IN THE SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM THE OFFICE OF APPEALS
S.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES
COUNTY OF RICHLAND

GENESIS HEALTH CARE, INC.,
APPELLANT,

V.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,
RESPONDENT.

NOTICE OF APPEAL

Case Numbers:

11-MISC-048
11-MISC-213
11-MISC-239
11-MISC-249
11-MISC-275
11-MISC-019
12-MISC-020
12-MISC-021
12-MISC-022
12-MISC-023

APPELLANT'S MEMORANDUM ON THE ISSUE OF APPEALABILITY AND IN OPPOSITION TO RESPONDENT'S MOTION FOR REMAND

Pursuant to this Court's request, Appellant Genesis Healthcare, Inc. submits this Memorandum addressing the appealabilty of this matter.

BACKGROUND

Appellant Genesis Healthcare, Inc. ("Genesis") is a "Federally Qualified Heath Center" ("FQHC") under 42 U.S.C. Section 1396d(l)(2) and a provider of Medicaid services to Medicaid beneficiaries, with clinical locations in Darlington, South Carolina and Olanta, South Carolina. Genesis a designated essential community provider of healthcare services pursuant to S.C. Ann. Code Section 44-6-910(A), and is entitled to the benefits and protections thereof. Genesis is also entitled to the benefits and protections of the terms and conditions of the 42 U.S.C. Section 1396a(bb), which provides for a specific means of reimbursement for services Genesis provides to Medicaid beneficiaries that cannot be changed or altered by DHHS without the consent of Genesis. Under the provisions of the South Carolina Medicaid Plan approved by "CMS", FQHCs are entitled to 100% cost-based reimbursement for services provided to each Medicaid beneficiary.

In 2010, Respondent South Carolina Department of Health and Human Services ("the Department"), attempted to implement Third Party Liability ("TPL") provisions. TPL refers to the obligation of third parties such as other insurers to pay for medical assistance before the Medicare program will pay for the care of a covered service. Genesis had no notice of the Department's intention and upon learning of such, objected to the Department's application of the TPL provisions to its patients and the resulting reduction of Genesis' reimbursement.

The basis of Genesis' objection was that the South Carolina General Assembly has prohibited the Department from reducing Medicaid payments to FQHC entities such as Genesis, and the TPL policy violates that prohibition.[1] In other words, the Department's application of the TPL policy to Genesis (and other FQHCs) directly contravenes state law.

[1] The Department, through its agents, has already admitted that the effect of the TPL policy is decreased payments to Genesis.

Despite Genesis' objection, the Department refused to reinstate the 100% cost –based reimbursement to which Genesis was entitled. Genesis then sought a hearing with the Department's Division of Hearing and Appeals. In that matter, Genesis sought to depose Anthony Keck, the Director of the Department, as to the Department's purported change in policy in instituting the TPL provisions.[2] The Hearing Officer denied this request by Order dated April 11, 2014. Genesis also sought to bring a court reporter/stenographer, at its own costs, to the Fair Hearing set for April 14, 2014, as permitted by S.C. Code 1-23-320(H). This request was also denied by the April 11, 2014 Order. Finally, Genesis sought a stay of the Fair Hearing until proper discovery could be completed, and the Hearing Officer denied this request as well by Order of April 23, 2014.[3] Genesis then timely appealed the Orders.

I. This Court is not an improper forum.

The Department claims that this Court is an improper forum and that the Administrative Law Court (ALC) must hear any appeals. However, the Department cites to S.C. Code § 1-23-600 (D) and (E) and those sections only apply to "appeals of final decisions." Thus, neither section has any application here. The Department then claims that S.C. Code § 1-23-600(G) has jurisdiction over this appeal, relying on this section: "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." By its explicit language, that section only applies to some process

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[2] The Department claims that the "[t]he change here [the implementation of the TPL policy to FQHCs] is not a change in reimbursement methodology, but only a change in the way the supplementary payments are made." Regardless of the terms used, the Department has, as its spokes people have admitted, reduced funding to FQHCs and fundamentally altered the reimbursement methodology required by 42 USC Section 1396a(bb). The Director of the Department is the only person authorized to promulgate plan amendments for approval by CMS, not the Department's staff.

[3] Now that Genesis has filed the instant appeal, the matters before the Department's Division of Hearings and Appeals has been stayed pursuant to Rule 241, SCACR, but no discovery is being conducted since the Hearing Officer had previously denied Genesis' request for written discovery and depositions.

actually "issued" by the agency; for example, a party was seeking to quash a subpoena issued by an agency could apply to the ALC for relief. Here, however, no process has been issued and nothing for the ALC to relieve.

Furthermore, neither of the cases cited by the Department support their claim that the ALC is the proper forum for this appeal. Bursey v. S. Carolina Dep't of Health & Envtl. Control, 369 S.C. 176, 631 S.E.2d 899 (2006) overruled by Allison v. W.L. Gore & Associates, 394 S.C. 185, 714 S.E.2d 547 (2011) interpreted a code section involving appeals of mining issues, and did not address either S.C. Code § 1-23-680 or 1-23-600. Thus, Bursey has absolutely no application here. The Department cites Allison v. W.L. Gore & Associates, 394 S.C. 185, 714 S.E.2d 547 (2011) as support for its argument that Genesis has not complied with the rules governing this appeal, and therefore the Court is divested of appellate jurisdiction. The Department has misinterpreted the Allison case, which held that the full Workers Compensation Commission, as an appellate body for a single commissioner's decision, could not extend the time to appeal. The timeliness of the appeal is not an issue here. Moreover, Genesis has followed the rules governing an interlocutory appeal of an agency decision pursuant to SCACR and S.C. Code § 1-23-380:

> 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.

Id. Neither of these cases support for the Department's position that the above-quoted section is trumped by 1-23-600(D) and that the ALC is the proper forum.[4]

[4] In addition, the Department's reliance on S.C. Code § 44-6-190, for additional support that the ALC is the proper forum for this appeal, is misplaced. That code section relates to the Department's ability to promulgate regulations,

II. Genesis is entitled to an appeal of the preliminary orders pursuant to S.C. Code 1-1-23-380.

The two orders being appealed are the April 11, 2014 Pre-Hearing Order of the Department's Division of Appeals and Hearings and the April 23, 2014 Order of the Department's Hearing Officer. These Orders, while not final agency decisions under the Administrative Procedures Act, can be appealed pursuant to S.C. Code 1-23-380, which states:

> 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.**

S.C. Code § 1-23-380(A)(emphasis added).

In this matter, a review of the final agency decision would not otherwise provide the Genesis an adequate remedy. The Hearing Officer denied Genesis' request to transcribe the administrative hearing oral proceedings,[5] in violation of Section 1-23-320(H) of the SC Code of Laws ["Oral proceedings or any part of the oral proceedings must be transcribed on request of a party."] requiring that any part of the oral proceedings must be transcribed on request of a party. While the Hearing Officer indicated that a tape recording of the proceeding would be made, that recording cannot take the place of a real-time transcription by a court reporter or stenographer. A court reporter or stenographer can clarify any verbal remarks that take place at the hearing, and he or she can also maintain an accurate record of the exhibits introduced, whereas a passive

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and the forum for appeals related to those regulations, not a " preliminary, procedural, or intermediate agency action or ruling" described in S.C. Code § 1-23-380 and such as the one at issue here.

[5]Order of April 11, 2014 - item 2

audio recorder cannot. This is crucial in the event an appeal on the merits is needed. The opportunity for a real-time transcript will be lost forever if not addressed by this Court at this time.

Likewise, the Hearing Officer's denial of Appellant's right to subpoena Mr. Anthony Keck, Director of the Department, to testify at the hearing[6] cannot be remedied by a review of the final agency decision. S.C. Code § 1-23-320(D) provides that "[the agency hearing contested case may issue subpoenas in the name of the agency for the attendance and testimony of witnesses...on its own behalf or, **upon request, on behalf of another party to the case**." (emphasis added). Despite Genesis' request pursuant to this statute, the Department refused to issue the subpoena, and the order does not even set forth the basis for the denial.

Our Supreme Court has recognized that immediate appeals may be necessary in matters of discovery. Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 292, 692 S.E.2d 526, 529 (2010) (court found that a discovery order was immediately appealable under S.C.Code Ann. § 1-23-380(A)). If Genesis is not permitted to immediately appeal the procedural order denying Genesis the ability to call Director Keck as a witness, Genesis will be substantially prejudiced and an appeal after a decision on the merits does not provide an adequate remedy (and would waste judicial resources) as the only remedy would be to have an entirely new hearing with Director Keck as a witness.

The S.C. General Assembly has given the Department the responsibility to administer and supervise the Medicaid program in South Carolina (S.C. Code Ann. § 44-6-30(1)), and to submit the state Medicaid plan for approval as required by state and federal law. See S.C. Code Ann. § 44-6-30 [The Department shall administer Title XIX of the Social Security Act (Medicaid), ... and S.C. Code Ann. § 44-6-40. Duties: "... (1) Prepare and approve state and federal plans prior to

[6] Order of April 11, 2014 – item 3.

submission to the appropriate authority as required by law for final approval or for state or federal funding, or both...]. The Department submitted the state Medicaid plan to the federal government for approval and the state Medicaid plan has been approved by CMS.

In their pre-trial brief to the Hearing Officer, the Department argued that the "[t]he change here [the implementation of the TPL policy to FQHCs] is not a change in reimbursement methodology, but only a change in the way the supplementary payments are made." However, the plain truth is that the Department has, as its agents have admitted, reduced funding to FQHCs and fundamentally altered the reimbursement methodology required by 42 USC Section 1396a(bb) and have altered the plan approved by CMS.[7] Director Keck is the only person authorized by the Governor to promulgate amendments to the State plan, including the reimbursement methodology, and thus is a crucial witness as to the Department's change in reimbursement (and whether this change was made by the Director or the Department's staff) and alteration to the State plan approved by CMS.

Moreover, when an issue or order that is not entitled to an immediate appeal accompanies an issue that is entitled to an appeal, both issues can be considered on appeal. Hite v. Thomas & Howard Co., 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991) ("[A]n order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and *a ruling on appeal will avoid unnecessary litigation.*") (emphasis added), *overruled on other grounds by Huntley v. Young,* 319 S.C. 559, 462 S.E.2d 860 (1995); see also Ferguson v. Charleston Lincoln/Mercury, Inc., 344 S.C. 502, 509-10, 544 S.E.2d 285, 289 (Ct. App. 2001) aff'd as modified sub nom. Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564 S.E.2d 94 (2002)(allowing appeal of denial of class certification and citing Hite). Thus, even if the denial of the Keck subpoena is not immediately appealable,[8] the denial of Genesis' request

[7] The Department also stated that "Staff, not the Director made the policy changes involved."
[8] Genesis does not concede that that the ruling is unappealable.

for a court reporter or stenographer is immediately appealable under S.C. Code §1-23-380 as set forth above. Since the issues are both contained in the April 11, 2014 Order, they are both appealable and should be considered by this Court.

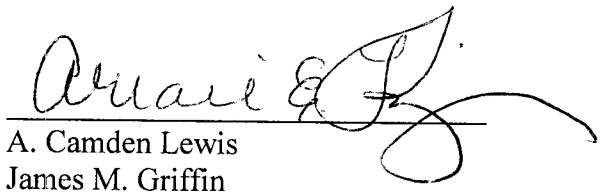
Finally, the April 23, 2014 Order denying Genesis' request to stay the Fair Hearing until discovery had been completed (including both written discovery and depositions of the Department's witnesses) is also appealable under S. C. Code § 1-23-380, or Genesis will be denied adequate review. Under S.C. Code § 1-23-320, a party to a contested case is entitled to take depositions and have subpoenas to compel production of written documents. If the Fair Hearing proceeds without the completion of discovery and depositions and Genesis does not prevail, it will be forced to appeal that decision the final agency decision. Even if Genesis could appeal the procedural order of April 23, 2014 at that time, the only remedy, should this Court determine the Department erred, would be to reverse and require that the discovery proceed before a new Fair Hearing could be scheduled. In that scenario, judicial resources have been wasted, while a decision by this Court now would further judicial economy and streamline any future appeals. *See Edge v. State Farm Mut. Auto. Ins. Co.,* 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (finding resolution of partial denial of motion to dismiss was proper when it was coupled with appeal from partial grant of motion to dismiss because resolution of both was "in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy)").

CONCLUSION

For the reasons set forth herein, Appellant Genesis Healthcare submits that the orders of April 11, 2014 and April 23, 2014 are immediately appealable under S.C. Code § 1-23-380 and Genesis requests that this Court allow the appeal to proceed.

Respectfully submitted,

LEWIS, BABCOCK & GRIFFIN LLP



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PROOF OF SERVICE

I, Connie W. Grugan, secretary to the law firm of Lewis, Babcock & Griffin L.L.P, do hereby certify that I have served a copy of Appellant's Memorandum on the Issue of Appealability and in Opposition to Respondent's Motion for Remand by mailing a copy of the same, postage prepaid and return address clearly indicated, to the following:

Richard G. Hepfer, Esquire
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Connie W. Grugan

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June 2, 2014

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June 2, 2014

HAND DELIVERED
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

Re: Genesis Health Care, Inc. v. SC Dept. of Health and Human Services
Appellate Case No. 2014-000927

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Appellant's Memorandum on the Issue of Appealability and in Opposition to Respondent's Motion for Remand for filing in the above-referenced case. Please return a clocked copy of same via our courier.

By copy of this letter, I am hereby serving a copy of same upon counsel of record.

Sincerely,

LEWIS, BABCOCK & GRIFFIN, L.L.P.

Ariail E. King

Ariail E. King

AEK:cg
Enclosures
cc: Richard G. Hepfer, Esquire