

No. 71122-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SWEDISH HEALTH SERVICES,
a Washington nonprofit corporation,

Petitioner,

v.

DEPARTMENT OF HEALTH OF THE STATE OF
WASHINGTON,

Respondent.

REPLY BRIEF OF SWEDISH HEALTH SERVICES

Brian W. Grimm, WSBA No. 29619
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(T) 206.359.8000
(F) 206.359.9000

Attorneys for Petitioner,
Swedish Health Services

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAY 9 AM 11:22

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	2
A.	Swedish’s interpretation of the regulation is correct based on its plain language.	2
B.	Swedish’s interpretation of the regulation is correct under the principles of statutory construction.....	4
1.	Swedish’s interpretation is consistent with the intent of the CON statute.	4
2.	Swedish’s interpretation gives effect to all of the language in the regulation.	5
3.	Swedish’s interpretation harmonizes the PCI regulations.....	6
4.	Swedish’s interpretation is consistent with ensuring the success of all PCI programs in the planning area.	8
5.	The Court should not defer to the Department’s interpretation of the regulation.....	10
III.	CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<i>Conway v. Department of Social and Health Services</i> , 131 Wn. App. 406, 120 P.3d 130 (2005).....	5
<i>D.W. Close Co., Inc. v. Department of Labor and Industries</i> , 143 Wn. App. 118, 177 P.3d 143 (2008).....	6
<i>Gaines v. Department of Employment Security</i> , 140 Wn. App. 791, 166 P.3d 1257 (2007).....	10
<i>Overlake Hospital Association, et al. v. Department of Health</i> , 170 Wn.2d 43, 239 P.3d 1095 (2010).....	2, 4, 5

Regulations

WAC 246-310-720.....	passim
WAC 246-310-745.....	7, 8, 9, 11

I. INTRODUCTION

The Department expects PCI programs to perform at least 300 procedures annually. However, the Department recognizes that new programs need a ramp-up period before they will achieve this volume. Accordingly, the Department requires programs to perform 300 PCIs per year only after they have been in operation for at least three years.

The Department and the intervenors suggest that the existence of such nascent programs creates a moratorium on the approval of any new programs in the same planning area, such as Swedish's proposed program in Issaquah. But this would contradict the Department's regulations. The regulations provide that if a hospital proposes to establish a new PCI program in a planning area where there is an existing program, in operation less than three years and performing fewer than 300 PCIs annually, the Department should approve the proposed new program only if the projected volume of PCIs in the planning area is sufficient to support the nascent programs and the proposed new program, each at 300+ PCIs per year, in future years. Thus, the Department's regulations provide that a new program can be approved in these circumstances, if the projected need is great enough.

Swedish respectfully requests that the Court determine that the HLJ's interpretation of the regulation at issue was erroneous and that the

existence of the nascent programs in the King East planning area did not prohibit approval of Swedish's application. The Court should remand to the HLJ to determine whether Swedish's application satisfies the other applicable CON criteria, including whether there is sufficient projected volume to support Swedish's proposed program, which the parties dispute and the HLJ did not decide.¹

II. ARGUMENT

A. **Swedish's interpretation of the regulation is correct based on its plain language.**

As Swedish, the Department, and the intervenors each recognize, “[i]f the meaning of a rule is plain and unambiguous on its face” the Court should “give effect to that plain meaning.” *Overlake Hosp. Ass'n, et al. v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010); *see also* Opening Brief of Swedish Health Services (“Swedish Op. Br.”) at 14; Department of Health's Response Brief (“Dept. Br.”) at 7-8; Response of Overlake Hospital Medical Center and King County Public Hospital District No. 2 d/b/a EvergreenHealth (“Intervenors Br.”) at 12.

To determine whether the meaning of WAC 246-310-720 is plain and unambiguous on its face, the Court need only look to the text.

¹ In this reply brief, Swedish will use the same defined terms as were identified in its opening brief.

Subsection 2(b) of the regulation creates the following requirement for approval of a new PCI program:

All existing PCI programs in that planning area are meeting or exceeding the minimum volume standard.

WAC 246-310-720(2)(b). This of course begs the question: What is the “minimum volume standard”? The question is answered by subsection 1, which defines the standard as follows:

Hospitals with an elective PCI program must perform a minimum of three hundred adult PCIs per year by the end of the third year of operation and each year thereafter.

WAC 246-310-720(1).

The Department and the intervenors insist that the “minimum volume standard” is 300 PCIs per year, without regard to how long a program has been in operation, and that a new program may not be approved if a nascent program is performing fewer than 300 PCIs per year. *See* Dept. Br. at 8; Intervenors Br. at 12. Their argument cannot be reconciled with the plain language of the regulation. The plain language of the regulation defines the minimum volume standard as “three hundred adult PCIs per year by the end of the third year of operation and each year thereafter.” By asserting that the last thirteen words must be disregarded, the Department and the intervenors are not advocating a plain-language interpretation.

The Department accuses Swedish of “wrongly attempt[ing] to add words to” the regulation. *See* Dept. Br. at 9. This is not accurate. Swedish has added no words to the regulation; Swedish simply asserts that all of the words already in the regulation should be given effect.

WAC 246-310-720 is plain and unambiguous on its face. A PCI program must “perform a minimum of three hundred adult PCIs per year by the end of the third year of operation and each year thereafter.” All existing PCI programs in the King East planning area were in compliance with this rule when Swedish applied to establish a new PCI program. Overlake was in compliance because it was performing more than 300 PCIs per year; the other three programs were in compliance because they each had been in operation less than three years.

B. Swedish’s interpretation of the regulation is correct under the principles of statutory construction.

If the Court determines that there is more than one reasonable interpretation of the regulation, and the regulation therefore is ambiguous, the Court should rely upon the principles of statutory construction to resolve the ambiguity. *See Overlake Hosp. Ass’n*, 170 Wn.2d at 52.

1. Swedish’s interpretation is consistent with the intent of the CON statute.

The Court’s “paramount concern” when interpreting a regulation “is to ensure that the regulation is interpreted in a manner that is consistent

with the underlying policy” of the enabling statute. *Overlake Hosp. Ass’n*, 170 Wn.2d at 52 (emphasis added). As explained in Swedish’s opening brief, only Swedish’s interpretation of the regulation is consistent with the legislative intent underlying the enabling statute. *See* Swedish Op. Br. at 15-16.

The alternative interpretation proposed by the Department and the intervenors would preclude a PCI program from being approved which the Department projects will be needed to meet planning-area demand for these services. This alternative interpretation would contradict the legislative intent underlying the CON laws. *See Overlake Hosp. Ass’n*, 170 Wn.2d at 55 (holding that the “overriding purpose of the [CON] program” is “promotion and maintenance of access to health care services for all citizens” and interpreting ambulatory surgical facility CON regulations in the way that would permit more facilities to be approved) (emphasis added).

2. Swedish’s interpretation gives effect to all of the language in the regulation.

When interpreting a regulation, the Court should “give effect to every word, clause, and sentence whenever possible[.]” *Conway v. Dep’t of Social and Health Servs.*, 131 Wn. App. 406, 416, 120 P.3d 130 (2005). As explained in Swedish’s opening brief, only Swedish’s interpretation

gives effect to all words in the regulation, specifically the last thirteen words of WAC 246-310-720(1). *See* Swedish Op. Br. at 16-17.

The intervenors argue that “Swedish is looking at the wrong section” of the regulation and that subsection 2(b) must be read without reference to subsection 1. *See* Intervenors Br. at 14. But subsection 2(b) simply states that “[a]ll existing PCI programs in that planning area are meeting or exceeding the minimum volume standard.” WAC 246-310-720(2)(b). Subsection 2(b) does not itself define the “minimum volume standard.” The standard is defined in subsection 1, as “a minimum of three hundred adult PCIs per year by the end of the third year of operation and each year thereafter.” WAC 246-310-720(1) (emphasis added).

To determine what “minimum volume standard” is being referred to in subsection 2(b), the Court must look to subsection 1. Under the principles of statutory construction, all words in subsection 1 should be given effect, including the last thirteen.

3. Swedish’s interpretation harmonizes the PCI regulations.

When interpreting a regulation, the Court also should do so in a way which “harmoniz[es] all provisions.” *D.W. Close Co., Inc. v. Dep’t of Labor and Indus.*, 143 Wn. App. 118, 126, 177 P.3d 143 (2008). As explained in Swedish’s opening brief, only Swedish’s interpretation of WAC 246-310-720 harmonizes that regulation with the PCI regulations as

a whole. In particular, only Swedish's interpretation harmonizes the regulation with WAC 246-310-745, which specifically describes how to evaluate need for a proposed new PCI program where there are existing programs, in operation less than three years, which are not yet performing 300 PCIs per year. *See* Swedish Op. Br. at 17-19.

The Department and the intervenors argue that WAC 246-310-720 and WAC 246-310-745 must be compartmentalized, and that WAC 246-310-720 prohibits approval of a new PCI program if there are existing programs, in operation less than three years, which are not yet performing 300 PCIs per year, even though WAC 246-310-745 explains how to evaluate need for a proposed new PCI program in precisely these circumstances. *See* Dept. Br. at 10-13; Intervenors Br. at 16-19. This approach is inconsistent with the principles of statutory construction, under which the Court should attempt to interpret regulations in a way which harmonizes them, not interpret them such that they conflict with one another, and then compartmentalize them.

Moreover, the alternative interpretation of the Department and the intervenors not only would create conflict among the PCI regulations, it would render language in WAC 246-310-745 entirely superfluous. They argue that a new PCI program can never be approved if existing providers, in operation less than three years, are not yet performing 300 PCIs

annually. But if WAC 246-310-720 prohibits approval of a new program in these circumstances, it would make no sense for WAC 246-310-745 to explain how need for a new program will be evaluated in these circumstances.

The Department argues that this language was included in WAC 246-310-745 to give hospitals guidance as to whether there would be a projected need when the nascent programs achieve 300 PCIs. *See* Dept. Br. at 12. But once the nascent programs achieve 300 PCIs, their capacity will be measured at their actual volume levels. The only purpose of this language is to explain how to evaluate need when the nascent programs' volumes still are below 300, as in this case, so that the Department can determine whether yet another PCI program is needed and may be approved.

4. Swedish's interpretation is consistent with ensuring the success of all PCI programs in the planning area.

Both the Department and the intervenors suggest that there will be too few procedures to support each of the nascent programs and Swedish at the expected volume level. *See* Dept. Br. at 8-9; Intervenors Br. at 15. However, the Court need not make any determination as to which party's need forecast is correct. The only issue before the Court is the interpretation of WAC 246-310-720(2)(b).

The HLJ granted summary judgment based on his interpretation of this regulation. If the Court determines that Swedish's interpretation of WAC 246-310-720(2)(b) is correct, and that Swedish's application therefore satisfies this regulation, the Court should remand to the HLJ to determine whether there is need for Swedish's proposed program under WAC 246-310-745, as well as whether Swedish satisfies the other applicable CON criteria.

Moreover, to the extent that the Department and the intervenors are arguing that Swedish's interpretation of the regulation should be rejected because it could result in more PCI programs being approved than are needed, this concern is addressed by the need methodology. As explained in Swedish's opening brief, WAC 246-310-745 will permit approval of Swedish's proposed program only if there is a projected volume of PCIs in the planning area such that each of the nascent programs and Swedish can be expected to perform at least 300 PCIs per year. *See* Swedish Op. Br. at 18. Under Swedish's application of need methodology, there is such a projected volume. AR 1372. However, this is a disputed issue which the HLJ did not resolve, and which will need to be resolved in the remand

proceeding, should the Court determine that Swedish's application satisfies WAC 246-310-720.²

5. The Court should not defer to the Department's interpretation of the regulation.

Finally, the Department and the intervenors argue that the Court should defer to the Department's interpretation of WAC 246-310-720. However, "courts retain the ultimate responsibility for interpreting a statute or regulation." *Gaines v. Dep't of Employment Sec.*, 140 Wn. App. 791, 797, 166 P.3d 1257 (2007). Here, the Department's interpretation of the regulation contradicts the legislative intent. *See* discussion *supra* § II.B.1. It also fails to give effect to all words in the regulation and creates conflict with related regulations. *See* discussion *supra* §§ II.B.2-3.

Even if deference is afforded to the Department's interpretation of a regulation, this does not obviate the other principles of statutory construction. To be consistent with legislative intent, to give effect to all words in the regulation, and to harmonize the regulation with related regulations, the Court should determine that Swedish's interpretation of WAC 246-310-720 is correct.

² The intervenors suggest repeatedly that Swedish will not be able to demonstrate in a remand proceeding that its application satisfies the other CON criteria. Because the Department has not yet made a final determination as to whether Swedish's application satisfies these criteria, and they are not before the Court, Swedish will not address them in detail, except to state that the Administrative Record demonstrates that Swedish's application satisfies all applicable CON criteria.

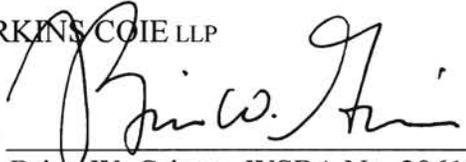
III. CONCLUSION

If the Department and the intervenors were correct that WAC 246-310-720(2)(b) prohibits approval of a new PCI program where an existing program, in existence less than three years, is performing fewer than 300 PCIs annually, there would be no purpose for the language in WAC 246-310-745 explaining how to evaluate need for a proposed new program in precisely these circumstances (i.e., to attribute 300 of the projected future annual PCIs to the nascent program, and then calculate whether there are enough additional projected procedures to support the proposed new program). The Court should not adopt an interpretation of WAC 246-310-720 which creates conflict with related regulations, and renders other regulatory language superfluous, particularly where there is a much more logical interpretation of WAC 246-310-720 which is consistent with legislative intent, gives effect to all words in the regulation, and harmonizes the regulation with related regulations.

Swedish respectfully requests that the Court determine that Swedish's interpretation of WAC 246-310-720 is correct, set aside the HLJ's summary-judgment denial of Swedish's application based on his erroneous interpretation of the regulation, and remand to the HLJ to determine whether or not Swedish's application satisfies the other requirements for approval.

Respectfully submitted this 9th day
of May 2014.

PERKINS COIE LLP

By: 

Brian W. Grimm, WSBA No. 29619

1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Petitioner,
Swedish Health Services

LEGAL120866743.1