NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1762

DOCTORS HOSPITAL OF AUGUSTA

VERSUS

DEPARTMENT OF HEALTH AND HOSPITALS

DATE OF JUDGMENT: SEP 17 2014

ON APPEAL FROM NINETEENTH JUDICIAL DISTRICT COURT
NUMBER C612216, SEC. 27, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE TODD HERNANDEZ, JUDGE

* * * * * *

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* * * * * *

BEFORE: WHIPPLE, KUHN, HIGGINBOTHAM, THERIOT, AND DRAKE, JJ.

Whipple, J. concurs.

Disposition: REVERSED AND REMANDED.

Drake J concurs and assigns written reasons —
Higginbotham, J. dissents.
Theriot, J concurs

KUHN, J.

Plaintiff/appellant, Doctors Hospital of Augusta (Doctors), appeals the district court judgment pursuant to its petition for judicial review under La. R.S. 49:964, which upheld the final decision of defendant/appellee, Department of Health and Hospitals (DHH), denying payment for inpatient hospital services rendered by Doctors to a Louisiana Medicaid recipient. We reverse and remand.

FACTS AND PROCEDURAL BACKGROUND

Forty-six year old Daffney Davis suffered major burns after falling in a bathtub of scalding water. She was admitted to the emergency room at East Jefferson General Hospital (EJGH) in Metairie, Louisiana, on January 21, 2011. Dr. Michael K. Ng, the emergency room physician, determined Davis had suffered at least second degree burns to twenty to twenty-five percent of her body. Because her burns met burn center criteria, Dr. Ng decided Davis had to be transferred to a burn center. Dr. Ng's charge nurse, Michele D. Davenport, contacted Doctors, which has a nationally recognized burn center, the Joseph M. Still Burn Center.[1] Davenport was unaware of Davis's Medicaid status and testified that the patient's insurance status or financial situation is not known to the clinical personnel because their focus is on providing medical care to the patients. Davenport testified that no one at EJGH makes a transfer decision based on the payor status of the patient. Dr. Ng was also not aware of Davis's payor status and testified he normally does not check payor status, especially in a case such as Davis's, as his concern is to take care of the patient as quickly as possible.

Dr. Ng testified that usually he transfers patients to burn centers that have the capability and capacity to take care of the patient, who will accept the patient, and get the patient care quickly. As is customary, Dr. Ng spoke to Dr. Robert F. Mullins, the

[1] Davenport testified that she called Doctors because its representatives had been at EJGH the week before making EJGH aware of their burn unit; Davenport also testified that EJGH had sent burn patients to Baton Rouge General Medical Center (BGMC) in the past and had no issues with that facility.

attending physician and surgeon at Doctors, via telephone before Davis's transfer to discuss her medical condition, and Dr. Mullins accepted the transfer of Davis. Dr. Ng was not sure where Dr. Mullins was located, but knew he was outside of Louisiana.

According to Dr. Ng, Davis's medical condition when she left EJGH was emergent, guarded, and serious, but would have remained stable for travel to Doctors. Dr. Mullins arranged for a medical transport plane to bring Davis to Doctors. During her trip, she was provided medical care by a nurse or nurses. Dr. Mullins also testified that Davis's condition when transferred was emergent because she met the criteria for treatment in the burn center, which is burns over ten percent of the body. He stated that the mortality risk was from thirty to fifty percent with her injuries and that the absence of immediate medical attention would result in higher morbidity and higher risk to the patient. More specifically, he testified that if a burn patient does not get the appropriate fluid resuscitation, "it can definitely be detrimental to your body functions."

On arrival at Doctors later on January 21, 2011, Davis was diagnosed with a forty percent body surface area burn injury, of which half were second degree burns and half were third degree burns. She underwent multiple surgeries, the first two within the first forty-eight hours of her arrival at Doctors. Dr. Mullins opined that transferring her back to Louisiana would have exposed her to outside elements that could have increased the risk of medical problems. Moreover, during her stay at Doctors, the majority of her second degree burns converted to third degree burns. Davis was discharged to EJGH for rehabilitation on March 31, 2011. The total charges Davis incurred at Doctors from January 21, 2011 through March 31, 2011 were $2,813,393.73.

Davis was a Medicaid recipient, but, as EJGH does not make emergency transfer decisions based upon payor status, it was unaware of her status. As a policy,

Doctors does not inquire as to the identity of the payor for a prospective burn patient or the identity of the entity that may ultimately be responsible for payment. (Dr. Mullins did not know Davis was a Medicaid patient and never makes inquiry as to who the patient's payor is when accepting patients for transfer.) Doctors did not become aware that Davis was a Medicaid recipient until Tuesday, January 26, 2011. Faye Whitmire, a nurse at Doctors, stated in her affidavit that she first became aware that Davis was a Medicaid patient on January 26, 2011, and on that date, she made repeated efforts to contact Louisiana Medicaid regarding treatment authorization, but the phone lines were continually busy.[2]

Doctors Hospital submitted a claim to Medicaid of Louisiana on March 25, 2011, which was denied.[3] In its denial letter, Kellea L. Tumminello, program manager with the Managed Care Division within Medicaid at DHH signing for Don Gregory, the Medicaid Director, stated, "The reason for the denial is that the needed treatment is available within the state of Louisiana at Baton Rouge General Hospital [BRGMC] in Baton Rouge, Louisiana. Our policy is to authorize non-emergency out-of-state treatment only when the needed services are not available within the state." DHH treated Doctors' claim as a non-emergency and denied reimbursement on the grounds that needed services were available within the state. Molina Health Solution, DHH's contracted third-party fiscal intermediary, reviewed the claim for DHH, and Dr. Lalid K. Barai, the consulting physician of Molina, recommended denial of out-of-state treatment based on services being available in Louisiana at BRGMC and LSU. However, in his deposition and at the hearing before the administrative law judge, Dr. Barai testified he did not know if there were available beds at BRGMC and LSU on January 21, 2011, when Davis needed admission. On reconsideration, Dr. Barai upheld the denial.

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[2] We take judicial notice of the fact that January 21, 2011 was a Friday and January 26, 2011 was a Tuesday. See ***Chambers v. Russell***, 152 So.2d 349, 351 (La. App. 1st Cir. 1963). See also La. C.E. art. 201(B)(2).

[3] Both Doctors and EJGH are enrolled Louisiana Medicaid providers.

Doctors appealed the denial of payment and an administrative law hearing was held. On March 27, 2012, the administrative law judge recommended that DHH's denial of payment be reversed and the matter remanded to DHH for further consideration. The administrative law judge found that in policy and practice, DHH did not deny reimbursement for emergency admissions because services were available in Louisiana. He determined that the policy was to honor out-of-state emergency services without prior authorization. The administrative law judge also concluded that DHH's policy pursuant to the applicable rule was to reimburse an out-of-state non-emergency claim only if the needed services were not available within the state, but this requirement did not apply to emergency services. However, on April 18, 2012, the Office of the Secretary of DHH submitted a final decision rejecting the recommendation of the administrative law judge. DHH denied payment on the basis that Doctors failed to show that burn centers at BRGMC and LSU Health Sciences Center in Shreveport (LSU) could not have provided care to Davis. The final decision upheld the denial of reimbursement by Medicaid of Louisiana to Doctors.

Doctors sought judicial review in the district court, alleging DHH's decision was arbitrary and capricious and characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. The district court found that the decision of the Secretary upholding DHH's denial of Doctors' request for reimbursement was a reasonable exercise of statutory authority and there was no basis in law or fact to reverse or modify the decision under La. R.S. 49:964. The district court affirmed the decision, and from this judgment, Doctors appeals.

Doctors raises three assignments of error. In its first assignment of error, it contends that DHH's final decision is arbitrary and capricious and characterized by an abuse of discretion or clearly unwarranted exercise of discretion pursuant to La. R.S. 49:964(G)(5). In its second assignment of error it contends that DHH's final

decision is not supported and sustainable by a preponderance of evidence under La. R.S. 49:964(G)(6). Lastly, Doctors asserts that Medicaid of Louisiana received a windfall by denying payment to Doctors.

DISCUSSION

The Louisiana Administrative Procedure Act (APA), at La. R.S. 49:964G, governs the judicial review of a final decision in an agency adjudication, providing that:

> G. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (6) Not supported and sustainable by a preponderance of the evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

The APA further specifies that judicial review shall be conducted by the court without a jury and shall be confined to the record. La. R.S. 49:964(F). When reviewing an administrative final decision, the district court functions as an appellate court. ***Wild v. State, Dep't of Health and Hospitals***, 2008-1056 (La. App. 1st Cir. 12/23/08), 7 So.3d 1, 6. Once a final judgment is rendered by the district court, an aggrieved party may seek review by appeal to the appropriate appellate court. La. R.S. 49:965. On review of the district court's judgment, no deference is owed by the court of appeal to the factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. ***Wild***, 7 So.3d at 6. Consequently, this Court will conduct its own independent review of

the record in accordance with the standards provided in La. R.S. 49:964G.

This Court must review the decision of DHH to determine if it was arbitrary or capricious or characterized by an abuse of discretion or to determine if it is not supported by a preponderance of evidence. The decision of DHH is considered the final decision, not the determination by the administrative law judge. La. R.S. 49:992(D)(2)(b)(iii)(aa); see also 42 U.S.C. 1396. This dispute may be analyzed under either La. R.S. 49:964G(5) or (6), because when the issue on review is an administrative agency's evaluation of the evidence and application of law to facts, our review becomes somewhat intertwined. ***Wild***, 7 So.3d at 6. Credibility determinations of evidence are specifically considered as factual questions under La. R.S. 49:964G(6), but the application of the law to the facts at issue is a legal conclusion subject to analysis under La. R.S. 49:964G(5). ***Wild***, 7 So.3d at 6-7. An arbitrary decision shows disregard of evidence or the proper weight thereof while a capricious decision has no substantial evidence to support it or the conclusion is contrary to substantiated competent evidence. ***Carpenter v. State, Dep't of Health and Hospitals***, 2005-1904 (La. App. 1st Cir. 9/20/06), 944 So.2d 604, 612, writ denied, 2006-2804 (La. 1/26/07), 948 So.2d 174.

A reviewing court should afford considerable weight to an administrative agency's construction and interpretation of its rules and regulations adopted under a statutory scheme that the agency is entrusted to administer, and its construction and interpretation should control unless the court finds it to be arbitrary, capricious, or manifestly contrary to its rules and regulations. ***Rachal, ex rel. Regan v. State, ex rel. Dep't of Health and Hospitals***, 2009-0786 (La. App. 1st Cir. 10/27/09), 29 So.3d 595, 603, writ denied, 2009-2588 (La. 3/5/10), 28 So.3d 1013. An interpretation used by the state administrative agency may be persuasive, but inconsistent interpretation of the overall scheme or use of the wrong rule cannot stand. ***Women's and Children's Hosp. v. State, Dep't of Health and***

Hospitals, 2007-1157 (La. App. 1st Cir. 2/8/08), 984 So.2d 760, 766, aff'd, 2008-946 (La. 1/21/09), 2 So.3d 397. If the evidence, as reasonably interpreted, supports the determination of an administrative agency, its orders are accorded great weight and will not be reversed or modified in the absence of a clear showing that the administrative action is arbitrary and capricious. ***Id.*** Hence, the test for determining whether the action is arbitrary and capricious is whether the action taken is reasonable under the circumstances. Stated differently, the question is whether the action taken was without reason. ***Id.***

The statutory rules of construction and interpretation apply equally to ordinances, rules and regulations. ***Id.*** at 768. When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. La. C.C. art. 10. When the words of a law are ambiguous, the meaning must be sought by examining the context in which they occur and the text of the law as a whole. La. C.C. art. 12. Courts should give effect to all parts of a statute and should not give a statute an interpretation that makes any part superfluous or meaningless, if that result can be avoided. ***Rachal***, 29 So.3d at 605.

The pertinent regulation in this case is Louisiana Administrative Code (LAC) 50:1.701, which is entitled "Out-of-State Medical Care," and which states:

> A. Medicaid coverage is provided to eligible individuals who are absent from the state.
>
> B. Medical claims for out-of-state services are honored when:
> 1. an emergency arises from an accident or illness;
> 2. the health of the recipient would be endangered if he undertook travel or if care and services are postponed until he returns to the state;
> 3. it is general practice for residents of a particular locality to use medical resources in the medical trade areas outside the state; and
> 4. the medical care and service or needed supplementary resources are not available within the state. Prior authorization is required for out-of-state care.

DHH has interpreted LAC 50:1.701(B)(1) and (2) to be the only requirements to honor claims for out-of-state services where the accident or illness causing the emergency situation occurs while the individual is absent from the state and the individual's health would be endangered if he undertook travel or if care and services were postponed until he returned to Louisiana. Tumminello testified that LAC 50.1.701(B)(1) did not apply because Davis was in Louisiana when the emergency happened. Consequently, DHH found that Doctors had to satisfy LAC 50.1.701(B)(4) by proving that medical care and services were not available in Louisiana.[4] Tumminello determined that LAC 50.1.701(B)(4) did not apply because there were two Louisiana facilities that could have treated the burns. DHH referred to the principle that an agency's interpretation of the rule becomes part of the rule.

In its decision, DHH concluded that Davis was not in an "emergency medical condition" such that "immediate medical attention" was not necessary within the meaning of the Medicaid Act. DHH based this finding on Dr. Ng's and EJGH's failure to contact the closest available burn center, which it found was in Louisiana, to obtain the most expeditious treatment possible. Based on the failure to contact a Louisiana burn center, DHH found that Dr. Ng "determined that transport time was not medically significant to necessary treatment of this individual." According to DHH, despite Davis's undergoing a first and second surgical intervention within the first forty-eight hours of her admission to Doctors, "that is not 'immediate' within the meaning of the Medicaid Act." DHH added that Davis was stable enough to travel for a three-hour flight so immediate medical attention was not medically necessary.

[4] Tumminello stated that LAC 50.1.701(B)(3) did not apply because Georgia is not in Louisiana's medical trade area, which generally includes the bordering counties in Texas, Mississippi and Arkansas.

In its first assignment of error, wherein Doctors asserts that DHH's final decision is arbitrary and capricious and characterized by an abuse of discretion, it argues that DHH imposed a burden of proof on Doctors that is unsupported by law and would require Doctors to prove a "negative after the fact," i.e., that a burn unit was not available in Louisiana for Davis on January 21, 2011. Doctors contends that DHH failed to abide by its own policy and is attempting to supplement the Medicaid Hospital Services Provider manual. It argues that it is being penalized for EJGH's failure to determine if there was a Louisiana burn unit available. Doctors' second assignment of error is that DHH's final decision is not supported and sustainable by a preponderance of evidence under La. R.S. 49:964(G)(6) because there is no evidence in the record that the medical care and treatment required by Davis was available in Louisiana at the time of Davis's transfer to Doctors. It next asserts that DHH's final decision misstates the testimony of the witnesses and disregards the overwhelming and undisputed evidence that Davis was in an emergency medical condition requiring immediate medical attention. DHH responds to these assignments of error by arguing that an agency's construction of its regulations is given deference and that it correctly interpreted the regulation at issue.

According to the general rules of statutory construction, unless the context clearly indicates otherwise, the word "and" indicates the conjunctive and the word "or" indicates the disjunctive. ***Smith v. Our Lady of the Lake Hosp., Inc.,*** 624 So.2d 1239, 1249 (La. App. 1st Cir. 1993), aff'd in part, rev'd in part on other grounds, 93-2512 (La. 7/5/94), 639 So.2d 730; see also La. C.C.P. art. 5056. In ***Smith***, the court noted that it was cognizant of the jurisprudence which suggests that, in a civil context, "and" may mean "or" and vice versa. The court then cautioned that when the context of the statutory provision does not clearly indicate otherwise, the court must ascribe a conjunctive meaning to the word "and." ***Id.***

However, to construe LAC 50.1.701(B) to require all of its provisions to be met before coverage is provided based on the use of the word "and" in subsection (3) would lead to the impossible requirement that coverage would only be provided if an individual who was a resident of a particular locality that generally used medical resources in a medical trade area outside of Louisiana was in an accident or suffered an illness giving rise to an emergency condition and whose health would be endangered if he undertook travel or postponed care until he returned to Louisiana, but for which the medical care required was not available within the state. Thus, the word "and" following subsection (3) should be interpreted as "or" so that if any one of the requirements of LAC 50.1.701(B) is met, Medicaid coverage will be provided. According to DHH, it requires only subsections (B)(1) and (B)(2) to be met in emergencies "**only if the 'accident or illness' causing the emergency situation occurs while the individual is 'absent from the state**.'" We note that the federal regulation upon which Louisiana's regulation is based is 42 C.F.R. § 431.52(b), which requires a Medicaid recipient to meet only one of the listed conditions, which are similar to those in the Louisiana regulation, for coverage.[5] Under the federal regulation, if medical services are needed because of an emergency or if medical services are needed and the patient's health would be endangered if he were required to travel to his state of residence, the state plan

[5] 42 C.F.R. § 431.52 states, in pertinent part:

> (b) *Payment for services.* A State plan must provide that the State will pay for services furnished in another State to the same extent that it would pay for services furnished within its boundaries if the services are furnished to a beneficiary who is a resident of the State, and any of the following conditions is met:
>
> (1) Medical services are needed because of a medical emergency;
>
> (2) Medical services are needed and the beneficiary's health would be endangered if he were required to travel to his State of residence;
>
> (3) The State determines, on the basis of medical advice, that the needed medical services, or necessary supplementary resources, are more readily available in the other State;
>
> (4) It is general practice for beneficiaries in a particular locality to use medical resources in another State.
>
> (c) *Cooperation among States.* The plan must provide that the State will establish procedures to facilitate the furnishing of medical services to individuals who are present in the State and are eligible for Medicaid under another State's plan.

should provide payment for those out-of-state services. 42 C.F.R. § 431.52(b)(1) & (2).

Doctors points to the 2007 Louisiana Medicaid Hospital Provider Training Manual, in its section entitled "Out-of-State Hospitals" as to its provisions on "Out-of-State Services" for a different interpretation of the rules for out-of-state emergency care. The Manual states:

> The Louisiana Medicaid Program will reimburse claims for emergency medical services provided to Louisiana Medicaid eligible recipients who are temporarily absent from the state:
>
> - when an emergency is caused by accident or illness.
> - when the health of the recipient would be endangered if the recipient undertook travel to return to Louisiana and
> - when the health of the recipient would be endangered if medical care were postponed until the recipient returns to Louisiana.
>
> Prior Authorization is required for all non-emergency hospitalization, which includes both inpatient and outpatient services. ... When medical care or needed supplemental resources are not available in Louisiana Prior Authorization must be obtained from the Fiscal Intermediary in these non-emergency circumstances.

Under these provisions in the manual, DHH does not deny reimbursement for emergency admissions because services are available in Louisiana.

While an agency's construction is given great weight, to add the additional requirement for coverage that the emergency must arise from an accident or illness occurring out of state to LAC 50.1.701(B)(1) is an abuse of discretion. The federal regulation upon which Louisiana's regulation is patterned, 42 C.F.R. § 431.52(b)(1), does not include language that the medical emergency must arise from an accident or illness outside of the state. Likewise, the Louisiana Medicaid Hospital Training Manual does not include this requirement or the requirement that the needed medical care must not be available in Louisiana. Therefore, substantial evidence does not support its interpretation of the Out-of-State Medical Care regulation. In the instant case, if Davis's medical situation was that of an

emergency due to accident or illness when she was admitted to Doctors, an out-of-state hospital, coverage should be provided.

We conclude that DHH erred in determining that Davis's medical condition did not constitute an emergency simply because she was transported from Louisiana to Doctors' burn unit for three hours by air. The Emergency Medical Treatment and Labor Act (EMTALA) in the Medicaid Act defines "emergency medical condition" as:

> a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in –
>
> A) placing the health of the individual . . . in serious jeopardy,
> B) serious impairment to bodily functions, or
> C) serious dysfunction of any bodily organ or part.

42 U.S.C.A. § 1395(dd)(e)(1)(A).

La. R.S. 40:2113.4(B), the Louisiana counterpart to EMTALA, defines emergency as "a physical condition which places the person in imminent danger of death or permanent disability." Dr. Ng determined that an emergency medical condition existed and stabilized Davis so that she could be transferred to a burn unit, an appropriate facility for treatment.[6] An appropriate transfer is "effected through qualified personnel and transportation equipment, as required including the use of necessary and medically appropriate life support measures during the transfer." 42 U.S.C.A. § 1395dd(c)(2)(D). Davis received emergency medical care from trained clinicians from Doctors on the aircraft while being transported. The fact that she

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[6] EMTALA defines "to stabilize" and "stabilized" as follows:

> **(3)(A)** The term "to stabilize" means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, . . .
> **(B)** The term "stabilized" means, with respect to an emergency medical condition described in paragraph (1)(A), that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), that the woman has delivered (including the placenta).

42 U.S.C.A. § 1395(dd)(e)(A) & (B) .

was stabilized and transported did not change her medical condition to a non-emergency, particularly where she received medical care to keep her stable during the trip. According to Dr. Mullins, "There is an air med that has a fixed-wing service that will pick up burn patients. Their nurses are trained and take care of our patients." When Davis was admitted to Doctors, due to the severity of her burns, she was still in an emergency medical condition. After she was admitted to Doctors, she was given initial fluid resuscitation and received initial cleaning and debridement of her injuries in the trauma debridement room.

We also disagree with DHH's finding that EMTALA did not apply in this case. Pursuant to EMTALA,

> A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (a) of this section or further medical examination and treatment required under subsection (b) of this section in order to inquire about the individual's method of payment or insurance status.
>
> 42 U.S.C.A. § 1395dd(h).

Additionally, according to 42 U.S.C.A. § 1395dd(g):

> A participating hospital that has specialized capabilities or facilities (such as burn units, shock-trauma units, neonatal intensive care units, or (with respect to rural areas) regional referral centers as identified by the Secretary in regulation) shall not refuse to accept an appropriate transfer of an individual who requires such specialized capabilities or facilities if the hospital has the capacity to treat the individual.

EMTALA also deals with an appropriate transfer under 42 U.S.C.A § 1395dd(c)(2), which states in pertinent part:

> (2) Appropriate transfer
>
> An appropriate transfer to a medical facility is a transfer--
>
> **(A)** in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health ...
>
> **(B)** in which the receiving facility--
>
> **(i)** has available space and qualified personnel for the

> treatment of the individual, and
>
> **(ii)** has agreed to accept transfer of the individual and to provide appropriate medical treatment;
>
> **(C)** in which the transferring hospital sends to the receiving facility all medical records (or copies thereof), related to the emergency condition for which the individual has presented . . .
>
> **(D)** in which the transfer is effected through qualified personnel and transportation equipment, as required including the use of necessary and medically appropriate life support measures during the transfer; and
>
> **(E)** which meets such other requirements as the Secretary may find necessary in the interest of the health and safety of individuals transferred.

EMTALA also provides that its provisions "do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C.A. § 1395dd(f). EJGH determined Davis was in an emergency medical condition and appropriately transferred her to Doctors's burn unit by medical air transport for treatment. Doctors was required to provide her care under 42 U.S.C.A. § 1395dd(g). Thus, DHH's conclusions based on the application of the law, represented by LAC 50.1:701(B), to the facts in this matter were arbitrary and capricious.

While DHH found that Dr. Mullins had no duty to check Davis's insurance status before accepting her, it also found that if he had determined her situation was an emergency under EMTALA, he could have asked Dr. Ng if there were any burn centers closer than Georgia to provide immediate attention to Davis. DHH concluded that when immediate attention was medically necessary, an emergency room physician had a duty to transfer the patient to the closest facility to meet the patient's treatment needs. DHH also stated that Louisiana hospitals without burn centers and their emergency room physicians had a duty to be aware of Louisiana burn centers. However, Doctors was unaware of DHH's interpretation of its regulations that the transferring hospital must first determine there is not a

Louisiana hospital capable of treating the patient. Additionally, under EMTALA, Doctors was required to provide Davis with care. There is no support in the law or DHH's Medicaid regulations to impose a duty on Dr. Mullins to inquire if there is a closer burn center with beds available than his.[7]

While we believe that DHH erred in imposing the requirement on Doctors that it show that the necessary medical services were not available in the state, we note that there is no evidence to show that the medically necessary services were available in either of Louisiana's two burn centers on January 21, 2011. Dr. Barai and Tuminello testified that they did not know if there was a bed available for Davis at those burn centers when needed. We note that DHH in its final decision stated that if the administrative law judge's interpretation were adopted as to DHH's rule, "any Medicaid recipient who suffered an accident or injury in Louisiana and goes to any emergency room in Louisiana can be transferred to any hospital with appropriate medical facilities in any of the other 49 states for reimbursement by Medicaid of Louisiana as long as the individual is transported by emergency transportation." However, this statement discounts the emergency room doctor's medical decision to transport a burn victim in an emergency medical condition to a burn center via medical transport for appropriate treatment. Dr. Barai testified he had never had such a situation as presented by this case. Dr. Ng also testified that in his four years as an emergency room physician, he had only treated a few burn patients who had to be transferred to burn centers, and, at the time of his deposition on February 7, 2012, Davis was the most recent burn patient he had

[7] DHH relies on ***J.P. v. Stark County Social Services Board***, 737 N.W.2d 627 (N. Dak. 2007), wherein North Dakota's Department of Human Services denied Medicaid payments for out-of-state medical care to an infant who was referred to a Minnesota hospital for specialized care. DHH's reliance is misplaced, however, because in J.P., whether the infant was in an emergent condition was disputed and the records clearly indicated the child was a Medicaid patient. Moreover, the North Dakota provision for out-of-state medical care for emergencies states, "A determination that the emergency requires out-of-state care may be made at the primary physician's' discretion, but is subject to review by the department." ***Id.*** at 632.

treated and transferred. He also stated that he had transferred some burn patients to BRGMC.

In conclusion, we find that the district court erred in upholding DHH's decision to deny reimbursement to Doctors because substantial rights of Doctors were prejudiced because DHH's decision was arbitrary and capricious under La. R.S. 49:964(G)(5) and was not supported by a preponderance of evidence under La. R.S. 49:964(G)(6). Finding that Doctors' first two assignments of error have merit, we pretermit its last assignment of error, that Medicaid of Louisiana receives a windfall by denying payment to Doctors.

CONCLUSION

For the reasons assigned, we reverse the decision of the district court, which upheld DHH's decision to deny Doctors Hospital of Augusta's request for reimbursement for out-of-state services. We remand this matter to the Department of Health and Hospitals to determine Doctors Hospital of Augusta's reimbursement for the medical care and treatment it rendered to Davis from January 21, 2011 until March 31, 2011. All costs of this appeal in the amount of $737.50 are to be borne by the Department of Health and Hospitals.

REVERSED AND REMANDED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1762

DOCTORS HOSPITAL OF AUGUSTA

VERSUS

DEPARTMENT OF HEALTH AND HOSPITALS

BEFORE: WHIPPLE, C.J., KUHN, HIGGINBOTHAM, THERIOT, DRAKE, JJ.

DRAKE, J., concurring.

I concur with the result of the majority's opinion, but not the reasoning behind it. As the majority accurately states, I believe DHH's understanding of LAC 50:1.701(B)(4), as stated, is correct. I see no conflict with 42 C.F.R. §431.52 because I read Section 431.52(B)(1), which states, "Medical services are needed because of a medical emergency," to likewise inherently contain an extra-state component to the "emergency." Similarly, I find the 2007 Louisiana Medicaid Provider Training Manual to be in accord. In the section entitled "Out-of-State Hospitals," the Manual states, in pertinent part:

> The Louisiana Medicaid Program will reimburse claims for emergency medical services provided to the Louisiana Medicaid eligible recipients **who are temporarily absent from the state**:
>
> - **when an emergency is caused by accident or illness.**
> - when the health of the recipient would be endangered if the recipient undertook travel to return to Louisiana and
> - when the health of the recipient would be endangered if medical care were postponed until the recipient return to Louisiana.
>
> Prior Authorization is required for all non-emergency hospitalization, which includes both inpatient and outpatient services. ... When medical care or needed supplemental resources are not available in Louisiana Prior Authorization must be obtained from the Fiscal Intermediary in these non-emergency circumstances. (Emphasis added.)

The entire paragraph refers to "Louisiana Medicaid eligible recipients who are temporarily absent from the state: when an emergency is caused by accident or illness." To give the above rule the meaning as suggested by the majority opinion would authorize reimbursement to out-of-state providers when the emergency medical situation arises from an intra-state accident or illness. This is considered by me to be an erroneous conclusion.

I do agree with the result of the majority on other grounds. I believe that DHH's final decision was not supported nor sustained by a preponderance of the evidence under La. R.S. 49:964(G)(6) because there is no evidence in the record that the medical care and treatment required by Davis was available in Louisiana at the time of Davis's transfer to Doctors. Even as recently as the oral arguments in this matter, neither litigant knew whether or not a burn unit bed was available in Louisiana on January 21, 2011. Of course, DHH argues that Doctors had the burden of proving the absence of an appropriate, available bed. Contrary, Doctors asserts that DHH would be in the best position to ascertain bed availability. I believe that since DHH was using this asserted fact [an available bed] to deny Doctors's claim for reimbursement, then it was incumbent upon DHH to provide and prove that fact.

For these reasons, I concur in the result.