

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE DEPARTMENT OF HEALTH AND HUMAN SERVICES
Thomas R. Smith, Hearing Officer

Case Nos. 11-MISC-048, 11-MISC-213, 11-MISC-239, 11-MISC-249, 11-MISC-275, and
12-MISC-019 through 12-MISC-023

Genesis Health Care, Inc,.....Appellant,

v.

South Carolina Department of
Health and Human Services,.....Respondent

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MAY 29 2014
SC Court of Appeals

MOTION FOR REMAND

Appellate Case No.: 2014-000927

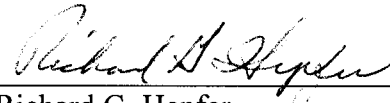
To: Mr. A. Camden Lewis, Esquire, and Ariel King, Esquire, & Mr. James Mixon Griffin,
Esquire PO Box 11208, Columbia, SC 29211; Hon. John M. Milling, Esquire, PO
Drawer 519, Darlington, SC 29540; Mr. Tony Ray Megna, 3400 West Avenue,
Columbia, SC 29203 AND The Honorable Jenny Abbott Kitchings, Clerk of the South
Carolina Court of Appeals, Post Office Box 11629, Columbia, SC 29211

YOU WILL PLEASE TAKE NOTICE that the South Carolina Department of Health and
Human Services (DHHS) HEREBY moves that this matter be remanded to the Department's
Division of Appeals and Hearings for and evidentiary hearing on the issues initially raised by the
Appellant in the agency appeal.

This Motion is based on the interlocutory nature of the Orders appealed as shown by the facts
and law set forth in the attached Memorandum and such facts and law as may be brought forth
afterward.

SIGNATURE BLOCK ON FOLLOWING PAGE

Respectfully Submitted,



Richard G. Hepfer
Deputy General Counsel
Office of General Counsel
South Carolina Department of Health
and Human Services

P. O. Box 8206
Columbia, SC 29202-8206
(Voice) (803) 898-2795
(Fax) (803) 255-8210
Attorney for Defendant, DHHS

May 29, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE DEPARTMENT OF HEALTH AND HUMAN SERVICES
Thomas R. Smith, Hearing Officer

Case Nos. 11-MISC-048, 11-MISC-213, 11-MISC-239, 11-MISC-249, 11-MISC-275, and
12-MISC-019 through 12-MISC-023

Genesis Health Care, Inc,.....Appellant,

v.

South Carolina Department of
Health and Human Services,.....Respondent

MEMORANDUM IN SUPPORT MOTION FOR REMAND

(Appellate Case No.: 2014-000927)

Background

The Respondent, the Department of Health and Human Services (DHHS), is the Single State Agency under 42 USC §1396a, et seq., and S.C. Code Ann. §44-6-10, et seq. to administer the Medicaid Program in South Carolina. As such, the DHHS enters into provider agreements with providers of healthcare for the rendering of services to qualifying beneficiaries of the South Carolina Medicaid Program. The Program is administered completely in accordance with the guidance set forth in statutes within the Social Security Act (mostly in Title XIX of the SSA, 42 USC §1396a et seq.) and the regulations promulgated thereunder.

The Appellant is the parent company of two (2) currently enrolled providers of healthcare to eligible beneficiaries. The providers operate as Federally Qualified Health Centers (FQHCs)

(Olanta Family Care and Pee Dee Health Care). Prior to this appeal, the case was pending before the Department's Division of Appeals and Hearings, under the Department's regulations at S.C. Code R. 126-152 et seq. The matter was scheduled for an evidentiary hearing on May 1, 2014. Now, the Appellant has appealed what the Respondent believes are two (2) procedural Orders of the Department's Hearing Officer dealing with the denial of Subpoenas and other discovery issues.

The Respondent contends that the Appellant has not established appellate jurisdiction because the matter has been brought in the wrong forum. Furthermore, the Respondent contends that the matter is not appealable at this time as the Orders complained of are interlocutory.

Consequently, the Respondent's position is that the matter should be remanded to the Department's Division of Appeals and Hearings for an evidentiary hearing.

Inappropriate Forum

This matter, as a contested case was originally brought before the Appeals Division of the Department of Health and Human Services. See the Appellant's Notice of Appeal, at Attachment I. The jurisdictional statement of at least one (1) of the Appellant's subsequent pleadings invokes sections of the Department's Appeals and Hearing regulations at S.C. Code R. 126-150 through 158. See the Appellant's Motion for Summary Judgment, at Attachment II. Those Regulations are cited in Article IX of the contract between the Parties:

ARTICLE IX
APPEALS PROCEDURE

If any dispute shall arise under the terms of this contract, the sole and exclusive remedy shall be the filing of a Notice of Appeals within thirty (30) days of receipt

of written notice of SCDHHS' action or decision which forms the basis of the appeal. Administrative appeals shall be in accordance with SCDHHS' regulations 27 S.C. Code Ann. Regs. §126-150, et seq. (1976, as amended), and in accordance with the Administrative Procedures Act, S.C. Code Ann. §1-23-310, et seq., (1976, as amended). Judicial review of any final SCDHHS administrative decisions shall be in accordance with S.C. Code Ann. §1-23-380 (1976, as amended).

In their jurisdictional statement in this appeal the Appellant references S.C. Code Ann. §1-23-380 which is part of the South Carolina Administrative Procedures Act (APA). The provision is set forth below:

SECTION 1-23-380. Judicial review upon exhaustion of administrative remedies.

A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. Except as otherwise provided by law, an appeal is to the court of appeals.

Based on that section the Appellant has brought its appeal of the referenced procedural matters to the Court of Appeals. However, the Respondent believes that the Appellant has skipped an essential level of review set forth in S.C. Code Ann. §1-23-600 which provides that:

SECTION 1-23-600. Hearing and proceedings

.....
(D) An administrative law judge also shall preside over all appeals from final decisions of contested cases pursuant to the Administrative Procedures Act, Article I, Section 22, Constitution of the State of South Carolina, 1895, or another law,....

And

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MAY 29 2014

SC Court of Appeals

E) Review by an administrative law judge of a final decision in a contested case, heard in the appellate jurisdiction of the Administrative Law Court, must be in the same manner as prescribed in Section 1-23-380 for judicial review of final agency decisions with the presiding administrative law judge exercising the same authority as the court of appeals, provided that a party aggrieved by a final decision of an administrative law judge is entitled to judicial review of the decision by the court of appeals pursuant to the provisions of Section 1-23-610.

And

(G) Notwithstanding another provision of law, the Administrative Law Court has jurisdiction to review and enforce an administrative process issued by an agency or by a department of the executive branch of government, as defined in Section 1-30-10, such as a subpoena, administrative search warrant, cease and desist order, or other similar administrative order or process. A department or agency of the executive branch of government authorized by law to seek an administrative process may apply to the Administrative Law Court to issue or enforce an administrative process. A party aggrieved by an administrative process issued by a department or agency of the executive branch of government may apply to the Administrative Law Court for relief from the process as provided in the Rules of the Administrative Law Court.

The Respondent believes that the statute contemplates appellate review by the ALC of matters in which the *de novo* or contested case hearing is brought at the agency level, which is factually the situation here. Furthermore, what has been put in issue here is precisely review of the Department's administrative process in the disallowing of discovery such as depositions and Subpoenas, which could possibly be reviewed under (G). The original trust of (G), however, is probably aimed at compulsory process issued by an agency.

The State Legislature recognized the unwieldiness of requiring the Administrative Law Court to have *de novo* hearings for Medicaid appeals when they instituted the Administrative Law Judge Division in 1993. Section 1055 of Act No. 181 of 1993, which established the Division, also changed S.C Code Ann. §44-6-190 of the Department's enabling statutes to read:

SECTION 44-6-190. Applicability of Administrative Procedures Act; compliance with Medicaid disclosure rules.

The department may promulgate regulations pursuant to the Administrative Procedures Act. Appeals from decisions by the department are heard pursuant to the Administrative Procedures Act, Administrative Law Judge, Article 5, Chapter 23 of Title 1 of the 1976 Code....

This section is cited as authority for the proposition that the ALJ sits as an Appellate Tribunal on matters heard on appeal from the Department's final administrative decisions. See Jean Hoefler Toal, Shahin Vafai, and Robert A. Muckenfuss, Appellate Practice in South Carolina, Second Edition (2002).

In the case of Bursey v. South Carolina Department of Health and Environmental Control, 369 S.C. 176 631 S.E.2d 899 (2006), Mr. Bursey and the Mining Association brought an appeal to the Mining Counsel on DHEC's decision to not require SCE&G to get a mining permit when they remediated the Lake Murray dam. The Mining Council reviews such DHEC permitting disputes. Over SCE&G's argument that the appeal should go directly to the ALC, the Court said that, in accordance with S.C. Code Ann. §48-20-60 &190, subject matter jurisdiction was with the Mining Counsel, even though normally DHEC decisions would be appealed to the ALC. In the present case, also, the convention is that the contested case be held at the DHHS, with appeal to the ALC.

In 2011, the Supreme Court issued its decision in Allison v. W.L. Gore & Associates, 394 S.C.185, 714 S.E.2d 547 (2011) overruling the Bursey case insofar as it categorized as a requirement for "subject matter jurisdiction" that an appeal should be taken in accordance with the governing rules. The Court clarified "that the question of compliance with rules, regulations

and statutes governing an appeal is one of “appellate jurisdiction.” The Appellant in this case has not complied with the rules governing this appeal, thereby divesting the Court of Appeals of appellate jurisdiction. The Respondent, therefore submits, that under both Allison and Burse (as modified by Allison), the appropriate remedy in this matter is remand to the Department’s Division of Appeals and Hearings for an evidentiary hearing.

The Orders are Interlocutory.

For administrative matters, the ability to appeal is governed by the South Carolina Administrative Procedures Act (APA), not the general appealability statute at S.C. Code Ann. §14-3-330. See Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep’t of Health & Env’tl. Control, 387 S.C. 265, 692 S.E.2d 894 (2010), which confirms that a different appellate scheme applies for appeals and judicial reviews of administrative determinations. As to appeals from the judicial review to the Supreme Court, the case of Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (2013) further explains the principals of this administrative appellate scheme by determining that under the proper controlling statute, S.C. Code Ann. §1-23-390, an aggrieved party may obtain review of a final judgment of the circuit court or court of appeals by appeal to the Supreme Court. Furthermore, under §1-23-610 a party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final administrative decision in a contested case is entitled to judicial review. “An agency decision which does not decide the merits of a contested case... is not a final agency decision subject to judicial review S.C. Baptist Hosp. v. S.C Dep’t of Health & Environmental Control, 291 S.C. 267, 270, 353S.E. 2d 277, 279 (1987).” As quoted in Bone at 73. So far, there seems to be no other guidance as to the appealability within the administrative process, as here, where the next level of appeal (as

asserted above) under §1-23-600(A)(5) is to the ALC. Presumably, the same principal would apply: that is the decision appealed must be a final decision. Clearly, under the cases cited above, a remand is probably not a final decision. See also Price v. Peachtree Elec. Services, Inc. 405 S.C. 455, 748 S.E.2d 229 (2013).

However, as the Appellant has pointed out “a preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” S.C. Code Ann. §1-23-380. Other than short, unpublished opinions, we could find only Ex parte Wilson, 367 S.C. 7, 625 S.E.2d 205 (S.C.2005) standing for the proposition that quasaal of Subpoenas (admittedly under §14-3-330, and for a non-party’s documents) does not constitute an appealable final decision. Wilson does appear to be indicative of the Court’s general posture toward the appealability of procedural and preliminary matters. As indicated in Bone, at 74, preliminary matters may still be raised on appeal of the final award. (Bone was a worker’s compensation case.)

As further guidance in the administrative context, the South Carolina Supreme Court has declined to allow an appeal of discovery orders issued by the Administrative Law Court, but instead issued a writ of certiorari to vacate the same discovery orders because, while acknowledging that the general scope of discovery is broad, the Court expressed the desire to speak to trial courts regarding overreaching discovery. Oncology and Hematology Assocs. v. DHEC, 387 S.C. 380, 692 S.E.2d 920 (2010).

In sum, the Respondent believes that, even in the administrative context, an appealable order is one that finally decides the merits of the matter. By that measure, the matters complained of in this case are interlocutory, unless it becomes clear that eventual appeal of the agency decision would not provide an adequate remedy.

The aspects of the Orders complained of in this appeal involve transcription of the hearing, failure to issue a Subpoena and the perceived general deficiencies in the discovery permitted by the Hearing Officer.

- 1) As to the transcription of the hearing, the Hearing Officer responded to its request to bring a separate stenographer by informing the Appellant that “An audio recording of the proceedings is made by the Hearing Officer at all Fair Hearings. This recording is the official record for any transcripts if an appeal is taken to a higher court.” See the Hearing Officer’s Pre-Hearing Order of April 11, 2014, attached to the Appellant’s Notice of Appeal (dated April 28, 2014). Thus, the Respondent’s position is that the Hearing Officer was correct in denying, as superfluous, the Appellant’s request. Furthermore, the described practice of the Appeals Division to preserve the proceedings by audio recording and produce transcriptions upon request fully meets the requirements of S.C. Code Ann. §1-23-320(H).

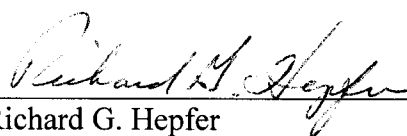
- 2) As to the failure to issue a Subpoena for the director of the agency, Mr. Anthony Keck, the Respondent’s attorney opposed the Subpoena for the reason that: “Staff, not the Director made the policy changes involved. Mr. Keck cannot add any information to the

factual aspects of this case. We, therefore, oppose the Petitioner's [below] request to subpoena the agency director as unnecessary and burdensome, interposed for the purpose of inconveniencing the Department." See the Respondent's e-mail correspondence of April 1, 2014, attached as III and the Affidavit of Mr. Keck regarding his part in setting the FQHC reimbursement rates and "patient liability" policy at Attachment IV.

- 3) As to the failure to allow for extended discovery in this administrative matter, the Respondent opposed for the reason that: "The South Carolina statutes (particularly S.C. Code Ann. § 1-23-320) do not impose upon agencies the obligation to produce discovery upon demand like the South Carolina Rules of Civil Procedure do." Nevertheless, in the spirit of fairness, the Department agreed to three (3) depositions, although that seemed to be excessive for this matter. The Respondent also agreed to exchange documents as described in standard Interrogatory 2. The Respondent also suggested that further discovery not be granted unless first submitted to the Hearing Officer for a determination of particular relevance. See, the Respondent's Return to Motion for Discovery, dated April 9, 2012, Attachment V. The Respondent's three (3) main witnesses were deposed by the Appellant and a fourth witness was questioned (although not under oath). In addition the Appellant made liberal use of the S.C. Freedom of Information Act to obtain documents. See the cover pages to the responses to the FOIA requests at Attachment VI. (The request is included unless the substance of the request is obvious by the response.)

Therefore the Respondent respectfully requests that the Court find that the Orders under appeal are interlocutory and remand the matter to the Department's Appeals Division for a final decision on the merits.

Respectfully Submitted,

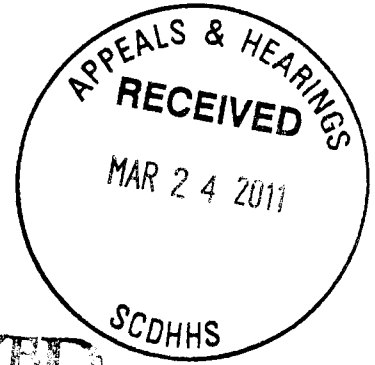


Richard G. Hepfer
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Attorney for Defendant, DHHS

May 29, 2014
Columbia, South Carolina

I

TONY R. MEGNA
ATTORNEY-AT-LAW
3400 WEST AVENUE
COLUMBIA, SOUTH CAROLINA 29203
TELEPHONE: 803-254-3676
tmegna@gmail.com



CERTIFIED MAIL – RETURN RECEIPT REQUESTED

March 21, 2011

Division of Hearing and Appeals
SC Department of Health and Human Services
1801 Main Street
PO Box 8206
Columbia, SC 29202



MAY 28 2011

SC Court of Appeals

Re: Administrative Appeals of Genesis Healthcare Inc., [dba Olanta Family Care in Oltanta, SC and Pee Dee Health Care in Darlington, SC] Federally-Qualified Health Care Center Look-alike, from the final determinations of the Department as more fully described herein.

Ladies and Gentlemen:

Genesis Health Care, Inc. [GHC] respectfully appeals [for all locations] from final Department, including but not limited to he following:

1. The attached letter from CMS dated September 21, 2010 directed to the Director of SCDHHS, Ms. Emma Forker, Directors, of SCDHHS, that states Genesis Health Care, Inc. is “considered an FQHC look-alike with respect to Medicaid coverage and payment, effective September 21, 2010.” The Department, however, has made a final determination that the effective date for GHC to be Medicaid certified as a FQHC look-alike was November 18, 2011 for Olanta Family Care and November 17, 2010 for Pee Dee Health Care [see Article 1 of contracts attached hereto], and that payment was not to begin until those dates. GHC is informed and believes the final determination of the Department in regard to the effective dates of the contract is in error. GHC was not notified that the Department had made a final determination to the contrary of the determination of CMS until February 25, 2011.
2. On the attached contracts dated February 25, 2011 [both being attached hereto and received by Appellant on February 25, 2011], the Department made determinations that are contrary to federal law and regulations. GHC respectfully appeals the following final determination of the Department:
 - a. The Department’s determination that the ambulatory services described in Article VI-A [dental and podiatry] services are not to be reimbursed to GHC

STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIVISION OF HEARINGS AND APPEALS

Genesis Health Care, Inc.

Plaintiff,

v.

South Carolina Department of Health and
Human Services,

Defendant.

MOTION FOR SUMMARY
JUDGMENT, OR, IN THE
ALTERNATIVE, TEMPORARY
RESTRAINING ORDER

(11-MISC-239)

PART I

INTRODUCTION

A

Genesis Health Care, Inc. (hereinafter referred to as "Plaintiff") requests that a hearing on the matters contained herein be held immediately, or for this tribunal to enter an order requiring the South Carolina Department of Health and Human Services (hereinafter referred to as "Department") to immediately refrain from interfering with the contractual reimbursement due Plaintiff's Federally Qualified Health Center.

This tribunal has the authority to enter the relief requested by Plaintiff based on S.C. Regulation 126-150 and 154, which provide:

126-150 C. Hearing Officer--Any Agency employee appointed by the Director to make Decisions either affirming or reversing Agency program determinations by setting forth findings of fact and conclusions of law in appeals arising under this regulation.

126-154. A Hearing Officer has the authority, among other things to: direct all procedures; issue interlocutory orders; schedule hearings and conferences; preside at formal proceedings; rule on procedural and evidentiary issues; require the submission of briefs and/or proposed findings of fact and conclusions of law; call

Rick Hepfer

From: Rick Hepfer
Sent: Tuesday, April 01, 2014 9:41 AM
To: 'Tony Megna'; Thomas Smith
Subject: RE: Subpoenas for Genesis Healthcare v SCDHHS hearing of 5-1-2014
Attachments: Genesis Ruling on Deposition.pdf

We intend to have Jeff Saxon, Debbie Strait, Rebecca Clark, and possibly Val Williams at the hearing. The previous hearing officer denied Mr. Megna's request to depose Mr. Keck for the reasons stated (Order attached). Those reasons still obtain. Staff, not the Director made the policy changes involved. Mr. Keck cannot add any information to the factual aspects of this case. We, therefore, oppose the Petitioner's request to subpoena the agency director as unnecessary and burdensome, interposed for the purpose of inconveniencing the Department.

-----Original Message-----

From: Tony Megna [<mailto:tmegna@gmail.com>]
Sent: Monday, March 31, 2014 7:50 PM
To: Thomas Smith
Cc: Rick Hepfer
Subject: Subpoenas for Genesis Healthcare v SCDHHS hearing of 5-1-2014

Dear Mr. Smith:

I respectfully request you subpoena the following individuals for the Genesis Healthcare v SCDHHS hearing scheduled for May 1, 2014.

1. Anthony Keck
2. Jeff Saxon
3. Rebecca Clark

The request is made pursuant to:

> SC Code Section 1-23-320(D). The agency hearing a contested case may issue subpoenas in the name of the agency for the attendance and testimony of witnesses and the production and examination of books, papers, and records on its own behalf or, upon request, on behalf of another party to the case. A party to the proceeding may seek enforcement of or relief from an agency subpoena before the Administrative Law Court pursuant to Section 1-23-600(F).

I am willing to work around schedules as necessary and as you deem appropriate. Please let me know if there are any issues with the requests at your earliest opportunity. They are necessary witnesses to make a record of the information known by the Department's decision-makers in regards to the allegations of the complaint, particularly the reduced reimbursement to Genesis in violation of state law.

Thanks, Tony Megna

IN THE SOUTH CAROLNA COURT OF APPEALS

Genesis,)	
)	
Appellant,)	CASE NO.: 2014-000927
)	
vs.)	
)	
South Carolina Department of Health and Human Services)	
)	
Respondent.)	
_____)	

**AFFIDAVIT OF DIRECTOR KECK IN SUPPORT
OF RESPONDENT’S MOTION TO DISMISS**

PERSONALLY APPEARED BEFORE ME, Anthony Keck, who, being duly sworn, deposes and states as follows:

1. I am an adult over the age of 18 and am competent to testify as to the facts set forth in this Affidavit;

2. I am the Director of the South Carolina Department of Health and Human Services, (“SCDHHS”);

3. As the Director, I am the highest ranking official at the agency, and I, with the general guidance of the Governor and the General Assembly, set the overall direction and goals of the Department;

4. In my capacity as Director, I am generally aware of, but am not directly knowledgeable about the administration of Department’s reimbursement methodology including the methodology for payment of Federally Qualified Health Centers (FQHCs);

5. Nor, in my capacity as Director, am I knowledgeable about the detailed workings of the Department's Third Party Liability policies as they relate to the payment of Medicare co-payments and deductibles;

6. However, I do know that the Department's State Plan allows payment for FQHC dually eligible patients in the amount of the Medicaid payment less the amount paid by Medicare not to exceed the sum of the Medicare copayment and deductible;

7. Policy Bulletins, Manual Updates, and State Plan Amendments are issued over my signature, and I review them, but I have no direct involvement in drafting them;


8. Furthermore, I have no direct involvement in the development of any specific reimbursement methodology, and I rely on the Staff in the Bureau of Reimbursement Methodology to draft the methodology contained in the State Plan;

9. Once drafted, State Plan Amendments including those regarding reimbursement for specific services and supplemental payments are circulated among relevant staff and I rely on that process to ensure that the Department's reimbursement methodology complies with State and federal requirements;

10. I am aware that the State of South Carolina Medicaid Program covers FQHC services, and I am further aware that there are specific federal requirements for reimbursing FQHC costs, but I have no detailed knowledge of those federal requirements;

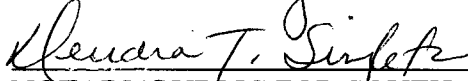
11. I assumed the directorship of the Department in January of 2011, and I am informed and believe that the substance of the State Plan provision setting the reimbursement methodology for FQHCs was promulgated in 2001, long before I was in any way involved with the South Carolina Medicaid Program;

12. The "Patient Liability" policy was finalized during my administration, and I signed the final Bulletin implementing the process, and I have a general knowledge about the policy as described in Item #6, above, but I have relied on staff and the agency review process to insure that the policy is in furtherance of the goals of the South Carolina Medicaid Program and in compliance with State and federal requirements.



Anthony Keck
Director of SCDHHS

SWORN AND SUBSCRIBED TO me
This 27th day of May, 2014



NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 9/22/2018

Effective for dates of service beginning September 15, 2010, payment for Medicare Part B coinsurance and deductibles will be reimbursed as follows for outpatient hospital services and drugs prescribed under Part B.

The Medicaid payment will amount to the Medicaid claim payment less the amount paid by Medicare not to exceed the sum of the Medicare coinsurance and deductible.

For all other Medicare Part B covered services, the Medicaid payment will be limited to the state plan rates.

On or after August 9, 2011, the reimbursement for (all) Medicare Part B is:

The Medicare payment will amount to the Medicaid claim payment less the amount paid by Medicare not to exceed the sum of the Medicare coinsurance and deductible.

Therefore, on or after August 9, 2011, the Petitioner is only reimbursed the Medicare deductible and coinsurance in many cases. Genesis is a Federally Qualified Healthcare Center (FQHC). FQHCs are one of the few provider groups whose Medicaid rates are sometimes higher than Medicare rates. Thus, the change affected the reimbursement that FQHCs receive from Medicaid. As an Example:

Medicaid Rate	\$170
Medicare allowed amount	\$100
Medicare deductible left	\$ 00
Medicare coinsurance	\$ 20
Medicare payment	\$ 80
Medicaid payment	\$ 20


Prior to the change, the FQHC would have gotten \$90 from Medicaid. Our reasoning is that the FQHC has agreed to accept the Medicare (or other insurance-covered) patient for the Medicare

(or third party) payment plus the coinsurance and deductible as payment in full. Therefore, the Medicaid Program should not have to pay more for the service than agreed upon by the patient, the provider and the third party payer.

I suggest that the Parties exchange initial Briefs or position statements and witness lists including a brief statement about the substance of their testimony (Standard Interrogatories 1 & 7) within thirty (30) days of your discovery Order. Since the statute does seem to contemplate discretionary depositions, I would reluctantly agree to three (3) depositions, just in the spirit of cooperation and fairness, although that seems to be excessive for an administrative hearing. Also, the Parties could exchange documents as described in standard Interrogatory 2. This should be with leave to amend by some point prior to the hearing. I see no reason (or statutory authority) for other interrogatories, or requests for admission, and suggest that those not be granted unless they are first submitted to the Hearing Officer for a determination of particular relevance.

Therefore, the Hearing Officer should issue a discovery Order requiring the exchange of witness lists and documents, and no more than three (3) depositions.

Respectfully submitted,



Richard G. Hepfer
Deputy General Counsel
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Post Office Box 8206
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(803) 898-2791
Fax (803) 255-8210
Attorney for the Respondent

Columbia, South Carolina
April 9, 2012

April 21, 2014

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203

Re: Most Recent FOIA, via April 1, 2014 e-mail

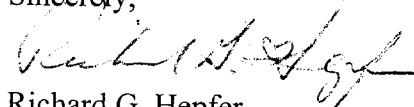
Thank you for your FOIA request associated with your appeal of the Department's "Patient Responsibility" policy. Enclosed is Mr. Keck's position description which sets out the terms of his employment.

Our cost for preparing and reproducing the enclosed information is Eight and thirty-two hundredths dollars (\$8.32). Please make the check payable to the Department of Health and Human Services and send it to:

Department of Health and Human Services
Department of Receivables
Post Office Box 8297
Columbia, SC 29202-8297

I hope this information is helpful to you. Please contact me if there are any questions. My direct is (803)

Sincerely,



Richard G. Hepfer
Deputy General Counsel

Enclosures

cc: Jeff Saxon, Reimbursement
Lynnette Wilson, Receivables

April 18, 2014

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203

Re: Most Recent FOIA, via March 30, 2014 e-mail

Thank you for your FOIA request associated with your appeal of the Department's "Patient Responsibility" policy. Enclosed is the information you requested organized in accordance with the sequence of your request:

1. All documents provided to CMS by the Department to CMS regarding SPA SC-11-005.

The official SPA file is enclosed.

2. All documents provided by or sent by CMS to the Department CMS regarding SPA SC-11-005.

The official SPA file is enclosed.

3. All documents that interpret, provide commentary on, or otherwise comment in anyway whatsoever in the possession and or control of the Department by anyone whosoever on Act 77 of the 2010 legislature.

We cannot locate Act 77 of the 2010 S.C. Legislature. Act 77 of the 2011 legislative year does deal with Proviso 89.87 of the 2010 Legislative year and may be the correct reference. As we have explained in our Briefs, it appears to us that the Proviso 89.87 was not carried forward for the 2011-12 fiscal year, so the effect of the Joint Resolution (Act 77) also expired. Enclosed are Bulletins and other documents that were generated as a result of the expiration of Proviso 89.87 (and by implication Act 77), which allowed the agency to make reimbursement cuts for Medicaid beneficiaries. Note that in some of the documents FQHCs and other specific providers are specifically exempt from the cuts. Please let us know if we have misunderstood your request. We can, if you request, institute a wider search for documents, but the cost of running such a search through our IT Department generally is about \$100.00, and we will need more time to run such a search. Let me know if you would like us to proceed.

4. All correspondence to or from CMS regarding whether or not FQHCs and / or RHCs are subject to the TPL (third-party liability).

We believe that this is likely to be the only specific such correspondence. Ms. Strait is the person in the agency most likely to have had such a conversation, and her entire e-mail chain is enclosed. We do not believe that anyone else communicated with CMS on the issue. However, we will again be happy to run a wider search, and again estimate the cost to be in the \$100 range and take additional time.

5. Any and all documents that explain the first sentence of the second paragraph on the first page of SPA SC-11-005 that states FQHCs and RHCs are exempted from the reductions associated with the SPA due to federal regulations. Please provide copies of the federal regulation documents to which the SPA refers.

We cannot find any other explanatory documents than those sent with the SPA package and Bulletins, etc. that are enclosed related to 1, 2 & 3, above. Although no specific citations are included, we believe that the references to the "regulations" are most likely a general reference to the requirements set forth in §1902(bb) of the Social Security Act [42 USC §1396a(bb)], which I have enclosed. A complete search of the Department's records would cost about \$100.00 and take additional time. Let us know if you would like us to proceed with a complete sweep of the Department's records.

6. Please provide all documents that indicate that the SC state legislature allowed, condoned or otherwise granted permission for the Department to implement the TPL policy as to (third-party liability) as to FQHCs and/or RHCs.

There are no such documents that specifically deal with implementation of the TPL policy (explained in Bulletins on December 10, 2010 and May11, 2011, at Attachment I of the Respondent's Prehearing Brief, submitted on January 21, 2014) with respect to FQHCs and RHCs. The Department made this change in accordance with its authority as the designated Single State Agency in South Carolina for administration of the Medicaid Program, Title XIX of the Social Security Act. See 42 U.S.C. §1396 et. seq. and S.C. Code Ann. §44-6-10 et. seq. See also, federal regulations at 42 CFR §431.10 and state regulations at S. C. Code R. 126 et seq. regarding the authority to administer the Medicaid Program in South Carolina. As previously explained in our Briefs, we believe that the TPL regulations at 42 CFR §433.135 et seq. require the Department to limit supplementary payment to those for which the patent is liable.

7. Please provide all documents from CMS, or elsewhere, that indicate federal law creates a legal obligation on a state to limit Medicaid PPS reimbursement for Medicare patients to Medicare deductibles and co-payments.

The Regulations and the State Medicaid Manual provision were cited in the Department's Initial Brief. The statutory references are at §1902(a)(25) of the Social

Security Act [42 USC §1396a(a)(25)] and is cited in our Initial Brief dated January 21, 2014.

8. Please provide all documents that indicate Act 77 of the 2010 legislature allows the Department to limit Medicaid PPS reimbursement for Medicare patients to Medicare deductibles and co-payments.

Again, we are unable to find Act 77 of the 2010 Legislative year, but we can find Act 77 of the 2011 Legislative year. It is the Petitioner's position that the Act (77 of the first year, 2011, of the two-year 119th Legislative Session), passed in April of 2011, coupled with Proviso 89.87 of the previous Legislative year, prohibits the Department from imposing rate reductions on FQHCs and other providers. Even if that is so, since it is silent on payment of Medicare coinsurance and deductibles, it does not prohibit (allows) the Department from implementing the "patient responsibility" policy which is the subject of the appeals to which this FOIA request relates. Furthermore, since the Proviso was not carried forward, the Respondent believes the effect of both the Proviso and the Joint Resolution (Act 77) was extinguished.

9. Please provide all documents that indicate Act 77 of the 2010 legislature allows the Department to change the methodology for reimbursing the Medicaid PPS reimbursement to FQHCs and/or RHCs by limiting Medicaid PPS reimbursement for Medicare patients to Medicare deductibles and co-payments.

Again, Act 77 of the 2011 Legislative year, since it is silent on payment of Medicare coinsurance and deductibles, does not prohibit (allows) the Department from implementing the "patient responsibility" policy. Furthermore, the implementations of the "patient responsibility" policy does not in any way affect or limit the reimbursement methodology for FQHC Medicaid beneficiaries, as set forth in the South Carolina Medicaid State Plan.

10. Please provide all documents that indicate Genesis Healthcare has agreed to a reduction in the Medicaid PPS reimbursement for any eligible Medicaid beneficiary for any reason.

There are no such documents. Genesis has apparently not yet formally decided whether to accept the payments offered under the Prospective Payment System (PPS) or continue with the Alternate Reimbursement Methodology (ARM), which every other FQHC in the State has chosen. Instead, Genesis has accepted an interim ARM while it negotiates with the Department over which facility has comparable costs. Genesis may decide to accept the ARM, choose the PPS or appeal the calculation of either.

Mr. Tony R. Megna
April 18, 2014
Page 4

11. Please provide all documents that indicate the Department is not required to reimburse Genesis Healthcare its' full Medicaid PPS reimbursement for "dual eligible" patients who qualify for Medicare and *full* benefits under Medicaid.

We believe that the basic rule is set forth in §1902(n) of the social Security Act [42 USC §1396a(n)]. Enclosed is our State Plan provision. Also enclosed is a Health Care Financing Administration (HCFA, the predecessor of CMS) State Medicaid Director letter which explains the changes made by the Balanced Budget Act of 1997 (BBA). Also enclosed, is the State Medicaid Manual (SMM) provision that anticipated the BBA change. There probably has been additional guidance on the BBA provisions throughout the years, but, as is much of the requested information, federal Medicaid guidance is normally available on CMS' website at www.CMS.gov. Should the ARM not be acceptable, the Department will pay Genesis its full PPS reimbursement for all Medicaid patients. Services to "dual eligible" patients will be subject to the "patient responsibility" policy, and the Department will not pay the coinsurance and deductible for any patients who do not have any liability to Genesis therefor.

Our cost for preparing and reproducing the enclosed information is Sixty-seven and ninety hundredths dollars (\$67.90). Please make the check payable to the Department of Health and Human Services and send it to:

Department of Health and Human Services
Department of Receivables
Post Office Box 8297
Columbia, SC 29202-8297

I hope this information is helpful to you. Please contact me if there are any questions. My direct is (803)

Sincerely,



Richard G. Hepfer
Deputy General Counsel

Enclosures

cc: Jeff Saxon, Reimbursement
Lynnette Wilson, Receivables



June 5, 2013

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203

Re: Most Recent FOIA

Thank you for your FOIA request associated with your appeal of the Department's "Patient Responsibility" policy. Enclosed is the information you requested organized as follows:

1) Documents discussing why and/or when and/or how the "(other than nursing facilities)" was added to the Title XIX State Plan.

Please see the folder "other than" on the enclosed disc. This was a sweep of all agency e-mails still retained by the agency including the language in the e-mail or attached documents.

2) Documents evidencing any persons involved in discussions regarding adding the "(other than nursing facilities)" language in the State Plan.

Please see the folder "other than" on the enclosed disc.

3) All documents discussing the need for public notice for the "(other than nursing facilities)" in the State Plan.

Please see the hard copy documents, which are copies of the official State Plan Amendments including the phrase "(other than nursing facilities)."

4) All documents regardless of format discussing any matter with William A. Prince related to the "(other than nursing facilities)."

We could find no such documents. We think that Mr. Prince's tenure with the agency predated the time when the language first appeared in the State Plan.

Our cost for preparing and reproducing the enclosed information is Forty-six and thirty five hundredths dollars (\$46.35). These documents are true and accurate copies of information kept in the normal course of Department business. Please make the check payable to the Department of Health and Human Services and send it to:

Department of Health and Human Services
Department of Receivables
Post Office Box 8297
Columbia, SC 29202-8297

RECEIVED

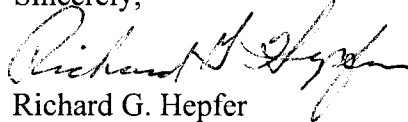
MAY 9 9 2014

SC Court of Appeals

Tony R. Megna, Esquire
June 5, 2013
Page 2 of 2

I hope this information is helpful to you. Please contact me if there are any questions. My direct is (803)

Sincerely,

A handwritten signature in black ink, appearing to read "Richard G. Hepfer". The signature is written in a cursive style with a large, prominent initial "R".

Richard G. Hepfer
Deputy General Counsel

Enclosures



April 10, 2013

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203

Re: Recent FOIA

Dear Mr. Megna:

This is in response to the following March 22, 2013, e-mailed questions (**in bold**):

First, I would appreciate the Department providing the mathematical formula used in determining FQHC reimbursement rates as stated in the approved amendment to the state medicaid plan See page 1(g), Attachment 4.19-B, of MA-013 (RO approval on 11/16/03 with an effective date of paragraph 2, last sentence. See page 1(g), Attachment 4.19-B, paragraph 2, last sentence of the State Medicaid plan).

As you can see by the language in the State Plan, the cost, as determined by the Medicare RHC cost report, is divided by the encounters (or the minimum number of encounters) to determine the rate.

Second, I would appreciate you providing the mathematical formula used in determining the FQHC reimbursement rate for Genesis Health Care, Inc. [We have two clinical office, the first in Olanta, SC, and the second in Darlington, SC]. They both have the same interim reimbursement rate.]

As you may remember, when your facilities were beginning to provide FQHC services as new FQHCs you suggested using a composite rate composed of the average of: 1) Hope Medical's rate (\$150); 2) CareSouth's rate (\$180) and the estimated costs on your pro forma cost report. Your current rate is \$170.66. Enclosed is the portion of the cost report (Part B) that contains the numerator and denominator and your e-mail.

Please accept this information with our compliments, and contact me if there are any questions. My direct is (803) 898-2791.

Sincerely,



Richard G. Hepfer
Deputy General Counsel

Enclosures



April 2, 2013

Adam Freeman
Compliance and Quality Improvement Coordinator
Genesis Health Care, Inc.
3400 West Avenue
Columbia, SC 29203

Re: Public Notice

Dear Mr. Freeman:

Enclosed as you requested, regarding the change in the Department's handling of the Medicaid payment amounts, in TPL cases are the Notices.

Our expense for extracting, reproducing, and mailing this information is twelve and 32/100ths dollars (\$12.32). Please make the check payable to the Department of Health and Human Services and send it to:

Department of Health and Human Services
Department of Receivables
Post Office Box 8297
Columbia, SC 29202-8297

If there are any questions, please feel free to contact me at the address below or at my direct line: (803) 898-2791.

Sincerely,

Richard G. Hepfer
Deputy General Counsel

Enclosures

cc: Lynette Wilson, Receivables (w/o enclosures)



January 21, 2012

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203

Re: Recent FOIA

Dear Mr. Megna:

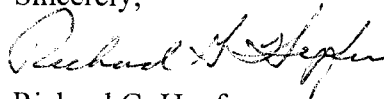
Enclosed at the first Tab is the documentation sent to CMS on State Plan Amendment 11-005. The Attachment (4.19-A) of the State Plan is available at:
http://www1.scdhhs.gov/openpublic/stateplan/Attachment_4.19-A.pdf. If you have any difficulty accessing that site, let me know, and I can print a copy for you. Finally, the second Tab consists of the approval for SPA 11-012, including the attachments.

Our expense for preparing and reproducing the enclosed information is twenty eight and ten hundredths dollars (\$28.10). The documents are true and correct copies of information kept in the regular course of the Department's business. Please make the check payable to the Department of Health and Human Services and send it to:

Department of Health and Human Services
Department of Receivables
Post Office Box 8297
Columbia, SC 29202-8297

I hope this information is helpful to you. Please contact me if there are any questions. My direct is (803) 898-2791.

Sincerely,



Richard G. Hepfer
Deputy General Counsel

Enclosures

cc: Lynette Wilson, Receivables (w/o enclosures)



September 21, 2011

Mr. Tony R. Megna
Attorney-at-Law
3400 West Avenue
Columbia, SC 29201

Re: FOIA Request

Dear Mr. Megna:

Your enclosed FOIA Request was referred to this Office for a response. I believe that the enclosed documents are responsive.

Our cost for producing this information was six and sixty eight hundredths dollars (\$6.68). These documents are true and accurate copies of information kept in the normal course of Department business. Please make the check payable to the Department of Health and Human Services and send it to:

Department of Health and Human Services
Department of Receivables
Post Office Box 8297
Columbia, SC 29202-8297

Please call me if you have any questions. My direct is (803) 898-2791.

Sincerely,

Richard G. Hepfer
Deputy General Counsel

Enclosure

cc: Lynette Wilson, Receivables

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MAY 29 2014
SC Court of Appeals

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SEP 01 2011

Department of Health & Human Services
OFFICE OF THE DIRECTOR

TONY R. MEGNA
ATTORNEY-AT-LAW
3400 WEST AVENUE
COLUMBIA, SOUTH CAROLINA 29201
803.254.3676

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SEP 02 2011

SCDHHS
Office of General Counsel

FREEDOM OF INFORMATION REQUEST

[Faxed to 803.255.8228]

September 1, 2011

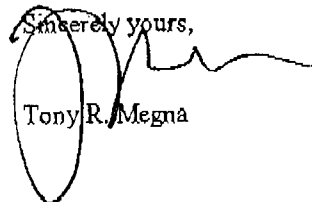
Jeff Saxon
Bureau Chief
Bureau of Reimbursement
Methodology & Policy
SCDHHS
Phone: 803.898.1040

Debbie Strait, Director
Division of Ancillary Reimbursements
SCDHHS
PO Box 8206
Columbia, SC 29202-8206
STRAIT@SCDHHS.GOV
(803) 898-1053

Dear Jeff and Debbie:

This letter is a request for access to public records pursuant to the SC Freedom of Information Act. I would like to review the documents your office has received from CMS indicating that the Medicaid Bulletins dated December 10, 2011 (signed by Emma Forkner and attached hereto) and May 11, 2011 (signed by Anthony Keck and attached hereto) that Debbie informed me this morning do not allow FQHCs [or RHCS] to be paid the 'wrap-around payments' of their allowed Medicaid FQHC [or RHC] reimbursement rates by any third party payer. I will pay any reasonable costs of copying.

For your convenience, please feel free to scan the documents and send them to as a pdf document by email to tmegna@gmail.com. Due to the importance of this matter to the financial well-being of FQHCs and RHCs, and the Medicaid patients we serve, time is of the essence. I respectfully request you expedite this copying and forwarding of these documents to me as soon as possible. Again, please feel free to scan the documents and send them to as a pdf document by email to tmegna@gmail.com. or to contact me on my mobile number, 803.606.5983.

Sincerely yours,

Tony R. Megna

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SEP 01 2011

SCDHHS BUREAU OF REIM.
METHODODOLOGY & POLICY

09/01/2011 11:18AM

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE DEPARTMENT OF HEALTH AND HUMAN SERVICES
Thomas R. Smith, Hearing Officer

Case Nos. 11-MISC-048, 11-MISC-213, 11-MISC-239, 11-MISC-249, 11-MISC-275, and
12-MISC-019 through 12-MISC-023

Genesis Health Care, Inc.,.....Appellant,

v.

South Carolina Department of
Health and Human Services,.....Respondent

CERTIFICATE OF SERVICE

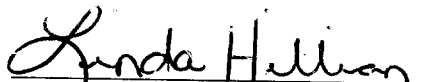
(Appellate Case No.: 2014-000927)

This is certify that I, Linda Hillian, paralegal for the South Carolina Department of Health and Human Services, sent by regular mail, a copy of this Motion for Remand, on the date shown below to:

Mr. A. Camden Lewis, Esquire
Ms. Ariel King, Esquire
Mr. James Mixon Griffin, Esquire
PO Box 11208
Columbia, SC 29211

Hon. John M. Milling, Esquire
PO Drawer 519
Darlington, SC 29540

Mr. Tony Ray Megna
3400 West Avenue
Columbia, SC 29203


Linda Hillian
Paralegal

Columbia, South Carolina
May 29, 2014

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MAY 29 2014

SC Court of Appeals

May 29, 2014

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

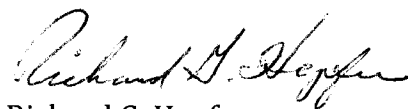
Re: Genesis Health Care v. SCDHHS, Appellate Case No. 2014-000927
Appeal from the Dept. of Health and Human Services, Case Nos. 11-MISC-048,
11-MISC-213, 11-MISC-239, 11-MISC-249, 11-MISC-275, and
12-MISC-019 through 12-MISC-023

Dear Ms. Kitchings:

Thank you for your request for a Memorandum addressing the appealability of the Orders of the Hearing Officer in this matter. Enclosed for filing are an original and six (6) copies of the Respondent's Motion for Remand in this matter and the Memorandum in Support, which sets forth the Respondent's position on the issue of appealability.

If there are questions or anything else is required, my direct is (803) 898-2791.

Sincerely,



Richard G. Hepfer
Deputy General Counsel

Enclosure

cc: Mr. A. Camden Lewis
Mr. James Mixon Griffin
Mr. Arail Elizabeth King
Hon. John M. Milling
Mr. Tony Ray Megna

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MAY 29 2014
SC Court of Appeals