Before the Insurance Commissioner
Of the State of Arkansas

IN THE MATTER OF A LIMITED SCOPE MARKET CONDUCT EXAMINATION OF ARKANSAS BLUE CROSS & BLUE SHIELD AID NO. 2007-078

ORDER

Now on this day the matter of the Report of Examination of ARKANSAS BLUE CROSS AND BLUE SHIELD, NAIC # 83470, (hereafter, the "Company") is taken under consideration by Julie Benafield Bowman, Insurance Commissioner for the State of Arkansas (the "Commissioner"). From the facts before her, the Commissioner finds as follows:

1. The Company is an Arkansas domiciled legal reserve mutual life and disability company authorized to transact insurance business in the State of Arkansas.

2. Pursuant to Ark. Code Ann. § 23-61-201(a)(1), the Arkansas Insurance Department (the "Department") began a limited scope, market conduct examination of the Company to determine if the Company complied with the Arkansas "Any Willing Provider Law," Ark. Code Ann. §23-99-201, et. seq. and Ark. Code Ann. §23-99-801, et. seq., ("AWP") in its payments to an "in-network" hospital of the Company, Arkansas Surgical Hospital, of North Little Rock, Arkansas (the "Complainant"). The basis of this examination derived from a January 29, 2007 complaint (the "Complaint"), filed at the Department by the Complainant against three health insurers, Arkansas Blue Cross & Blue Shield,

United HealthCare of Arkansas Inc., and QCA Health Plan Inc. (collectively, the "Respondent Health Insurers"). The Complainant requested that the Department compare the Complainant's payment rates with other "in-network" hospitals of each Respondent Health Insurer from a "selected list of procedures."

The Complainant requested that, if the payment rates for the procedures were in fact different, the Department should require that "the insurance providers pay affected hospitals the incremental amount necessary to correct discriminatory payment rates for all cases served in-network retroactive to the contract beginning date." As the basis of the Complaint, the Complainant cited AWP.

3. The examination began on April 30, 2007 and was completed on or about October 24, 2007. A verified report of examination (the "Report") was filed at the Department on or about October 24, 2007 and was forwarded by certified mail to the Company on October 27, 2007, return receipt requested. The Company received the Report on October 29, 2007 and made a November 26, 2007 written response or rebuttal to the Department about the Report and its findings.

4. The Report contains the following comments and discrepancies concerning the Company's operations:

A. The examiner noted that in a sampled comparison of reimbursement amounts for similarly performed procedures with other in-network hospital providers of the Company, the Company imposed no "monetary advantage or penalty" under Ark. Code Ann. §23-99-204(a)(1)(B)(ii) for

"outpatient services" because the Complainant's reimbursement was not "reduced" in comparison to other member hospitals.

B. The examiner noted that in a sampled comparison of reimbursement amounts for similarly performed "inpatient" procedures, performed by other member hospital providers of the Company, the Company did provide "reduced reimbursement" to the Complainant; however, the examiner noted that the "reduced reimbursement" did not constitute a "monetary disadvantage or penalty" under Ark. Code Ann. §23-99-204(a)(1)(B)(ii) without information that the reimbursement differences affected, either directly or indirectly, a beneficiary's choice to continue to use the Complainant as an in-network hospital. The examiner relied on the language in Ark. Code Ann. §23-99-204(a)(1) which describes a "monetary advantage or penalty" as one "that would affect a beneficiary's choice among those health care providers who participate in the health benefit plan according to the terms offered."

C. The examiner noted that, in analyzing whether "reduced reimbursement" acts as an improper "monetary advantage or penalty" under Ark. Code Ann. §23-99-204(a)(1)(B)(ii), the "penalty" must "affect a beneficiary's choice among those health care providers who participate in the health plan according to the terms offered." The examiner further stated that, even if there exists a "monetary advantage or penalty," a health insurer is not deemed to have committed a violation of AWP under Ark. Code Ann. §23-99-206 and Ark. Code Ann. §23-99-204(b) as long as it is an action taken by the health benefit plan to maintain quality, enforce utilization regulations, or to control costs. The examiner

concluded that the Company was not saved from a violation of Ark. Code Ann. §23-99-204(a)(1)(B)(ii) because the "reduced reimbursement" to the Complainant was due to cost or quality actions instituted by the health insurer. The examiner stated that the Complainant was paid less for the sampled "inpatient" services compared to two (2) other member hospitals because its base rate percentages differed with hospitals of larger size, which provide additional services, patient mix, and patient population. However, the examiner noted that he was unable to determine how such size and service characteristics of the hospital, or bed size, or geographical location, operated specifically as "the health benefit plan instituting measures designed to control costs and maintain quality standards" in each of the sample procedures themselves. Finally, the examiner noted that, in analyzing whether "reduced reimbursement" acts as an improper "monetary advantage or penalty" under Ark. Code Ann. §23-99-204(a)(1)(B)(ii), in terms of how medical providers are to be "grouped" or "classed" for purposes of comparing reimbursement to medical providers within "classes," that there exists no separate class for "specialty hospitals" but instead there exists one class as "hospitals" in Ark. Code Ann. §23-99-203(d)(11) and Ark. Code Ann. §23-99-802(4)(K).

5. On November 26, 2007, the Company filed a rebuttal or response to the findings as stated in the report, maintaining the following in response to the discrepancies listed in paragraph four (4) of this Order:

A. The Company stated that Ark. Code Ann. §23-99-204(a)(1) and (2) have no application to direct payments made by insurers to medical providers but

rather only to the monies required of, or paid to, beneficiaries. The Company stated that Ark. Code Ann. §23-99-204(a)(1) and (2) prohibit a health care insurer from imposing financial penalties, advantages or conditions on the beneficiary under a health benefit plan that would steer that beneficiary to one provider over another. (Emphasis Added). Therefore, as the Company maintains, the provisions do not govern in any way the level of direct payment to a hospital by a health insurer.

The Company stated that Ark. Code Ann. §23-99-204(b) is not applicable to the issue of whether it is permissible under AWP to negotiate different payment rates with different hospitals. The Company stated that "unless those different rates were set forth in the health benefit plan terms, with hospital-by-hospital listings of various rates, subsection 204(b) would not even come into play." (Emphasis Added). According to the Company, even if Ark. Code Ann. §23-99-204(b) was applicable, "differential payment of different hospitals could only be problematic under subsection 204(b) if one erroneously concluded that every hospital in the State is in the same class."

The Company stated that the legislative intent of AWP, as expressed in Ark. Code Ann. §23-99-202, was to provide "patient choice," not "reimbursement parity" to medical providers. The Company stated that given that Ark. Code Ann. §23-99-204(a)(3) and Ark. Code Ann. §23-99-802(1) require a medical provider to agree to the "terms and conditions" (and schedule of fees) of the health benefit plan, these provisions expressly assume the permission and right of the health insurer to be allowed to individually negotiate medical provider payment rates.

B. The Company stated that it disagrees with the examiner that the limitation in Ark. Code Ann. §23-99-204(b) (requiring that measures be imposed equally on all providers "in the same class") forbids a health insurer from classifying hospitals differently to control costs or maintain quality. The Company stated that, in light of the language in Ark. Code Ann. §23-99-206, there is an exemption from violation of AWP if the actions are taken in order to "control costs." The Company stated and provided examples indicating that "not all hospitals are the same" due to variations in services provided. The Company stated that it was erroneous for the examiner to conclude that the individual rate negotiation between each hospital and the Company was not a "measure" or "action" to control costs. The Company stated that "nothing is more integral to controlling health plan costs, and policyholders' premium levels, than the individual negotiation between hospitals and a health plan. "

C. Finally, the Company disagrees with the examiner that all hospitals are to be grouped into an indivisible class, as "hospitals," under Ark. Code Ann. §23-99-203(d)(11) and Ark. Code Ann. §23-99-802(4)(K). The Company stated that those provisions do not state that the listed provider types each constitute a class, but instead merely list the various types of providers who are entitled to the opportunity to be network participants under AWP.

THEREFORE, pursuant to the provisions of Ark. Code Ann. § 23-61-205, et seq., the Commissioner hereby orders:

1. That the Report filed with the Department is hereby adopted with the following modifications as provided in this Order;

2. That, for the purposes of AWP, particularly Ark. Code Ann. § 23-99-204(a)(1)(B)(ii), the Commissioner interprets the term "reimbursement" to mean what is traditionally understood by the term "reimbursement," in the insurance industry, payment made to an insured or beneficiary to repay money the insured or beneficiary has expended for services received from a medical service provider, as distinguished from payments made by an insurer directly to a medical service provider pursuant to the insurance policy or health maintenance organization contract. The Commissioner therefore rejects references in the Report which compares the Complainant's "reimbursement" under a network provider agreement with other in-network member medical providers. The Commissioner modifies such references to mean a comparison of medical provider "payments";

3. That, as to the provider payment of sampled "outpatient" services examined, the Company did not impose upon the Complainant a "monetary penalty" under Ark. Code Ann. §23-99-204 because it was paid the same amount for the sampled services in comparison with the other sampled network providers;

4. That, as to the provider payment of sampled "inpatient" services examined, the Complainant was paid less for certain sampled services compared to two (2) other member hospitals, however the Company did not impose upon the Complainant a "monetary penalty" under Ark. Code Ann. §23-99-204 because there is no evidence that beneficiary choice or patient choice to access the Complainant is affected;

5. That the examiner's finding that the Company was not instituting a measure or action to control costs or quality when a health insurer takes into consideration the additional services, patient population, patient mix, geographical location, and number of beds of a member hospital, or other unique characteristics of a hospital, in its base weight calculation for payment, is rejected. The Commissioner finds that under Ark. Code Ann. §23-99-204(b) a health insurer may take into consideration the unique service and size characteristics of a hospital in its negotiation of individual provider payment rates because these directly affect the costs a health plan absorbs. The Commissioner finds that AWP does not require identical payment to hospitals for similarly performed services. A health insurer may vary payment for similarly performed services because of cost or quality reasons related to the different size and scope of services provided by other member hospitals under Ark. Code Ann. §23-99-204(b) and Ark. Code Ann. §23-99-206;

6. That the examiner's finding that there exists no separate class for "specialty hospitals" but instead there exists one class as "hospitals" in Ark. Code Ann. §23-99-203(d)(11) and Ark. Code Ann. §23-99-802(4)(K) is rejected. A health insurer may categorize hospitals differently due to size, location, scope of services, and other distinguishing or unique factors in order to control costs, regulate utilization, or maintain quality as contemplated in Ark. Code Ann. §23-99-204(b) and Ark. Code Ann. §23-99-206. The statutes listing medical providers entitled to participate in AWP (Ark. Code Ann. §23-99-203 and Ark. Code Ann. §23-99-802(4)(K)) do not require "hospitals" to be classified as a single,

indivisible class any more than "physicians or surgeons" are restricted from further classification, under its general class, according to their specialties in determining payment;

7. That the Department shall forward a copy of this Order to the Company via certified mail;

8. That within twenty (20) days of receipt of this Order, the Company shall file with the Department affidavits executed by each of its directors stating under oath that they have received a copy of this Order; and

9. That the Adopted Examination Report will be open for public inspection upon the expiration of thirty (30) days from the date of this Order.

IT IS SO ORDERED this 14th day of December, 2007.

JULIE BENAFIELD BOWMAN
INSURANCE COMMISSIONER
STATE OF ARKANSAS