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COURT OF APPEALS

STATE OF NEW YORK

GOVERNMENT EMPLOYEES INSURANCE CO., ET AL.,

Respondents,

-against-

No. 27

AVANGUARD MEDICAL GROUP, PLLC,

Appellant.

20 Eagle Street
Albany, New York 12207
February 10, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. Good
2 afternoon, everyone. First matter on our calendar
3 today is number 27, Government Employees Insurance
4 Company v. Avanguard Medical Group.

5 Counsel, would you like to reserve rebuttal
6 time?

7 MR. MICHAEL: Yes, may I please reserve six
8 minutes of rebuttal time?

9 CHIEF JUDGE DIFIORE: Yes, sir.

10 MR. MICHAEL: Good afternoon, Your Honors.
11 Charles Michael from Steptoe & Johnson on behalf of
12 the appellant, Avanguard Medical Group.

13 Welcome, Judge Garcia.

14 JUDGE GARCIA: Thank you.

15 MR. MICHAEL: May it please the court.
16 This is a case about statutory interpretation. New
17 York's no-fault insurance laws require auto insurers
18 to cover car accident victims, regardless of fault,
19 for up to 50,000 dollars in basic economic loss. The
20 term "basic economic loss" is defined in Insurance
21 Law 5102 in relevant part as follows: All necessary
22 expenses for medical services and surgical services.
23 That is the key phrase in this case, Your Honors, all
24 necessary expenses for medical services and surgical
25 services.

1 JUDGE STEIN: To - - - to me there is - - -
2 there's a question, and I'm not sure it's answered
3 here, and that is assuming that the fees that you're
4 talking about are necessary and assuming that they
5 should be covered, the question that I am having
6 trouble with - - - one of them - - - is, are these
7 fees incorporated in the professional service fees
8 and, you know - - - and - - - and how - - - how are
9 they different from regular medical offices?

10 MR. MICHAEL: Sure. Let me answer those
11 two questions. First, no, they are not incorporated
12 in the professional fees. So just to back up - - -

13 JUDGE STEIN: How do we know that?

14 MR. MICHAEL: The reason we know that - - -
15 here's the - - - there's several ways. The simplest
16 way is that the regulators have adopted facility fees
17 for ambulatory surgery centers and hospitals. And
18 the regulations adopting those tell you exactly what
19 those are for.

20 So if you look, for example, at the
21 regulations pertaining to the facility fees for
22 ambulatory surgery centers, that's 10 NYC 86-4.40,
23 this is what they cover: Nursing services,
24 technician services, drugs, biologicals, surgical
25 dressings, materials for anesthesia, space occupancy

1 - - -

2 JUDGE STEIN: Right, but those aren't
3 separately covered under regular doctors' offices,
4 correct?

5 MR. MICHAEL: Right, so all - - -

6 JUDGE STEIN: So are - - - so how do we
7 know whether - - - whether here the intention was
8 that they were covered as regular office - - -
9 doctor's offices, or whether they should be
10 considered as they - - - as hospitals and - - - and
11 other - - - sur - - - sorry, surgical centers?

12 MR. MICHAEL: Sure, so there's a singular
13 professional fee schedule that everybody gets paid.
14 So if a doctor repairs a knee from somebody who is a
15 car accident, the doctor looks up in the medical fees
16 schedule and will say, you got 1,000 bucks to fix
17 that knee.

18 JUDGE STEIN: And that covers nurses and
19 overhead and everything else, right?

20 MR. MICHAEL: It doesn't cover any of that,
21 because all of these things are listed as a separate
22 fee that, at least under the second department's
23 decision, the ambulatory surgery center can charge
24 and the hospital can charge. If the facility fee
25 covers all these things, they can't possibly be baked

1 into the professional fee.

2 JUDGE FAHEY: But wouldn't your - - -
3 wouldn't your - - -

4 JUDGE RIVERA: You're saying that they're
5 segregated elsewhere, so therefore that must mean
6 they can't be included in a professional fee - - -

7 MR. MICHAEL: Precisely.

8 JUDGE RIVERA: - - - not to mention
9 professional fees seems to suggest something other
10 than facility fee.

11 MR. MICHAEL: Precisely. And I would also
12 refer, Your Honors - - - if you look at the appendix
13 to GEICO's brief at page 29, that is the professional
14 fee schedule. And at page 29 - - - or I guess they
15 call it an addendum - - - page 29 is Chapter 4, it
16 talks about surgery, and it says, "Package or global
17 fee concept. Listed values for all surgical
18 procedures include: The surgery, local infiltration,
19 digital or regional block and/or topical anesthesia."
20 And it goes on; it says nothing about equipment,
21 expenses, or overhead.

22 What they're calling a global fee means the
23 doctor can't say, I'm going to charge one fee to do
24 the surgery and one fee to check up on the patient,
25 one fee for the interview - - - they say, no, that's

1 a global fee, but there's nothing about these same
2 expenses.

3 JUDGE RIVERA: The facility fee, the bricks
4 and mortars, is that what we're talking about?

5 MR. MICHAEL: Well, that's part of it.

6 JUDGE RIVERA: The structure itself or is
7 it also as you're saying, the equipment - - - what -
8 - - what - - - what are you arguing is a facility fee
9 supposed to encompass?

10 MR. MICHAEL: It covers all of it.
11 Everything that's not covered in the professional
12 fee, for lack of a - - - of a better definition. So
13 that would - - - that would be all the overhead. The
14 building, the operating room, the table, the recovery
15 room, the nurses - - -

16 JUDGE ABDUS-SALAAM: But why should this
17 particular facility be able to charge that fee, when,
18 as you point out, these are ambulatory services, and
19 hospitals and ambulatory centers can charge them, but
20 there's no mention of this particular facility.

21 MR. MICHAEL: Sure, the reason why
22 accredited office-based surgery providers should be
23 able to charge and recover them, is for the simple
24 reason they fit within the statute; they are
25 necessary expenses. Now, the regulators, it is true,

1 have not adopted fees for office-based surgery
2 providers, but they haven't updated that schedule
3 since 2003 - - -

4 JUDGE PIGOTT: Can we do it? You're asking
5 us to update the schedule?

6 MR. MICHAEL: Absolutely not. One thing
7 that's critical to understand in this case, Your
8 Honor, is the question of how much or how little is -
9 - - should be reimbursed, is not before the court.
10 In some respect, this case presents a very narrow
11 question: GEICO sought declaratory judgment to
12 immediately halt 167 arbitrations. We have zero - -
13 - nothing in the record about those 167 arbitrations,
14 because the Second Department said, you know what,
15 GEICO gets summary judgment before discovery.

16 So the only question here is essentially a
17 yes or no. Are there any circumstances when an
18 accredited office-based surgery provider can charge -
19 - -

20 JUDGE RIVERA: Isn't - - - isn't there a
21 legislative delegation of quantifying this "all
22 necessary expenses"? Your way is an ad hoc way,
23 right?

24 MR. MICHAEL: My way is - - -

25 JUDGE RIVERA: So one - - - one person

1 might say that - - - that particular expense to that
2 facility is worth, I'll just make up a number, five
3 dollars' worth; someone else may have it for ten
4 dollars; you lose the consistency. Isn't this a
5 legislative delegation of - - - to the regulator to
6 figure out what - - - what is the way to quantify
7 that fee?

8 MR. MICHAEL: I would certainly agree the
9 legislation - - - the regulators ought to act.
10 They've been sitting on their hands; that is true.
11 But prior to the Second Department's decision, there
12 were literally thousands upon thousands of cases
13 before arbitrators where they did this job just fine.
14 And as we pointed out in our brief - - -

15 JUDGE RIVERA: Let me try it another way.
16 Could the regulator choose not to cover you?

17 MR. MICHAEL: Sure.

18 JUDGE RIVERA: I'm saying, that's not their
19 choice?

20 MR. MICHAEL: Absolutely, absolutely.

21 JUDGE RIVERA: They could make that choice.

22 MR. MICHAEL: They could adopt a fee
23 schedule that says, you know - - - because fee
24 schedules, as the statute says, set a maximum and the
25 regulators could say, the maximum to charge for an

1 office-based surgery provider is zero. If they
2 adopted that schedule, we - - - we would lose.

3 JUDGE ABDUS-SALAAM: But why would they
4 have to adopt a schedule that specifically references
5 office-based surgery? Why don't - - - they have a
6 schedule now that doesn't reference it, so isn't that
7 equivalent of saying you get zero?

8 MR. MICHAEL: Not at all, and I would - - -
9 I think what's instructive here are the acupuncture
10 cases. Because at least until recently, it was the
11 same situation there. There's a schedule for doctors
12 who do acupuncture and chiropractors who do
13 acupuncture, but no schedule for licensed
14 acupuncturists who are not doctors and not
15 chiropractors. In the insurance department, whose
16 opinion should be given some deference, and every
17 court who addressed the question, legions of courts
18 said, licensed acupuncturists can recover. And the
19 reason they said that is they said, this fits the
20 statutory definition.

21 JUDGE FAHEY: So are you saying that the
22 procedures in office-based surgeries are equivalent
23 to the procedures in ambulatory surgical care centers
24 or in hospitals? Because it seems to me there's a
25 continuum of procedures and - - - and part of the

1 rationale for having - - - for not including a
2 facility fee as a necessary expense is the nature of
3 an office procedure versus the nature of a hospital
4 or an ambulatory surgical care center procedure.

5 In the chiropractors cases, the procedures
6 were equivalent, they were the same thing.

7 MR. MICHAEL: Sure. Office-based surgery
8 procedures can be essentially the same extent as - -
9 -

10 JUDGE FAHEY: That's not - - - that's not
11 my experience. That's not the way I read this. The
12 way I read this is that there's a rational
13 distinction drawn between these - - - between the
14 kind of procedures that are done, a liposuction
15 office-based surgery, versus knee surgery at a one-
16 day ambulatory surgical care center.

17 MR. MICHAEL: Sure. There very well can be
18 distinctions, but no regulator has decided that that
19 justifies zero reimbursement for office-based
20 surgery.

21 JUDGE FAHEY: Well, it - - - it could be a
22 not unnecessary expense simply because it's already
23 included within fees that are already comp - - -
24 where you're already compensated.

25 MR. MICHAEL: Sure, but we - - - we have

1 the medical fee schedule and it's attached to GEICO's
2 brief and I respectfully urge the Court, look in
3 there, find anything that says expenses are covered.
4 It's not - - - it's not in there. And it would be
5 quite peculiar to have, you know, a doctor who gets
6 1,000 dollars to do the procedure could get 1,000
7 dollars to do it in an accredited office-based
8 environment - - - which, by the way, as the amicus
9 brief on our side demonstrates, looks quite a lot
10 like an ambulatory surgery center - - - could get the
11 1,000 bucks and nothing more - - -

12 JUDGE ABDUS-SALAAM: Do they - - - do the
13 office-based surgery centers pay the same fees that
14 ambulatory centers pay? You said it looks the same,
15 but aren't they regulated differently than office-
16 based surgeries?

17 MR. MICHAEL: They're regulated somewhat
18 differently, but the cost to run them are very close
19 because the accreditation standards are essentially
20 the same, and it's the same agencies who do it. So
21 they have the same standards that say you have to
22 have this much space around a table, and designated
23 personnel to deal with disease control; all of those
24 detailed regulations, the office-based surgery
25 providers have to deal with that just the same.

1 JUDGE RIVERA: Your light has gone off - -
2 -

3 CHIEF JUDGE DIFIORE: Thank you.

4 JUDGE RIVERA: - - - so with the Judge's
5 permission, if I'll - - - I'll just give you the
6 question so you can think about it. I wanted you to
7 address and let your opponent address it too. 68.5
8 refers only to services. Why does it cover a
9 facility? So that's my question, I know you can get
10 that later.

11 MR. MICHAEL: Okay.

12 CHIEF JUDGE DIFIORE: Thank you.

13 MR. MICHAEL: Thank you, Judge.

14 CHIEF JUDGE DIFIORE: Respondent.

15 MR. LEVY: Good afternoon. May it please
16 the court, Barry Levy for Government Employees
17 Insurance Company.

18 Fundamentally, we have to start with the
19 statute in this case, and the one thing that
20 Avanguard doesn't read into the statute is the
21 limitation in 5108. They want to talk a lot about
22 what necessary expenses incurred are, but they don't
23 want to talk about what 5108 says, which says that
24 the limit that's payable for basic economic loss,
25 which were the necessary expenses incurred, are

1 capped at what the fee schedule provides for.

2 JUDGE STEIN: Yeah, yeah, but that talks
3 about amounts, not necessarily what is actually
4 covered, doesn't it?

5 MR. LEVY: Well, it - - - it - - - what
6 does is it sets forth a framework for within it - - -
7 from within which the analysis is done. So what we
8 have here is an office-based surgical practice which
9 is nothing more than an extension of the doctor's
10 medical practice.

11 If Your Honors read in - - - the historical
12 reference, OBS has existed for years and years and
13 years before the legislation was adopted here under
14 the public health law. And what OBSs do is they
15 allow doctors to perform certain types of procedures
16 in their office, in an office-based setting. And in
17 the context of doing so, they get paid fees, and
18 those fees were - - - are the professional fees that
19 are in the medical fee schedule that the Workers'
20 Compensation Board has adopted.

21 And the key about that medical fee schedule
22 is two things. Number one, not only is there
23 reference in the fee schedule to payment for overhead
24 and expenses throughout the course of the fee
25 schedule - - - if, in fact, you look at various

1 sections in the surgery section and various sections
2 in the radiology section, the interesting thing about
3 Avanguard is the procedures that they do are under
4 fluoroscopic guidance, which is essentially the use
5 of some form of X-ray or ultrasound imaging
6 technology - - - technology, it actually refers to
7 facilities and costs are built into the professional
8 fees.

9 And the other interesting, and I think
10 important, piece of this is that there is no
11 variation in the - - - in the Workers' Compensation
12 fee schedule as to the setting in which the service
13 is performed. And I think that that that's key,
14 because other payer systems, like Medicare, pay
15 differing or varying rates to physicians depending on
16 the nature of the setting in which the procedure is
17 formed - - - performed.

18 JUDGE ABDUS-SALAAM: Your setting is
19 accredited. And what does that do or not do for
20 them?

21 MR. LEVY: All - - - all the accreditation
22 does is say, you have enough safety measures in place
23 that we, as the Department of Health, believe, and
24 the state of New York believe, allows you to safely
25 do the types of procedures that you are accredited to

1 perform. The physician has to be accredited and the
2 location - - - you - - - his surgical suite in his
3 office - - -

4 JUDGE PIGOTT: How much are we talking
5 about in terms of the - - - what are you billed and
6 what are you not paying? I mean, how much are they
7 charging you for this?

8 MR. LEVY: It depends on what they - - -
9 well, in this particular case, if you look at the
10 record, I think that the - - - Doctor Gladstein's
11 practice billed 3,500 dollars for doing a - - - for
12 doing a procedure which consisted of a trigger point,
13 which consisted of a facet injection - - -

14 JUDGE PIGOTT: So there's - - - so there's
15 his - - - his professional fee and it - - - plus,
16 then, the 3,500 dollars?

17 MR. LEVY: He billed 3,500 on top of the
18 3,700 dollars that he billed for the professional
19 fee.

20 JUDGE PIGOTT: In - - - in - - - in past -
21 - - if somebody has a broken leg and they go to the
22 doctor and they - - - and they get fixed, you pay
23 that. If - - - if part of the bill is for X-Ray
24 Associates, which is really the corporation the
25 doctor setup for his X-ray machine which is over

1 here, do you pay that?

2 MR. LEVY: If there was a radiology service
3 associated with it, absolutely. As an accredited
4 practice, he uses fluoroscopic guidance. There's a
5 code, and I believe it's 77003, in the radiology fee
6 schedule that actually pays reimbursement for the
7 administration of the fluoroscopic guidance.

8 JUDGE PIGOTT: The reason I ask you is that
9 if you get into - - - let's assume for a minute you
10 have a - - - a patient who breaks a leg or makes - -
11 - make the threshold to begin a lawsuit, you're a
12 collateral source, but you're not a collateral source
13 for things you don't pay. So - - - so this facility
14 fee that we're talking about, in a plenary action,
15 would be separate and apart from the collateral
16 source that you pay?

17 MR. LEVY: No, because, Your Honor - - -
18 it's a good question, but no, because 5108 would cap
19 the charges which the - - - which Avanguard could - -
20 - could actually submit to the insurance company, and
21 to the extent that that wasn't payable, they couldn't
22 go ahead and charge the patient for that amount of
23 money because the assignment of benefits that is
24 given by the patient to the - - - to the office-based
25 surgical practice, to the physician's practice,

1 limits them to what's in the fee schedule. There's
2 no balance billing or anything like that. So you
3 don't have that problem that exists in - - - sort of
4 the commercial payer industry that we see from time
5 to time.

6 But I think that when we look at the fee
7 schedule, the fee schedule addresses that, and - - -
8 just so we could give sort of an analogy, you know,
9 what we have here is someone - - - what we have is a
10 medical practice that doesn't like what the fee
11 schedule says. This is clear; we wouldn't be here
12 otherwise. But the fact of the matter is that this
13 isn't any - - - really - - - really any different
14 than a physician office from the standpoint that the
15 overhead that's provided for in the medical fee
16 schedule reimburses for all of the overhead that is
17 reasonably incurred, or the Workers' Compensation
18 Board determines is reasonably incurred, in
19 connection with performing the procedure.

20 And if we take ourselves back in time a
21 little bit, and we think about the evolution of
22 medicine, years ago, doctors used to go to people's
23 homes, and they used to perform procedures in their
24 homes and, you know, the average doctor would - - -
25 would treat a couple of patients a day - - -

1 JUDGE PIGOTT: So if this - - - if this was
2 a workers' comp case, this would not be covered
3 either?

4 MR. LEVY: It would be the same. The
5 schedule is the schedule. The no-fault laws adopt
6 the workers' compensation fee schedule in the ground
7 rules.

8 JUDGE PIGOTT: So - - - so if - - - if the
9 same scenario happened in a workers' comp case, Dr.
10 Gladstein would not get paid the overhead?

11 MR. LEVY: My understanding is that the
12 Workers' Compensation Board does not provide, in that
13 setting, for reimbursement of facility fees as well.
14 Neither do commercial payers, neither does Medicare
15 or Medicaid.

16 JUDGE PIGOTT: But if workers' comp did,
17 then you would; is that a fair statement?

18 MR. LEVY: If workers' comp - - -

19 JUDGE PIGOTT: Paid - - - paid the - - -

20 MR. LEVY: If there - - - if there was a
21 proviso - - - let's say for example, Your Honor,
22 there was a variable fee in the fee schedule - - -
23 which is something the regulators could do to address
24 the question that you asked, Judge Rivera and Judge
25 Stein - - - the regulators could create, if they

1 wanted to, a variable fee schedule that would pay a
2 differing rate depending on the setting in which the
3 procedure is performed. But they've not; they've
4 used an average. They've used an aggregate average.
5 But it applies in - - - in the no-fault system, Judge
6 Pigott, it implies in the workers' compensation
7 system. And - - -

8 JUDGE STEIN: Why doesn't the catch-all
9 apply here and why is this different from the
10 chiropractor?

11 MR. LEVY: All right - - -

12 JUDGE STEIN: I mean, the acupuncturist.

13 MR. LEVY: I think that those are pretty
14 two simple questions to answer, and let me just - - -
15 first of all, in terms of the acupuncture cases, the
16 difference is is that an office-based surgical
17 practice, in comparison - - - in contrast to an
18 acupuncturist, is - - - is not a category of provider
19 that doesn't have a fee schedule that applies to it.
20 An office-based surgical practice which is a
21 physician - - - again, Avanguard is a professional
22 limited liability company owned by a physician - - -
23 has a fee schedule that applies to it, and there is a
24 rate for the procedures in the fee schedule that it
25 preforms, okay.

1 With respect to the acupuncture cases, it
2 was a little bit unique, because when the workers'
3 compensation board adopted the fee schedule, the CPT
4 codes for acupuncture, which are 97810, 11, 12 and
5 13, were adopted. But the regulator didn't put in,
6 for whatever reason, an amount payable to a licensed
7 acupuncturist. But a licensed acupuncturist is a - -
8 - an NPI provider, a licensed provider in the state
9 that is entitled to bill under the schedule. So 68.5
10 filled the gap there.

11 Here, there is no gap to fill because they
12 - - - if you think about it this way, there are two
13 boxes. You have your ASCs and your hospitals over
14 here, and Avanguard is not an ASC, they're not a
15 hospital, they don't qualify; they are however a
16 medical practice that - - - to which the medical fee
17 schedule applies. There's no gap to fill. For every
18 procedure that they perform, there is a fee payable
19 to them under the fee schedule - - - if you go back
20 and you look at the codes in the bills which are the
21 facet injections, the trigger points, 200553, 62311,
22 all those codes are in the fee schedule and there is
23 a fee ascribed to each and every one of them.

24 JUDGE RIVERA: I just - - - I just want to
25 clarify, because this is the question I was asking

1 your adversary. So 68.5 talks only about services
2 and providers. Why - - - perhaps clarify in a
3 different way why that doesn't include a facility
4 fee.

5 MR. LEVY: Because a facility fee is
6 overhead, Your Honor, and a facility - - -

7 JUDGE RIVERA: It's not a service?

8 MR. LEVY: It's not a service. A facility
9 fee is overhead, and when the Workers' Compensation
10 Board adopted the facility fee schedules for
11 hospitals, they look at the overhead that hospitals
12 and ASCs incur and they consider hundreds of other
13 criteria in the context of making that analysis.

14 Remember, one thing that's important about
15 distinguishing an ASC from an office-based surgical
16 practice is that an ASC has to participate in
17 Medicare and Medicaid. They have to take charity
18 cases, okay. Those are financial obligations that
19 the state has obligated them to undertake. Avanguard
20 essentially want the benefit of the bargain without
21 the burden that comes with it, okay. So I think part
22 of it goes to that question.

23 The other question is that when you look at
24 what Avanguard actually is, Your Honor, it is Dr.
25 Gladstein, who has incorporated a professional

1 about that, because that's really a fallacy. First
2 of all, if you look at the brief that was submitted
3 by the OBSs society, there are a thousand of these,
4 okay. They've existed for - - - for twenty or more
5 years. Doctors make the decisions to invest the
6 capital to build the OBSs because there are
7 efficiencies and synergies that generate more revenue
8 for them.

9 JUDGE STEIN: Okay, but is this a - - -
10 would this be a change if we said you don't get to
11 recover these fees, or have they been recovering
12 these fees up until now?

13 MR. LEVY: It's been - - - it's been - - -
14 let me put it this way, inside of the no-fault
15 system, which is only a small fraction of the total
16 payer system in the New York - - - in New York State,
17 it's very inconsi - - - it was very inconsistent,
18 okay.

19 JUDGE STEIN: Okay.

20 MR. LEVY: But think about 90 percent of
21 the other payer systems like commercial insurers,
22 like Medicaid, like Medicare, like workers' comp,
23 they provide no reimbursement. But nonetheless, we
24 have a thousand of these providers, so obviously - -
25 -

1 Quite frankly, we think public health law 230-d is
2 absolutely irrelevant in the context of this
3 analysis. But to talk about the fact that there is a
4 legislative process that is available to - - - to
5 cure what Avanguard believes is an inequality in
6 reimbursement, it's there.

7 There is also a secondary method which is
8 petitioning the workers' compensation fee - - -
9 Workers' Compensation Board for some kind of an
10 uptick in the fee schedule, either because of their
11 accreditation, or changing the reimbursement based on
12 the nature of the setting in which the procedure is
13 performed. Those are avenues that are available - -
14 -

15 JUDGE ABDUS-SALAAM: Wouldn't that be an ad
16 hoc kind of avenue because, as your adversary said,
17 those fee schedules haven't been updated since 2003.

18 MR. LEVY: That's actually not true, Your
19 Honor. The fee schedule has been updated every other
20 year since - - - since going back time immortal. I
21 should have brought it with me today, but the most
22 recent fee schedule was adopted in 2012. Now, there
23 hasn't been a new fee schedule since 2012, but there
24 has been a lot of ongoing dialogue within the
25 Worker's Compensation Board. And in fact, in July of

1 2014, they circulated a memo collectively among the
2 community to try to identify a number of issues
3 where, based on response that would come in, they
4 would address these particular issues.

5 So this is an evolving process. The
6 acupuncture - - - by the way, the acupuncture change
7 that came in, I think came in in 2008 - - -

8 JUDGE ABDUS-SALAAM: Uh-huh.

9 MR. LEVY: - - - in that version of the fee
10 schedule. So not only is there an avenue for them,
11 it - - - it really should be left to the legislature.
12 Our - - - our position is the legislature and the
13 Workers' Compensation Board are the appropriate
14 bodies to leave the question here in light of the
15 statute, in light of the workers' compensation fee
16 schedule, in light of all the other policy
17 considerations that have to be taken into account.
18 Because when the Workers' Compensation Board looks at
19 this, or when the legislature looks at it, it has to
20 look at it in the context of everything else. What
21 disadvantages does this create for ASCs who have
22 spent hundreds of thousands, if not millions of
23 dollars? What is the - - - what is the imposition on
24 the surcharge pool? Do we spread the surcharge pool
25 to the OBSs? Do we make the - - - do we make the

1 OBSs participate in Medicaid and Medicare as a
2 condition of getting a fee? They have no - - - if I
3 may just finish this last thought and then I'll - - -
4 I'll conclude.

5 OBSs are allowed to open wherever they
6 want. I can open one on one corner, on the next
7 corner, on the next corner. There's no geographical
8 restriction, there is no limitation, there is no
9 requirement to make a showing of need. All of those
10 factors are relevant for the legislature and/or the
11 regulator to take into consideration, and we don't
12 think that it's for this court to make those kinds of
13 policy determinations in this case when there's been
14 so much regulation around this.

15 CHIEF JUDGE DIFIORE: Thank you, sir.

16 MR. LEVY: Thank you, Your Honor.

17 CHIEF JUDGE DIFIORE: Counsel.

18 MR. MICHAEL: Thank you.

19 Judge Rivera, to answer your question from
20 before, 68.5 refers to "A service that is performed
21 which is reimbursable under Section 5102(a)1", so it
22 refers specifically to the statute, I think, quite
23 comfortably supplying the - - -

24 JUDGE RIVERA: It refers to a service.

25 MR. MICHAEL: Right, and I think a service

1 certainly includes - - -

2 JUDGE RIVERA: Not the costs associated
3 with the service.

4 MR. MICHAEL: Right, and - - - but it
5 refers to the statute, right? And I think - - -

6 JUDGE RIVERA: Yeah, but it's telling you
7 what category of services to look for, right?

8 MR. MICHAEL: Sure.

9 JUDGE RIVERA: 5102 - - - 02, excuse me,
10 (a)1, to look at sort of the laundry list of the
11 services or the categories of services.

12 MR. MICHAEL: Sure. It - - -

13 JUDGE RIVERA: It doesn't refer to costs
14 or, more importantly for this - - - this discussion
15 here, 5102(a)1's reference to expenses.

16 MR. MICHAEL: Right. I think quite
17 comfortably, a service can be providing the
18 environment for a surgery. That's what - - -

19 JUDGE PIGOTT: Is there a schedule - - - is
20 there a schedule that you would be charged that would
21 limit how much you can charge for this?

22 MR. MICHAEL: There isn't one; that's the
23 problem, that the regulators ought to adopt one.

24 JUDGE PIGOTT: Well, I - - - assuming they
25 don't, I mean, could you say, you know, my service

1 charge for my office is 1,400 dollars, or 5,000
2 dollars?

3 MR. MICHAEL: Well, it goes with the
4 prevailing rate for providers in the locality. And
5 to be clear, these are things that office-based
6 surgery providers have been charging for years,
7 negotiating and paying with insurance companies;
8 they're not some made up arbitrary thing.

9 JUDGE ABDUS-SALAAM: So are you using the
10 same fee schedules that the ambulatory centers use?

11 MR. MICHAEL: No, and that's a mistake in
12 the Second Department opinion. It says that - - -
13 totally false. If you look at record page 544 to
14 545, that's the only bill in the record; contrary to
15 the Second Department's opinion, it does not seek a -
16 - - a repayment under the PAS codes for ambulatory
17 surgery centers. We're not trying to pretend to be
18 an ambulatory surgery center.

19 CHIEF JUDGE DIFIORE: Counsel, going back
20 to Judge Garcia - - - Judge Rivera's question where
21 you started to describe a service can be and - - -

22 MR. MICHAEL: It can be supplying the
23 environment for a surgery, because there's a
24 professional corporation where one doctor or another
25 does the service, but then whoever - - - whichever

1 doctor is charging for the service, it's Avanguard
2 Medical Group PLLC that's giving you the building and
3 all the other stuff - - - it's a service just like a
4 service is - - - I paid for my hotel last night;
5 they're providing me a place - - -

6 JUDGE PIGOTT: Yeah, but it's the same - -
7 - it's the same doctor, right? I mean, we're not
8 fooling anybody. I mean, Dr. Gladstein is the one
9 who is the PLLC.

10 MR. MICHAEL: Right, but his wife doesn't
11 own the office-based surgery practice, and she
12 performs procedures, and she could charge separate -
13 - - or somebody else could do it.

14 JUDGE PIGOTT: Right.

15 MR. MICHAEL: Right. And - - - but
16 Avanguard, that particular professional corporation
17 is what provides the sort of housing for it.

18 JUDGE RIVERA: But I again, I - - - I just
19 can't see how - - - how you have that interpretation
20 of 68.5 if - - - if, as you say, its referring back
21 to the statute, and that's where your hook is, when
22 the statute clearly talks about expenses and
23 services; two different things.

24 MR. MICHAEL: Even if - - -

25 JUDGE RIVERA: Expenses are broader than

1 the services, right? Because you've got the little
2 categories of services.

3 MR. MICHAEL: Sure. I think that what
4 Avanguard is providing can be certainly described as
5 services, but even if not, the question is does it
6 fit within the statute. If that's the case, we get
7 reimbursed, and if - - - look, even if the court
8 concludes you don't use this catch-all, Avanguard
9 qualifies in the statute - - -

10 JUDGE RIVERA: Well, you know, driving - -
11 - driving to the OBS is an expense, right? Do you
12 think that's covered?

13 MR. MICHAEL: No, that's not a necessary
14 medical - - -

15 JUDGE RIVERA: Why not? I've got to get
16 there. How's the doctor going to get there?

17 MR. MICHAEL: How's the doctor - - -

18 JUDGE RIVERA: Or transportation costs.

19 MR. MICHAEL: Right, look if we come up
20 with all sorts of crazy additional charges and things
21 like this, the arbitrators are perfectly capable of
22 saying, no one's ever charged us before; you're
23 making it up. They've been doing this for years, and
24 so to answer your question, Judge Stein, this ties in
25 - - - is this a change in law or not? I would

1 emphasize, by a three to one overruling majority,
2 these were getting paid. This - - - what - - - the
3 only change in the law was the Second Department's
4 decision.

5 JUDGE STEIN: Let me ask you this, were
6 they getting paid under an interpretation - - - the
7 arbitrators' interpretation of these statutes and
8 regs, or were they getting paid under their
9 interpretation of contracts between the providers and
10 the insurance companies?

11 MR. MICHAEL: Strictly by the
12 interpretation of this statute. The predominant
13 theme, where we were winning below, the arbitrators
14 said, statute says all necessary expenses, these are
15 real expenses, you get paid, period. Because what
16 GEICO had been arguing in thousands upon thousands of
17 cases was this only goes to so-called Article 28
18 facilities. And the arbitrators rejected that.

19 JUDGE STEIN: Could - - - could you
20 negotiate for this in your contracts?

21 MR. MICHAEL: Sure. Sure, and some
22 insurance companies pay and - - - and some don't.
23 And let me just address, by the way, Mr. Levy
24 mentioned Medicare and Medicaid, what is undisputed
25 is they pay more in professional fees to office-based

1 surgery providers. Why do they pay more? To cover
2 the expenses, because they know that ambulatory
3 surgery centers and hospitals get an additional
4 facility fee. We don't get that facility fee, so
5 they fixed the anomaly in Medicaid and Medicare, but
6 as the Second Department Decision stands, we have
7 this peculiar result.

8 I used the example before of 1,000 bucks to
9 fix the knee. Why on earth would a doctor do it in
10 an accredited office-based environment when you could
11 walk next door to an ambulatory surgery center, get
12 the same 1,000 bucks with no effort on expenses,
13 because then the ASC can just issue a second 500-
14 dollar bill for its facility fee.

15 JUDGE RIVERA: So - - - so - - - so what's
16 - - - what is the facility fee? Are you amortizing
17 the bricks and mortars? Are you charging for the
18 ongoing costs of the maintenance of the fee? Is it
19 all of the above?

20 MR. MICHAEL: It's all of the above. It's
21 the nurses, the - - -

22 JUDGE RIVERA: So how are you going to
23 amortize that then over time? I mean, what - - -
24 what's going to keep it consistent? What - - - what
25 prevents, maybe not your client, okay - - -

1 MR. MICHAEL: Sure.

2 JUDGE RIVERA: What prevents one of these
3 OBSs from continuing to try and recoup something
4 that's already been covered in the purchase of the
5 facility?

6 MR. MICHAEL: The ambulatory - - -

7 JUDGE RIVERA: I mean, how would the
8 arbitrator know that? How would the insurance
9 company know that?

10 MR. MICHAEL: Look, the ambulatory surgery
11 centers, they charge this fee every procedure, again,
12 and again, and again, so it's the same issue, and the
13 arbitrators have found ways to find a reasonable fee.
14 They go by what's been charged and accepted before,
15 what's been paid by insurance companies; they found
16 ways to do it and they've been doing it in the
17 overwhelming majority of cases.

18 So I see that my light is on, I would just
19 ask that the court consider these arguments and
20 reverse; thank you for your time.

21 CHIEF JUDGE DIFIORE: Thank you, sir.

22 Thank you, counsel.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Government Employees Insurance Co., et al. v. Avanguard Medical Group, PLLC, No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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