

STATE OF TENNESSEE

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Opinion No. 07-66

Coverage for Reconstructive Breast Surgery Following Partial Mastectomy

QUESTION

Does Tenn. Code Ann. § 56-7-2507 require an insurance carrier to provide coverage for reconstructive breast surgery following a partial mastectomy?

OPINION

It is the opinion of this Office that Tenn. Code Ann. § 56-7-2507 requires that an insurance carrier that provides coverage for partial mastectomy surgery must also provide coverage for reconstructive breast surgery following a partial mastectomy.

ANALYSIS

In 1997, Tenn. Code Ann. § 56-7-2507 was enacted to require coverage for certain reconstructive breast surgeries related to mastectomies. This statute provides as follows:

(a)(1) Any individual, franchise, blanket or group health insurance policy, medical service plan, contract, hospital service corporation contract, hospital and medical service corporation contract, fraternal benefit society, health maintenance organization, or managed care organization which provides coverage for mastectomy surgery shall provide coverage for all stages of reconstructive breast surgery on the diseased breast as a result of a mastectomy, but not including a lumpectomy, as well as any surgical procedure on the nondiseased breast deemed necessary to establish symmetry between the two (2) breasts in the manner chosen by the patient and physician. The surgical procedure performed on a nondiseased breast to establish symmetry with the diseased breast must occur within five (5) years of the date the reconstructive breast surgery was performed on a diseased breast.

(2) Coverage for reconstructive breast surgery shall be subject to applicable copayments, coinsurance and deductibles.

(b) This section applies to any policy, plan, or contract entered into or renewed on or after July 1, 1997.

Tenn. Code Ann. § 56-7-2507.¹ Under this statute, an insurance carrier who provides coverage for mastectomy surgeries must extend coverage for all stages of a person's reconstructive breast surgery on the diseased breast as a result of a mastectomy, as well as for any surgical procedure on the person's nondiseased breast deemed necessary to establish symmetry between the two breasts.

Shortly after the enactment of Tenn. Code Ann. § 56-7-2507, the Women's Health and Cancer Rights Act (WHCRA) was signed into law on October 21, 1998. This federal act amended the Employee Retirement Income Security Act of 1974 and the Public Health Service Act. The WHCRA requires a group health plan, as well as a health insurance issuer providing health insurance coverage in connection with a group health plan, to provide reimbursement for reconstructive surgery that is associated with a mastectomy. In pertinent part, 29 U.S.C. § 1185b provides:

(a) In general

A group health plan, and a health insurance issuer providing health insurance coverage in connection with a group health plan, that provides medical and surgical benefits with respect to a mastectomy shall provide, in a case of a participant or beneficiary who is receiving benefits in connection with a mastectomy and who elects breast reconstruction in connection with such mastectomy, coverage for--

- (1) all stages of reconstruction of the breast on which the mastectomy has been performed;
- (2) surgery and reconstruction of the other breast to produce a symmetrical appearance; and
- (3) prostheses and physical complications of mastectomy, including lymphedemas;

in a manner determined in consultation with the attending physician and the patient. Such coverage may be subject to annual deductibles and coinsurance provisions as may be deemed appropriate and as are consistent with those established for other benefits under the plan or coverage. Written notice of the availability of such coverage shall be delivered to the participant upon enrollment and annually thereafter.

(e) Preemption, relation to State laws--

(1) In general

¹ During the current session of the General Assembly, legislation has been filed proposing to delete part 25 of chapter 7 of title 56 of the Tennessee Code. (SB 1141/ HB 1232).

Nothing in this section shall be construed to preempt any State law in effect on October 21, 1998, with respect to health insurance coverage that requires coverage of at least the coverage of reconstructive breast surgery otherwise required under this section.

(2) ERISA

Nothing in this section shall be construed to affect or modify the provisions of section 1144 of this title with respect to group health plans.

As stated above, subsection (e)(1) of 29 U.S.C. § 1185b provides that state laws in effect on October 21, 1998, are not to be preempted with respect to health insurance coverage that “requires coverage of at least the coverage of reconstructive breast surgery otherwise required under [§ 1185b].” Thus, in the case of an insurance carrier connected with a group health plan, it becomes necessary to also consider the requirements of 29 U.S.C. § 1185b in determining whether reconstructive breast surgery following a partial mastectomy is required to be covered, because the coverage extended under Tenn. Code Ann. § 56-7-2507 by such a carrier must be equivalent to or greater than the coverage required by 29 U.S.C. § 1185b.

In determining whether a partial mastectomy is required to be covered under Tenn. Code Ann. § 56-7-2507, we are guided by the rules and conventions of statutory construction. The guiding principle of statutory construction is to ascertain and give effect to the intention or purpose of the legislature as expressed in the statute. *Westinghouse Electric Corporation v. King*, 678 S.W.2d 19, 23 (Tenn. 1984), *appeal dismissed*, 105 S.Ct. 1830 (1984). The meaning of a statute is determined by viewing the statute as a whole and in light of its general purpose. *City of Lenoir City v. State ex rel. City of Loudon*, 571 S.W.2d 297, 299 (Tenn. 1978). Legislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used when read in the context of the statute and without any forced or subtle construction to limit the import of the language. *Azbill v. Azbill*, 661 S.W.2d 682, 686 (Tenn. Ct. App. 1983) (citations omitted).

These statutory construction principles are used to analyze Tenn. Code Ann. § 56-7-2507, which, in pertinent part, requires:

coverage for all stages of reconstructive breast surgery on the diseased breast as a result of a mastectomy, but not including a lumpectomy, as well as any surgical procedure on the nondiseased breast deemed necessary to establish symmetry between the two (2) breasts in the manner chosen by the patient and physician.

The term “mastectomy” is not a defined term in Tenn. Code Ann. § 56-7-2507. Based on the information you provided, it appears that some insurance carriers are construing the term “mastectomy” only to mean total breast removal. However, the Merriam-Webster on-line dictionary defines “mastectomy” as “surgical removal of *all or part* of the breast and sometimes associated lymph nodes and muscles.” Similarly, the American Heritage Dictionary states that “mastectomy is the “surgical removal of *all or part* of a breast, sometimes including the excision of the underlying

pectoral muscles and regional lymph nodes.” *American Heritage Dictionary* 835 (3d Coll. ed. 1997). In short, the natural and ordinary meaning of “mastectomy” appears to include the partial removal of a breast as well as the total removal of a breast.

Moreover, other language employed by the Legislature in Tenn. Code Ann. § 56-7-2507 indicates that the Legislature did not intend to exclude coverage for reconstructive breast surgery following a partial mastectomy. As stated above, the only procedure that the Legislature expressly excepts from coverage in Tenn. Code Ann. § 56-7-2507 is a “lumpectomy.” Turning once more to the Merriam-Webster on-line dictionary, a “lumpectomy” is defined as an “excision of a breast tumor with a limited amount of associated tissue.” Similarly, the *American Heritage Dictionary* states that “lumpectomy” is the “surgical excision of a tumor from the breast with the removal of a minimal amount of surrounding tissue.” *American Heritage Dictionary* 806 (3d Coll. ed. 1997). In short, a lumpectomy is a breast preservation procedure. See *Stedman’s Medical Dictionary* 233620 (27th ed. 2000) (“lumpectomy” defined as “removal of either a benign or malignant lesion from the breast with preservation of essential anatomy of the breast”). Partial mastectomies, in many instances, do not preserve the breast and require reconstruction of the breast. For instance, a “modified radical mastectomy” excises all or virtually all of the breast tissue but preserves the pectoral muscle. *Stedman’s Medical Dictionary* (27th ed. 2000). Similarly, a “subcutaneous mastectomy” involves the excision of breast tissues but spares the skin, nipple, and areola. *Id.*

In light of the differing nature of mastectomies from lumpectomies, it would appear that mastectomies should be read to include all types of mastectomies. If the Legislature had wanted to differentiate between types of mastectomies, it could have done so. In *Carr v. Blue Cross of Washington and Alaska*, 971 P.2d 102 (Wash. Ct. App. 1999), the Washington Court of Appeals examined a state statute similar to Tenn. Code Ann. § 56-7-2507 and concluded the same after employing a similar analysis. The court found no reason why a partial mastectomy should not be included in the term “mastectomy” where reconstruction of the breast was necessary following the partial mastectomy. *Carr*, 971 P.2d at 108.

Moreover, the statute provides for surgery on a nondiseased breast when that is necessary to restore symmetry. Thus, on its face, the statute reveals that one of the Legislature’s considerations was the restoration of a person’s appearance following a mastectomy. Remarks by legislators throughout the legislative process emphasize this consideration; making a person whole following a mastectomy was their primary consideration in passing this legislation. (SB 237/ HB 697). Whether a person has a whole breast or part of a breast removed, that person’s appearance and well-being have been altered. There is no indication that the Legislature intended to exclude from Tenn. Code Ann. § 56-7-2507’s ambit a person facing reconstructive breast surgery following a partial mastectomy.

In sum, it is our opinion that Tenn. Code Ann. § 56-7-2507 requires insurance carriers to cover reconstructive breast surgery following a partial mastectomy. It is also our opinion that 29 U.S.C. § 1185b, which applies in the case of an insurance carrier connected with a group health plan, leads to the same conclusion. As in the case of Tenn. Code Ann. § 56-7-2507, “mastectomy” is not a defined term in 29 U.S.C. § 1185b. While we are not aware of any court decisions that address the

question whether 29 U.S.C. § 1185b requires coverage of reconstructive breast surgery following a partial mastectomy, it is our opinion the courts would find partial mastectomies to be included within the term “mastectomy” based on the analysis set forth above. Moreover, unlike Tenn. Code Ann. § 56-7-2507, the WHCRA does not expressly except any procedure from coverage, and nothing on the face of 29 U.S.C. § 1185b indicates that Congress intended to exclude partial mastectomies from coverage. Further, the legislative history of WHCRA clearly reveals that one of Congress’s purposes in passing this Act was to restore a person’s “wholeness,” both physically and mentally, following a mastectomy. Restoration of a person’s “wholeness” is not accomplished by denying coverage to those needing reconstructive breast surgery following a partial mastectomy. Thus, construing 29 U.S.C. § 1185b in a manner that excludes coverage of reconstructive breast surgery following a partial mastectomy would seem to thwart one of the purposes of Congress in passing the WHCRA.

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