

Office of the Attorney General
State of North Dakota

Opinion No. 81-23

Date Issued: March 11, 1981

Requested by: Gene A. Christianson
Acting Administrator
State Health Department

--QUESTION PRESENTED--

Whether the institution of cardiac surgery by a hospital constitutes a new medical care service under Chapter 23-17.2 of the North Dakota Century Code.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that the question presented is a question of fact and not a question of law. Therefore, this question must be decided by the appropriate party at each level in accordance with the proper legal standards expressly or implicitly set forth in Chapter 23-17.2, N.D.C.C.

--ANALYSIS--

Under Section 54-12-01(6), N.D.C.C., the Attorney General has the duty to give written opinions on all legal or constitutional questions relating to the duties of state officers. It is my interpretation of this provision of law and other similar provisions that require a written opinion from the Attorney General, that the Attorney General can only give an opinion on a question of law. Necessarily, a decision on questions of fact is properly left in our system to the trier of facts whether it be a judge, jury, or hearing officer after an adversary proceeding or stipulation has developed all of the relevant facts. This process to fully develop the facts is not a part of the process in requesting an Attorney General's opinion. Questions of fact are not properly to be decided by the Attorney General. Accordingly, to the extent a question of fact is presented to the Attorney General, the Attorney General cannot express an opinion, but can only set forth the various legal issues which the trier of fact ought to consider in arriving at a decision.

That the question here presented is a question of fact is apparent from reading the relevant part of Section 23-17.2-04, N.D.C.C. That provision is as follows:

No hospital or related medical facility shall be constructed or expanded and no new medical care service shall be instituted after the effective date of this chapter except upon application for and receipt of a certificate of need as provided by this chapter. (Emphasis supplied.)

There is no specific mention in Chapter 23-17.2, N.D.C.C., or any of the rules adopted thereunder concerning cardiac surgery. Cardiac surgery is obviously a medical care service. The proper question is whether the institution of cardiac surgery is, in fact, a new medical care service. If it is, a certificate of need is required. If it is not, no certificate is required. The determination as to whether cardiac surgery in the particular case is a new medical care service must be determined from all of the relevant facts presented to the party making the determination.

Unfortunately, 'new medical care service' is not defined anywhere in Chapter 23-17.2, N.D.C.C. Nor is it defined in the rules issued pursuant to Section 23-17.2-05, N.D.C.C., as found in Article 33-09 of the North Dakota Administrative Code (N.D.A.C.). Section 23-17.2-02(6), N.D.C.C., defines health care service as follows:

'Health care facility and health care service' means any program, institution, place, building, or agency, or portion thereof, private or public, whether organized for profit or not, used, operated, or designed to provide medical diagnosis, treatment, nursing, rehabilitative, or preventive care to any person or persons which are licensed or certified by the department, or certified pursuant to the Federal Social Security Act as amended.

This definition is not particularly useful to this issue. Neither is the following definition found in Section 33-09-01-02(9), N.D.A.C.:

'Health care services' means clinically related (i.e., diagnostic, treatment, or rehabilitative) services, and includes alcohol, drug abuse, and mental health services.

Even if these two definitions specifically included cardiac surgery, that definition would still not answer the factual question of whether or not the cardiac surgery instituted constituted a 'new' medical care service.

There is only one reported North Dakota case dealing with this chapter. The North Dakota Supreme Court in *City of LaMoure v. State Health Council*, 213 N.W.2d 869 (N.D. 1973), dealt with the question of the construction of a hospital commenced prior to the effective date of the law. The first question presented was whether or not the hospital was actually under construction prior to the effective date of the law and the Supreme Court held that it was. The second question presented was whether or not the construction of a hospital constituted a 'new medical care service'. As to that question the Supreme Court held as follows:

Second, we believe the reference to 'new medical care service' was intended to cover situations where a medical care facility was being converted to a different type of medical care, such as conversion of an old hospital into an alcoholic or psychiatric treatment center, or the like, or a

situation where an existing hospital was adding new facilities or programs not covered by existing licenses from the Department of Health. This interpretation is fortified by the language of the public policy statement of the statute, found in Section 23-17.2-01, subsection 2, which declares it to be the public policy of the State:

'That the general welfare and the protection of the lives, health, and property of the people of this state require that the type, level, and kind of care needed in proposed construction or expansion of services in hospitals and related medical facilities within this state be subject to review and evaluation before commencing construction in order that proper facilities are made available for such care, that proposed new or expanded medical facilities provide, within the economic means of this state, the type, level, and kind of care necessary for the continued well-being and comfort of the patients of such hospitals and related medical facilities and to ensure that medical facilities are not constructed or services expanded which exceed the needs of patients or of persons in the area to be served.' (Emphasis added.)

We interpret the reference in Section 23-17.2-04 to 'new medical care service' to be intended to be equivalent to the triple reference to 'expansion of services in hospitals' or equivalent terms in 23-17.2-01, subsection 2, quoted above. 213 N.W.2d 869, 873.

Section 23-17.2-05, N.D.C.C., specifically states that the Council may promulgate rules and regulations as may be required by Public Law 93-641. I have reviewed P.L. 93-641 and can find no specific reference to cardiac surgery as being a new medical care service that automatically requires a certificate of need. It appears that the thrust of this public law is to encourage health care planning at the federal, state and area planning levels. The state of North Dakota has responded to the priorities set forth by Congress in P.L. 93-641 by developing the North Dakota State Health Plan of 1980 prepared by the Statewide Health Coordinating Council. In Section VI of the State Health Plan, from page 86 through page 90, the State Health Plan addresses the subject of open heart surgery as part of the secondary care services (diagnostic and treatment services) of the chapter on the organization of health care in North Dakota. On page VI-90 of the Plan it is stated that 'based on considerations of quality and cost the Statewide Health Coordinating Council specifies that there should be no additional adult open heart surgery services in North Dakota until each existing service is performing and is expected to continue to perform at least 350 adult open heart operations per year.' There is nothing, however, in Chapter 23-17.2, N.D.C.C., that authorizes the State Health Coordinating Council or any other agency of state government to override the specific direction given by the North Dakota Legislature. The foregoing statement by the State Health Coordinating Council and the State Health Plan is an expression of policy adopted by that entity and is not law. From information I have received, the State Health Department has adopted a policy that cardiac surgery requires a certificate of need. Apparently relatively few other surgical services are the subject of such a policy. Such a policy is not in accordance with the law insofar as it

fails to consider in each particular case whether cardiac surgery constitutes a 'new medical care service.' A matter of policy that fails to meet the requirements of law is invalid.

Since this policy to treat cardiac surgery as a new medical care service is invalid, the decision as to whether or not to seek a certificate of necessity in the first instance rests with the hospital. Whether cardiac surgery is a new medical care service or just another logical development of a variety of surgical services provided by a hospital is something the hospital must determine. A service or facility involving the expenditure of more than \$100,000 must by law and rule first receive a certificate of necessity, but no law or rule governs cardiac surgery unless it is, in fact, a new medical care service or it meets one of the other established rules requiring a certificate of necessity.

The clear purpose of Chapter 23-17.2, N.D.C.C., is not to restrict medical care services, but to see to it that necessary care is provided to the people of North Dakota which does not exceed the needs of the people and which does not result in the waste of health care dollars. The law ought to be liberally construed toward providing health care services and facilities instead of restricting them.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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