

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
OHIO STATE CHIROPRACTIC ASSOCIATION, et al., Plaintiffs-Appellees,
v.
OHIO BUREAU OF WORKERS' COMPENSATION, Defendant-Appellant,
The Industrial Commission of Ohio, et al., Defendants-Appellees.
No. 92AP-874.
Jan. 21, 1993.

Appeal from the Franklin County Court of Common Pleas.
Karr & Sherman Co., L.P.A., [Keith M. Karr](#) and [Robert P. Sherman](#), for plaintiffs-appellees.
Lee Fisher, Atty. Gen., [Dennis L. Hufstader](#) and [Cordelia A. Glenn](#), for defendant-appellant.
Squire, Sanders & Dempsey, and Preston J. Garvin, for amicus curiae Ohio Chamber of Commerce.
Vorys, Sater, Seymour & Pease, [Russel P. Herrold, Jr.](#), and [Bradley K. Sinnott](#), for amicus curiae Ohio Mfrs. Ass'n.
Vorys, Sater, Seymour & Pease, and [Robin R. Obetz](#), for amicus curiae Ohio Self-Insurers Ass'n.

OPINION

WHITESIDE, Judge.

***1** Defendant, Ohio Bureau of Workers' Compensation ("Bureau"), appeals from the granting of plaintiffs' summary judgment motion by the Franklin County Court of Common Pleas. Defendant raises two issues of fact, which we shall deem as assignments of error, as follows:

"1. The trial court erred in ruling that Chapter 13 of the Provider and Reimbursement Manual is illegal unless adopted in accordance with R.C. Chapter 119 rulemaking procedure.

"2. The trial court erred by holding that Chapter 13 of the Provider and Reimbursement Manual could not be promulgated as guidelines because it regulated activities external to the Bureau and establishes standards which are subject to enforcement by the Bureau." Plaintiffs, the Ohio State Chiropractic Association, individual chiropractors, and chiropractic patients, filed this action against the Bureau of Workers' Compensation, the Industrial Commission ("Commission"), the State of Ohio, Patrick Mihm, Donald Colasurd, Jo Ann Mason, John Boyle, "John Doe" and "Jane Doe." The complaint sought an injunction against the enforcement of Chapter 13 of the Bureau's *Provider Billing and Reimbursement Manual* ("Manual") and its accompanying Provider Bulletins, Nos. 91-6 and 91-7, and a declaratory judgment that the "guidelines" are invalid since defendant had not complied with the requirements of [R.C. 119.03](#) to [119.04](#). Plaintiffs also sought a temporary restraining order preventing the implementation of Chapter 13 of the Manual which was granted on April 8, 1991. Both parties filed motions for summary judgment. The trial court granted plaintiffs' motion for summary judgment, and it is that judgment which the Bureau is appealing.

The dispute revolves around Chapter 13 of the Bureau's *Provider Billing and Reimbursement Manual*. Chapter 13 of the Manual was originally promulgated through Provider Bulletins Nos. 91-6 and 91-7. The chapter contains information about the standards and eligibility requirements for the payment of physical medicine fee bills. These requirements include a new definition of "medical necessity," requiring prior approval for continued treatment after ten visits, and prohibiting billing for massages and heat treatments separately from manipulations, or billing separately for treating different areas of the back. Plaintiffs sought to enjoin the enforcement of Chapter 13 of the Manual

since defendant did not promulgate it in compliance with the R.C. Chapter 119 procedure for enacting rules.

There are no factual issues involved in this case, but only a question of statutory interpretation which is a question of law. To interpret the statute the court must " * * * give effect to the words utilized, cannot ignore words of the statute, and cannot supply words not included." [East Ohio Gas Co. v. Limbach \(1991\), 61 Ohio St.3d 363, 365](#), citing [Wheeling Steel Corp. v. Porterfield \(1970\), 24 Ohio St.2d 24, 27-28](#).

When there are no issues of material fact which appear from the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence and written stipulations of fact, the "moving party is entitled to judgment as a matter of law" provided it is clear "that reasonable minds could come but to one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor." [Civ.R. 56](#). Here, the trial court was required to interpret statutory law, not make findings of fact, so granting one of the motions for summary judgment was an appropriate ruling.

***2** Since the assignments of error are related, they will be discussed together. Defendant contends that the trial court erred in ruling that Chapter 13 of the Manual is illegal unless adopted in accordance with the mandatory R.C. Chapter 119 rule-making procedure because it is a set of rules. Defendant argues that Chapter 13 of the Manual is not a set of rules but, rather, is a set of guidelines which the Bureau may adopt without using R.C. Chapter 119 procedure pursuant to [R.C. 4121.32](#).

Although "guidelines" are not defined in the Revised Code, [R.C. 4121.32](#) does allow some rules to be supplemented. This section provides:

"(A) *The rules covering operating procedure and criteria for decision-making that the administrator of workers' compensation and the industrial commission are required to adopt pursuant to [section 4121.31 of the Revised Code](#) shall be supplemented with operating manuals setting forth the procedural steps in detail for performing each of the assigned tasks of each section of the bureau of workers' compensation and commission. No employee may deviate from manual procedures without authorization of the section chief. Manuals shall set forth the procedure for assignment and transfer of claims within sections, and shall require the impartial, random assignment of claims so as to prevent special handling or undue influence on claims handling and decisionmaking.*

"(B) *Manuals shall be designed to provide performance objectives, and may require employees to record sufficient data to reasonably measure the efficiency of functions in all sections. * * **" (Emphasis added.)

These provisions discuss manuals which supplement rules regarding operating procedure and criteria for decision-making. These supplemental manuals contain guidelines which set forth procedural steps for accomplishing the functions of employees. Additionally, [R.C. 4121.32\(C\)](#) authorizes guidelines for decisionmaking with respect to matters within the Bureau's and the Commission's respective jurisdictions. [R.C. 4121.32\(C\)](#) provides:

"Under the overall policy direction of the commission, the bureau and commission each shall develop, adopt, and use a policy manual setting forth the *guidelines and bases for decision-making* for any decision which is the responsibility of the bureau, district hearing officers, regional boards of review, staff hearing officers, or the commission. Guidelines shall be set forth in the policy manual by the bureau and commission to the extent of their respective jurisdictions for deciding at least the following specific matters:

"(1) Reasonable medical charges * * * [.]" (Emphasis added.)

These provisions authorize the Bureau and the Commission to adopt guidelines which direct the employees regarding operating procedures and decision-making. Guidelines as discussed in these provisions relate only to the employees and are to be designed to help the employees perform their functions. As authorized by [R.C. 4121.32](#), guidelines are only internal management regulations.

***3** These supplemental manuals and guidelines authorized by [R.C. 4121.32](#) are excluded from the definition of "rules" as set forth in [R.C. 119.01\(C\)](#) because they are internal management rules:

" * * * [A]ny rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule. 'Rule' does not include any internal management rule of an agency unless the internal management rule affects private rights." (Emphasis added).

The manuals and guidelines which are adopted pursuant to [R.C. 4121.32](#) are not "rules" since they are internal management regulations which do not affect private rights. [R.C. 4121.32](#) guidelines do not affect private rights since they are procedures for employees to follow in performing their job duties.

The regulations in this case do not constitute guidelines within the contemplation of [R.C. 4121.32](#). Chapter 13 of the Manual does affect private rights. It purports to be a set of regulations concerning bases for decision-making regarding reasonable medical charges and eligibility requirements for payment. However, these regulations affect third parties and are not related to internal management which assist employees to perform their functions. Instead, Chapter 13 of the Manual discusses eligibility for payment and reasonable medical charges. These items affect third parties in addition to Bureau and Commission employees.

Although Chapter 13 of the Manual is not a set of [R.C. 4121.32](#) guidelines, it does comply with [R.C. 4121.31](#) as a set of rules. [R.C. 4121.31](#) provides in pertinent part:

"The administrator of workers' compensation and the industrial commission each shall adopt rules covering the following general topics with respect to Chapter 4123. of the Revised Code:

"(A) Rules that set forth any general policy and the principal operating procedures of the bureau of workers' compensation or commission, including but not limited to:

" * * *

"(2) Procedures for decision-making * * * [.]"

This section authorizes the Bureau and the Commission to adopt rules governing procedures for decision-making. The rules contained in Chapter 13 of the Manual have a general and uniform operation and necessarily affect third parties since the regulations pertain to eligibility requirements for payment.

Moreover, nothing in either [R.C. 4121.31](#) or [4121.32](#) expressly or implicitly suggests that R.C. Chapter 119 does not apply with respect to rules adopted by the Bureau and the Commission. [R.C. 119.02](#) provides that every agency must comply with the R.C. Chapter 119 procedure unless otherwise specifically provided by law. [R.C. 4121.31](#) and [4121.32](#) contain no language specifically excluding the agency from compliance with R.C. Chapter 119 in adopting rules as defined by [R.C. 119.01\(C\)](#). Unless specifically exempted from the R.C. Chapter 119 procedure, any rule or amendment adopted without the R.C. Chapter 119 procedure is invalidated by [R.C. 119.02](#). Instead of being exempt, [R.C. 4121.30\(A\)](#) explicitly states that rules governing the operating procedure of the Bureau of Workers' Compensation, regional boards of review and the Industrial Commission shall be adopted pursuant to Chapter 119 of the Revised Code. [R.C. 4121.30\(A\)](#) provides:

***4** "All rules governing the operating procedure of the bureau of workers' compensation, regional boards of review, and the industrial commission shall be adopted pursuant to Chapter 119. of the Revised Code * * * [.]"

Rather than being exempt from using the R.C. Chapter 119 procedure when adopting rules, the Bureau and the Commission are expressly required to use such procedure.

Additionally, [R.C. 119.01\(A\)](#) defines agency to include both the Bureau of Workers' Compensation and the Industrial Commission as agencies specifically subject to [R.C. 119.01](#) to [119.13](#). [R.C. 119.01\(A\)](#) provides:

" 'Agency' means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in * * * the industrial commission, the bureau of workers' compensation * * * [sections 119.01](#) to [119.13 of the Revised Code](#) do not apply to * * * actions of the industrial commission or the bureau of workers' compensation under [Sections 4123.01](#) to [4123.94 of the Revised Code](#) with respect to all matters of adjudication, and to actions * * * under sections 4123.29, 4123.34, 4123.341, 4123.342, 4123.40, 4123.411, 4123.44, 4123.441, 4123.442 and

divisions (B)(C) and (E) of [section 4131.14 of the Revised Code](#). * * *"
[R.C. 4121.31](#) and [4121.32](#) are not included within the list of exclusions from the application of [R.C. 119.01](#) to [119.13](#) to the Bureau of Worker's Compensation and the Industrial Commission. The legislature contemplated exclusions but did not include these functions of defendant from the list of functions which are excluded from application of R.C. Chapter 119. These sections read *in pari materia* make it more clear that rules adopted by the Bureau and the Commission must be promulgated using R.C. Chapter 119 procedure.

Another consideration which supports the statutory interpretation that the regulations in question are rules rather than guidelines is a comparison of [Ohio Adm.Code 4123-7-12](#) to the regulations in question. [Ohio Adm.Code 4123-7-12](#) deals with the eligibility and reasonableness of physical therapist services. It is a rule adopted using R.C. Chapter 119 procedure. [Ohio Adm.Code 4123-7-12](#) specifically provides that fees for more than ten treatments shall not be approved unless prior authorization is given by the Bureau. A similar prior authorization requirement is set forth in the subject regulations for chiropractic services; however, the Bureau argues that the regulation is a guideline rather than a rule. Since it is the same requirement for different medical disciplines, there is no logical reason why the regulation should not be adopted in the same manner and form, using R.C. Chapter 119 procedure.

Our decision is consistent with the Supreme Court's holding in [Ohio Nurses Assn., Inc. v. Ohio State Bd. of Nursing Edn. & Nurse Registration \(1989\)](#), [44 Ohio St.3d 73](#), that a rule enacted without compliance with the requirements of R.C. Chapter 119 is invalid. In that case, the Ohio State Board of Nursing Education and Nurse Registration issued a position paper expanding the authority of licensed practical nurses to administer intravenous fluids when previously only registered nurses could administer them. The Supreme Court held the position paper was a rule and required to be promulgated using the R.C. Chapter 119 procedure. See, also, [Ohio Dental Hygienists Assn. v. Ohio State Dental Bd. \(1986\)](#), [21 Ohio St.3d 21](#), in which an advisory opinion letter having the effect of permitting dentists to delegate intra-oral procedures to basic qualified personnel without adopting a rule was found to violate R.C. Chapter 119. Similarly, in [Condee v. Lindley \(1984\)](#), [12 Ohio St.3d 90](#), the tax commissioner's policy allocating "situable" property was found to be invalid since no rule has been adopted through R.C. Chapter 119 procedure.

***5** The trial court correctly concluded that Chapter 13 of the Manual contains rules as defined by [R.C. 119.01\(C\)](#) and that, since it was not adopted in a manner mandated by R.C. Chapter 119, the rules are invalid pursuant to [R.C. 119.02](#). Neither assignment of error is well-taken.

For the foregoing reasons, both assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

[PETREE](#) and [TYACK](#), JJ., concur.

Ohio App. 10 Dist., 1993.

Ohio State Chiropractic Ass'n v. Ohio Bureau of Workers' Compensation

Not Reported in N.E.2d, 1993 WL 14190 (Ohio App. 10 Dist.)

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