy and requested that Watsonville be allowed to submit additional documentation to correct its FFY 2004 wage index.<sup>11</sup> On June 3, 2003, representatives from hospitals located in the Santa Cruz MSA met with the Medicare Contractor to discuss the FFY 2004 wage index.

On June 4, 2003, a representative from Community Health Systems ("CHS"), Watsonville's parent company, sent a letter to CMS protesting the adjustment to Watsonville's FFY 2004 wage index data.<sup>12</sup> CMS responded to this request in an undated letter denying the request to change Watsonville's FFY 2004 wage index data stating that the "request does not meet the conditions for processing revisions to the final wage data."<sup>13</sup>

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<sup>5</sup> Medicare Contractor's Revised Final Position Paper at 5. *See also* Medicare Contractor Exhibit I-4.

<sup>6</sup> *See* Medicare Contractor's Revised Final Position Paper at 6; Provider's Revised Final Position Paper at 4. The Hospitals maintain that this letter was sent to an incorrect old address for Watsonville and that the Medicare Contractor had been previously advised to send correspondence to a new address for Watsonville.

<sup>7</sup> *See* CMS Program Memorandum, CMS Pub. No. 60A, Transmittal A-02-94 (Oct. 4, 2002) (copy included at Medicare Contractor Exhibit I-3).

<sup>8</sup> *See* Medicare Contractor's Revised Final Position Paper at 6; Medicare Contractor Exhibit I-6.

<sup>9</sup> *See* Providers' Post Hearing Brief at 4-5.

<sup>10</sup> *See* Medicare Contractor Exhibit I-8.

<sup>11</sup> *See* Providers' Post Hearing Brief at 20; Provider Exhibit P-6.

<sup>12</sup> *See* Provider Exhibits P-20 and P-8.

<sup>13</sup> Medicare Contractor Exhibit I-10.

On January 15, 2004, the Hospitals filed with the Board a jurisdictionally proper appeal of the FFY 2004 wage index for the Santa Cruz MSA.<sup>14</sup>

## **DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **BOARD MOTION FOR EXPEDITED JUDICIAL REVIEW**

At the hearing, the Board asked the parties to address whether the case was appropriate for expedited judicial review (“EJR”).<sup>15</sup> After reviewing the parties’ responses and Medicare law and regulations, the Board finds that this case is not appropriate for EJR consistent with its 2006 decision in *Chicago 98-00 MSA Wage Index Group v. Mutual of Omaha Ins. Co.*<sup>16</sup>

The Board reviewed the facts in this case with the timetable established by the program memorandum issued on October 4, 2002 (“2002 Program Memorandum”)<sup>17</sup> and the final rule governing the FFY 2004 wage index that was published on August 1, 2003 (“August 2003 Final Rule”).<sup>18</sup> There is no doubt that the Hospitals were adversely affected by the Watsonville FFY 2004 wage data determination. In the August 2003 Final Rule, CMS described “the process” it created through notice and comment in the Federal Register for a hospital to challenge and correct its own wage index audit determinations and stated:

We have created the process . . . to resolve all substantive wage data correction disputes before we finalize the wage data for the FY 2004 payment rates. Accordingly, hospitals that did not meet the procedural deadlines . . . will not be afforded a later opportunity to submit wage data corrections or to dispute the intermediary’s decision with respect to requested changes. Specifically, our policy is that hospitals that do not meet the procedural deadlines set forth above will not be permitted to challenge later, before the Provider Reimbursement Review Board, the failure of CMS to make a requested data revision (*See W.A. Foote Memorial Hospital v. Shalala*, No. 99-CV-75202-DT (E.D. Mich. 2001), also *Palisades General Hospital v. Thompson*, No. 99-1230 (D.D.C. 2003)).

The Board does not find any authority in this statement (or elsewhere in the 2003 Final Rule) for a hospital to challenge another hospital’s wage data in the data correction administrative process.

Notwithstanding, the Board recognizes that, under 42 U.S.C. § 1395oo(a) and the regulations at 42 C.F.R § 405.1835, a hospital receiving payments in amounts computed under IPPS has the right to a hearing before the Board with respect to such payments provided other jurisdictional

<sup>14</sup> See Provider Exhibit P-2. The Board dismissed Watsonville from this appeal because the Board found that it had received timely notice but failed to respond to the November 11, 2002 letter from the Medicare Contractor and, accordingly, was barred from appeal for failure to exhaust its administrative remedies.

<sup>15</sup> See Tr. at 14-15.

<sup>16</sup> PRRB Dec. No. 2006-D-07 (Dec. 15, 2005), *declined review*, CMS Administrator (Feb. 15, 2006).

<sup>17</sup> CMS Program Memorandum, CMS Pub. No. 60A, Transmittal A-02-94 (Oct. 4, 2002).

<sup>18</sup> 68 Fed. Reg. 45345, 45395 (August 1, 2003).

criteria are met. The “amount of payment” under IPPS is defined at 42 U.S.C. § 1395ww(d)(3)(E) to include the wage index. In the CMS Administrator’s 1993 decision in *D.C. Hosp. Ass’n Wage Index Grp. Appeal*,<sup>19</sup> the CMS Administrator relied on this statutory provision to reverse the Board’s finding of no jurisdiction and held that the publication of the wage index in the Federal Register is a final decision which can be appealed to the Board. The providers in *D.C. Hosp. Ass’n Wage Index Group Appeal* were not seeking to correct an individual facility’s wage data. Rather, the providers challenged the validity of the wage index, claiming that the Secretary’s policy that used MSAs to define the geographical boundaries for the labor market used to calculate wage indices was inconsistent with the Medicare statute. They contended that they were legally entitled to a wage index based on hospital wages exclusively within the District of Columbia rather than the Washington-Maryland-Virginia MSA.

Here the dispute revolves around a single provider, Watsonville, who failed to pursue an administrative remedy created specifically to address an individual hospital’s wage data. However, the administrative process described in the August 2003 Final Rule fails to provide a remedy for other hospitals in the same MSA which are harmed by the hospital that failed to furnish correct wage index data.<sup>20</sup> The Board concludes that it is bound by this process and that, while it does have jurisdiction over the Hospitals, it lacks the authority to grant the remedy that the Hospitals seek, namely updating the Santa Cruz MSA wage index with the alleged correct Watsonville FFY 2004 wage index data.

The Board has reviewed the parties’ comments regarding whether the Board should grant EJR on its own motion as permitted by 42 U.S.C. § 1395oo(f)(1) and 42 C.F.R. § 405.1842(c) for the Hospitals. Because there remains disputed facts surrounding whether the Watsonville wage data was incorrect, the case is not appropriate for expedited judicial review. Although it creates an anomalous result, the Board, therefore, must resolve the fact issue even though it has no authority to grant a remedy.

#### **LACK OF NOTICE TO CALIFORNIA HOSPITAL ASSOCIATION**

The Hospitals assert that the Medicare Contractor failed to send the required letter to CHA notifying CHA of Watsonville’s non-compliance and that this procedural failure is critical because it is the only protection afforded to the other compliant hospitals located within the same MSA whose prospective payments may be adversely affected. In support of this argument, the Hospitals provided testimony from a CHA staff member who stated that she was responsible for receiving CHA mail and that she did not recall receiving the letter from the Medicare Contractor. The Hospitals support this position by citing to the Medicare Contractor’s lack of, or delay in, a further response to CHA inquiries and the fact that the Medicare Contractor has never actually proven that it actually sent the letter.<sup>21</sup>

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<sup>19</sup> *D.C. Hosp. Ass’n Wage Index Grp. Appeal*, CMS Administrator Dec. (Jan. 15, 1993) (vacating and remanding an unpublished Board jurisdiction decision).

<sup>20</sup> The process for “Requests for Wage Data Corrections” is described in Section III(G) of the August 2003 Final Rule and does not afford any remedy for hospitals in an MSA which are harmed by the failure of another hospital located in the same MSA to respond to wage index audit requests and adjustments. See 68 Fed. Reg. at 45401-45402.

<sup>21</sup> See Providers’ Post Hearing Brief at 20-23.

The Medicare Contractor maintains that the letter was sent to CHA and provided testimony from two witnesses to support that assertion.<sup>22</sup> In addition, the Medicare Contractor asserts that Watsonville itself received the request for documentation sent on November 11, 2002,<sup>23</sup> and received notice of the publication of the FFY 2004 wage index data by letter dated January 6, 2003.<sup>24</sup> The Medicare Contractor maintains that the evidence shows that despite a request to change Watsonville's correspondence address, Watsonville did, indeed, timely receive the November 11, 2002 letter and could have avoided the reduction in the wage rate if it had provided the necessary supporting documentation.

The Board acknowledges that there is a factual dispute regarding whether the Medicare Contractor sent and CHA received the required notice regarding the Watsonville's average hourly wage rate.<sup>25</sup> However, the Board finds that it does not need to resolve this issue because CHA is not a party to this appeal and the instructions as set forth in the 2002 Program Memorandum and the August 2003 Final Rule provide no remedy for a State hospital association or a hospital in an MSA in which another hospital is nonresponsive to a wage index audit request for additional information.<sup>26</sup> In this regard, the Board has no authority to disregard documentation obligations of one hospital to the benefit of other hospitals in an MSA.

Notwithstanding this finding, the Board finds that there is sufficient evidence of other communication between the Medicare Contractor, Watsonville, and CHA which otherwise put the parties on notice of Watsonville's noncompliance with the Medicare Contractor's request and provided the parties with opportunity *for purposes of this appeal* to supply the data/documentation to refute the Medicare Contractor's adjustment. In this regard, the Board finds that the Medicare Contractor notified Watsonville of adjustments to its wage index data for both FFY 2003 and FFY 2004 by letters dated November 9, 2001 and November 11, 2002 respectively. The evidence shows that both of these letters were received by the "WCH Administration" (presumably "Watsonville Community Hospital") on November 16, 2001 and November 14, 2002, respectively, per the date stamps on Watsonville's copies of these letters.<sup>27</sup> In addition, there is a second date stamp on the 2002 letter showing that it was received a few days later on November 18, 2002 by "Revenue Management" of Community Health Systems, Watsonville's parent company ("CHS").<sup>28</sup> The 2002 letter requested Watsonville to affirmatively state whether it agreed to the adjustment report and, if not, to provide "explanations

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<sup>22</sup> See Tr. at 216-217; Medicare Contractor Exhibit I- 6.

<sup>23</sup> See Tr. 211:9-16; Medicare Contractor Exhibit I-4.

<sup>24</sup> Medicare Contractor Exhibit I-8.

<sup>25</sup> See Tr. at 138, 216-217.

<sup>26</sup> MACs were required to transmit information to CMS by mid-November 2002 and, by early to mid-December 2002, to notify the relevant State hospital associations of any hospitals that failed to respond to issues raised during the wage index desk review audits. The purpose of this letter was to inform the State hospital association and its member hospitals that the nonresponsive hospital's failure to address the matters raised by the MAC during the desk review could result in a lower area wage index for the nonresponsive hospital and, in turn, lower Medicare payments for any other hospital located in the same MSA as the nonresponsive hospital. See CMS Program Memorandum, CMS Pub. 60A, Transmittal No. A-02-94, at 2 (Oct. 4, 2002); 68 Fed. Reg. at 45401-45402.

<sup>27</sup> See Medicare Contractor Exhibit I-4; Provider Exhibit P-21.

<sup>28</sup> See Medicare Contractor Exhibit I-4. The Board also notes that the records suggest that the Medicare Contractor may have refused to change Watsonville's correspondence address to CHS' address and that CHS may have been aware of this refusal. See Provider Exhibit P-20 at 7.

and documentation for any disagreed items.”<sup>29</sup> Clearly, both Watsonville and its parent company were on notice that the Medicare Contractor needed additional documentation in order to revise the FFY 2004 wage index adjustments prior to the February 17, 2003 deadline established by CMS.

The record also suggests that the Medicare Contractor sent another letter dated January 6, 2003 to Watsonville’s Chief Financial Officer (“CFO”) using the same address as the 2002 letter. In the 2003 letter, the Medicare Contractor informed Watsonville that the public use files for the preliminary FFY 2004 wage data would be available by Friday, January 10, 2003 and that any requests for changes must be submitted by February 10, 2003.<sup>30</sup> Again, the Medicare Contractor received no response from Watsonville until CHA sent its letter on May 30, 2003 asking for an opportunity for Watsonville to submit the required documentation and CHS sent its letter on June 4, 2003 to follow up on the June 3, 2003 meeting with the Medicare Contractor.<sup>31</sup> The Board concludes that Watsonville had sufficient notice of the need to comply with the Medicare Contractor’s requests.

With regard to CHA, the Board notes that CMS was required to publish a preliminary wage index public use file that would be available on January 10, 2003 and MACs were to “advise hospitals that these data are made available directly through their respective hospital organizations.”<sup>32</sup> Accordingly, the CHA would have received the preliminary wage index file for FFY 2004 and a comparison to the prior two years’ wage index for Watsonville would have shown a flat wage index for Watsonville for three years (*i.e.*, Watsonville’s wage index for FFYs 2002, 2003, and 2004 were the same).<sup>33</sup> Regardless of whether CHA received the December 13, 2002 letter from the Medicare Contractor notifying it of Watsonville’s nonresponse, it is clear that CHA did indeed receive notice (whether timely or untimely) because CHA contacted the Medicare Contractor by letter dated May 30, 2003 requesting that Watsonville have an opportunity to submit “additional documentation necessary to correct the wage data” and representing that Watsonville “has the information ready and is eager to work with UGS to get the data corrected.”<sup>34</sup>

Based on the above, the Board concludes that, *for purposes of this appeal*, the Hospitals (and CHA through the Hospitals) have had sufficient opportunity to submit to the Medicare Contractor any documentation and/ or information to support correction of the alleged error in Watsonville’s FFY 2004 wage index.

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<sup>29</sup> See Medicare Contractor Exhibit I-4.

<sup>30</sup> See Medicare Contractor Exhibit I-8.

<sup>31</sup> See Provider Exhibits P-6, P-8.

<sup>32</sup> 68 Fed. Reg. at 45401.

<sup>33</sup> See Tr. at 240-242. Further the record reflects that, for the FFY 2003 wage index audit, Watsonville also failed to respond to a request for additional information and that the wage index process for that year similarly required notification to CHA of Watsonville’s nonresponse. See Tr. at 241; 67 Fed. Reg. 49982, 50031 (Aug. 1, 2002). However, the record does not contain any information on whether CHA received notice of Watsonville’s nonresponse during the FFY 2003 wage index audit.

<sup>34</sup> Provider Exhibit P-6.

### CALCULATION OF THE AVERAGE WAGE INCREASE

The Hospitals contend that the Medicare Contractor's adjustment to Watsonville's average hourly wage rate was arbitrary and capricious. The Hospitals argue that the Medicare Contractor adjusted Watsonville's average hourly wage rate inappropriately under the "erroneous belief that the wage variance from the prior year was either 40.06% or 16.33%."<sup>35</sup> According to the Hospitals, the effect of this adjustment was for the Medicare Contractor to demand additional documentation from Watsonville even though it had submitted wage costs that were "well within the norm."<sup>36</sup> The adjustment resulted in a reduction in payments to other hospitals in the Santa Cruz MSA of more than two million dollars.<sup>37</sup>

The Medicare Contractor responded that it was not an "error" to adjust the wage data because Watsonville failed to support its claimed wage data for the last two years (*i.e.*, Watsonville's wage index data for FFYs 2002 and 2003). The Medicare Contractor maintains that the percentage increase of hourly wage data claimed in the FY 2004 wage data as compared to the prior year's settled adjusted hourly wage rate was above 16 percent and that this was well above the norm. As a result, the Medicare Contractor maintains that the request for additional documentation was appropriate and that, without this documentation, the Medicare Contractor correctly established the lower FFY 2004 wage index from which the Hospitals appeal.<sup>38</sup>

The Board finds that the Medicare Contractor's requests for additional documentation from Watsonville during its review of both FFY 2003 and FFY 2004 wage index data<sup>39</sup> were proper under Medicare rules because 42 C.F.R. § 412.52 specifies that all hospitals being reimbursed under IPPS "must meet the recordkeeping and cost reporting requirements of §§ 413.20 and 413.24." However, Watsonville failed to provide the necessary documentation to justify its wage data for either of these years.<sup>40</sup> This failure resulted in a reduction in Watsonville's hourly wage rate which, in turn, led to the reduced wage rate for all hospitals within the geographic area for FFY 2004. The Board finds that it was not the Medicare Contractor's "error" but rather Watsonville's lack of response to the Medicare Contractor's requests for supporting documentation to justify its wage data that caused the wage rate issue for all hospitals within the geographic area.

The Board further finds that, as part of this appeal, the Hospitals have failed to provide sufficient documentation to support reversal of the Medicare Contractor's adjustment because the Hospitals essentially have only made generic "reasonableness" arguments without providing any provider-specific information or documentation. Accordingly, the Board finds the Hospitals have not met their burden of proof and that the Medicare Contractor and CMS properly determined the Santa Cruz MSA Wage Index for FFY 2004.

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<sup>35</sup> Providers' Revised Final Position Paper at 2.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *See id.* at 17.

<sup>38</sup> *See* Medicare Contractor's Post Hearing Brief at 4-5; Medicare Contractor's Revised Final Position Paper at 9-10.

<sup>39</sup> *See* Provider Exhibit P-21 (letter from United Government Services dated November 9, 2001 to the Watsonville Chief Financial Officer ("CFO") regarding revision of FFY 2003 wage index data); Medicare Contractor Exhibit I-4 (letter to Watsonville's CFO dated November 11, 2002 regarding FFY 2004 wage index data).

<sup>40</sup> Tr. at 204-05; Medicare Contractor's Revised Final Position Paper at 9.

**DECISION AND ORDER:**

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Board finds that the Medicare Contractor and CMS properly determined the Santa Cruz, CA MSA Wage Index for FFY2004. Accordingly, the Medicare Contractor's adjustments to Watsonville's FFY 2004 Wage Index are affirmed.

**BOARD MEMBERS PARTICIPATING:**

Michael W. Harty  
Clayton J. Nix, Esq.  
L. Sue Andersen, Esq.  
Charlotte F. Benson, C.P.A.

**FOR THE BOARD:**

/s/  
Michael W. Harty  
Chairman

**DATE:** April 2, 2015

## APPENDIX I

	<b>Provider No.</b>	<b>Provider Name</b>	<b>FYE</b>
1	05-0242	Dominican Hospital	6/30/2004
2	05-0242	Dominican Hospital	6/30/2005
3	05-0714	Sutter Maternity and Surgery Center	12/31/2003
4	05-0714	Sutter Maternity and Surgery Center	12/31/2004