IN THE STATE OF SOUTH CAROLNA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Judge

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Appellate Case No.: 2015-001986

Countrywood Nursing, LLC.....Appellant,

v.

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

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. **Whether Appellant's initial cost report was subject to review by SAO. (Appellant Arguments I. B (2) and (3))**

Appellant claims that the contract between the South Carolina Department of Health and Human Services ("SCDHHS") and the State Auditor's Office ("SAO") limits audit reviews to two cost report periods. Appellant asserts that it is a third-party beneficiary of the contract between SCDHHS and SAO. Appellant further asserts that "public interest" confers standing to enforce the contract between SCDHHS and SAO.

2. **Whether SCDHHS is barred from recovering overpayments to Appellant identified by SAO. (Appellant Arguments I. B (1) and II. B)**

Appellant claims that the contract between SCDHHS and the Appellant bars recovery of disallowances in audit report AC #3-RDM-E8 (addressing the cost report for the period November 29, 2007 through May 31, 2008 and the rate period through September 30, 2009). Appellant asserts that certain disallowances identified in this report were issued more than three years following the close of the contract period under review, thereby preventing SCDHHS from recovering identified overpayments for the period November 29, 2007 through September 30, 2008. Based upon these claims, Appellant seeks to retain $546,968 in identified overpayments for Medicaid services.[1]

STATEMENT OF THE CASE

Appellant, Countrywood Nursing Center, LLC, is a 38-bed nursing facility in Hopkins, South Carolina. Appellant provides services under the South Carolina Medicaid program administered by Respondent, SCDHHS.

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[1] The cost report for the period November 29, 2007 through May 31, 2008 alone resulted in an overpayment of $292,592.00.

SCDHHS contracts with SAO to conduct audit reviews and identify reported costs that do not meet program requirements. On November 22, 2011, SAO issued the final audit reports that are subject to this appeal. Appellant filed a timely appeal for the audit reports AC#3-RDM-J9, cost report period 10/1/08 to 9/30/09 (Appeal Case 12-AUD-010), AC#3-RDM-J8, cost report period 11/29/07 to 9/30/08 (Appeal Case 12-AUD-011) and AC#3-RDM-E8, cost report period 11/29/07 to 5/31/08 (Appeal Case 12-AUD-012). Appellant's appeal included its opposition to a recoupment notice requesting repayment of $546,968 resulting from the cost report audits. Appellant and SCDHHS participated in a prehearing conference, exchanged documents, conducted depositions and filed prehearing briefs. A motion for summary judgment filed by Appellant was denied by order dated December 19, 2012 with permission to raise the issues presented in the hearing.

The hearing was convened on September 17, 2014, in Columbia, South Carolina. The Hearing Officer issued the agency's Final Administrative Decision on December 16, 2014. (R. pp. 8-22) Appellant brought a timely appeal to the Administrative Law Court. By order filed August 19, 2015, the Honorable Deborah Brooks Durden affirmed the Final Administrative Decision. This appeal followed.

STANDARD OF REVIEW

This appeal is governed by the Administrative Procedures Act ("APA"). Under the APA, a reviewing court:

> [M]ay not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. 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:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5)

This standard of review is commonly referred to as the substantial evidence rule. Under the substantial evidence rule, a reviewing court "may reverse or modify an administrative decision if such decision is affected by errors of law, characterized by an abuse of discretion, or clearly erroneous in view of the substantial evidence on the whole record." Todd's Ice Cream, Inc. v. S. Carolina Employment Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984)

> "Substantial evidence" is something less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment.

Id.; see also, Friends of Earth v. Pub. Serv. Comm'n. of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010) (Substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency") Furthermore, "[t]he findings of the agency are presumed correct and will be set aside

only if unsupported by substantial evidence." Kearse v. State Health & Human Servs. Fin. Comm'n., 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995) The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n., 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) Appellant bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." Id.

This Court recently examined the standard to be applied where, as here, challenge is made it an agency's interpretation of its own policies, procedures and guidelines. See, Trident Medical Center v. S.C. Dept. of Health and Environmental Control, 412 S.C. 341, 772 S.E. 2d 177 (Ct. App. 2015) Relying on the opinion of our Supreme Court in Kiawah Development Partners II v. S.C. Dept. of Health and Environmental Control, 411 S.C. 16, 766 S.E. 2d 707 (2014), this Court affirmed an ALC decision that deferred to the agency's position in absence of a showing that it was "arbitrary, capricious, or manifestly contrary to the statute." 412 S.C. at 354, 772 S.E. 2d at 184. As correctly held below, the application by SCDHHS of its own contracts and approved State Plan provisions in this instance was not arbitrary, capricious or manifestly contrary to law. Accordingly, should the Court find Appellant has standing to challenge the contractual relationship between SCDHHS and SAO, the decisions that these agencies acted within their lawful authority must be affirmed.

STATEMENT OF FACTS

The following facts contained in the record before the Hearing Officer and presented to the Administrative Law Judge provide substantial support for the decision on appeal:

1. Providers of Medicaid services are reimbursed for their allowable costs in accordance with Medicare principles as found in the Centers for Medicare and Medicaid Services (CMS) Provider Reimbursement Manual (HIM-15), unless modified by the State Plan.

2. Costs that are reasonable, necessary and related to patient-care are allowable, reimbursable costs under State Plan and HIM-15.

3. As a condition of participation in seeking Medicaid reimbursement, providers must follow the rules set forth in the HIM-15 and State Plan.

4. HIM-15-1, Section 2304 (Adequacy of Cost Information) states in part: "Cost information as developed by the provider must be current, accurate, and in sufficient detail to support payments made for services rendered to beneficiaries. This includes all ledgers, books, records and original evidences of cost (purchase requisitions, purchase orders, vouchers, requisitions for materials, inventories, labor time cards, payrolls, bases for apportioning cost, etc.), which pertain to the determination of reasonable cost, capable of being audited. . ."

5. The State Plan governs delivery of Medicaid services in South Carolina. (R. pp. 231-270) Appellant concedes that the State Plan is an "organic" document that must be read as a whole. (R. p. 617)

6. The State Plan provides that: "All nursing facilities are required to detail their cost for the entire reporting period..." (R. p. 231, Attachment 4.19-D, I. (B))

7. The State Plan provides that cost reports submitted by nursing facilities: "shall be certified by the operator..." (R. p. 232, Attachment 4.19-D, I. (D))

8. The State Plan provides that all nursing facilities must maintain accurate and detailed financial records for "at least six (6) years following the end of the contract period for which the cost report was used to set this rate..." and that such records "must be made available upon demand to representatives of the Medicaid Agency [SCDHHS], or the State Auditor..." (R. p. 233, Attachment 4.19-D, I. (C))

9. The State Plan provides that: "All cost reports are subject to on-site audit." If there is a dispute about audit findings, "[t]he provider has the right to appeal..." through the present process. (R. p. 242, Attachment 4.19-D, II. (F))

10. Appellant entered the South Carolina Medicaid program on November 29, 2007, having obtained an existing nursing facility (Ridgeview Manor). Appellant accepted assignment of the contract for Medicaid services entered between Ridgeview Manor and SCDHHS. (R. p. 272)

11. As a "new facility" Appellant filed an initial cost report for the period November, 29, 2007 through May 31, 2008, rather than the usual annual cost report filed by facilities operating in South Carolina for a year or more. (R. p. 248, Attachment 4.19-D, III. (E)) Appellant's initial cost report set its reimbursement rates through September 30, 2009. (R. pp. 181-182, 612-613)

12. The contract assumed by Appellant provides that: "For purposes of Article V, Section F only [Time Limit on Issuance of the Final Audit Report], **the contract period will be the rate period as defined by the South Carolina State Plan.**" (R. p, 277, Appellant Contract Article II)(emphasis added)

13. The contract assumed by Appellant "expressly incorporates" designated governing laws, regulations, guidelines, and amendments including the State Plan. (R. p. 279, Appellant Contract Article III)

14. The contract assumed by Appellant provides for audits and appeal from audit disallowances. (R. pp. 282-283, Appellant Contract Article V (A) and (B))

15. The contract assumed by Appellant provides that final audit reports "shall be issued within three (3) years of the close of the contract period..." (R. p. 283, Appellant Contract Article V (F))

16. The contract assumed by Appellant provides that all cost reports "shall be certified as true, accurate, and complete..." and shall not include claims for payment that the provider "knows, or has reason to know, are not properly prepared or payable..." (R. pp. 283-284, Appellant Contract Article V (G))

17. The contract assumed by Appellant provides that financial records shall be maintained for the same six year period designated in the State Plan and that such records are subject to inspection "at any time" by SCDHHS, the SAO and other identified agencies. (R. pp. 283-284, Appellant Contract Article V (G)(1) and (2))

18. The contract assumed by Appellant provides that it "shall be construed to be the complete integration of all understandings between the parties hereto." (R. p. 291, Appellant Contract Article IX (L))

19. SCDHHS and SAO have entered contracts for "Agreed –Upon Procedure Activities Related To Medicaid Institutional Providers." These contracts provide that the parties "have a common and concurrent interest in ascertaining that expenditures of

Medicaid funds is in accordance with the Provider contracts and the State Plan." (R. p. 300, SCDHHS/SAO Contract)

20. The cost reports submitted by Appellant contain the following certification: "Under penalties of perjury, I declare that I have examined this cost report, including any accompanying schedule and/or statement, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of the preparer (other than facility owner/personnel) is based on all information of which the preparer has knowledge)" (R. pp. 759, 799)

21. Appellant's initial cost report, for the period November 29, 2007 through May 31, 2008, was signed by its representative on February 11, 2009. (R. pp. 759-798) The cost report did not disclose related party transactions involving the purchase of more than $60,000.00 in "minor equipment." (R. p. 788)

22. Appellant's second cost report, for the period November 29, 2007 through September 30, 2008 was signed by its representative on May 12, 2009. (R. pp.799-839) Like Appellant's initial report, this second cost report did not disclose related party transactions involving the purchase of more than $60,000.00 in "minor equipment." (R. p. 828)

23. Because Appellant's initial cost report was used to set the reimbursement rates through September 30, 2009, non-recurring expenses, including disallowed "minor equipment" purchases, had a reimbursement impact of $131,665.00. (R. pp. 651-652)

24. Terry Schmoyer prepared the cost reports for Appellant. Mr. Schmoyer admitted that the "minor equipment" reported by Appellant was obtained through a related party that was not disclosed as required and certified. Mr. Schmoyer further

admitted that Appellant did not retain records of this transaction. Such records are required as a condition of reimbursement by contract, State Plan and controlling guidelines. (R. pp. 157, 161-162, 174-178)

25. SAO requested documentation relating to the challenged cost reports on July 15, 2011. (R. p. 328)

26. SAO issued final audit reports to Appellant on November, 22, 2011. (R. pp. 359, 380, 396) The reports identified overpayments of $546,968. (R. pp. 505-506)

27. Following issuance of the final audit reports, SAO continued to receive and consider additional information from Appellant through at least August 6, 2012. (R. pp. 187-188, 542)

GOVERNING LAW

This appeal centers upon the terms of contracts and the State Plan that address review of costs associated with providing Medicaid services by nursing facilities in South Carolina. SCDHHS is the agency designated by the State to administer this program and to hear reimbursement appeals. (R. pp. 922-925) SCDHHS contracts with facilities such as Appellant to provide services and with SAO to review the costs claimed by facilities for delivering the services to eligible recipients. The following legal principles govern the issues presented for review.

1. In a contest involving review of a statute, regulation or other public document, the plain language of the document in question controls and there is no need for explanation by way of testimony. See, Paschal v. State Election Comm'n., 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)

2. If there is any question about the meaning or intent of a public document, it is the responsibility of the reviewing body to ascertain the public interest at stake and to rule in a manner that serves that interest. Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994) (an interpretation that leads to an unintended result must be rejected)

3. In determining intent, the reviewing body may consider the interpretation and application of the agency responsible for execution of the legislation. See, Nucor Steel v. South Carolina Public Serv. Comm'n., 310 S.C. 539, 426 S.E. 2d. 319 (1992)

4. Where an administrative agency has consistently applied a statute or regulation in a particular manner, its construction may not be overturned absent cogent reasons. S.C. Cable Television Ass'n. v. Southern Bell Tel. & Tel. Co., 308 S.C. 216, 417 S.E.2d 586 (1992); Emerson Electric Co. v. Wasson, 278 S.C. 394, 339 S.E.2d 118 (1986)

5. The words used in a statute or regulation should be given their ordinary and common meaning, consistent with their manifest purpose. See, Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) A construction or interpretation that leads to an absurd or unintended result must be rejected. Peake v. S.C. Dept. of Motor Vehicles, 375 S.C. 589, 599, 654 S.E.2d 284, 289 (Ct. App. 2007); Jones v. State Farm Mut. Auto Ins. Co., 364 S.C. 222, 232, 612 S.E.2d 719, 724 (Ct. App. 2005)

6. Contractual language is to be construed according to its plain terms and courts are not at liberty to consider unexpressed or secret intentions. See, Lee v. University of South Carolina, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014)

7. Courts are without authority to alter a contract by construction or to make new contracts for the parties. C.A.N. Enterprises, Inc. v. S.C. Health and Human Services Finance Commission, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988), *citing* Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E.2d 445 (1984)

8. In construing the terms in contracts, courts "must first look to the language of the contract to determine the intentions of the parties." 296 S.C. at 377, 373 S.E.2d at 586, *citing* Superior Automotive Insurance Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)

9. Parole or other extrinsic evidence may be considered only if a contract is ambiguous and the evidence may be admitted only to show the intent of the parties. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 888-89 (Ct. App. 1997)

10. The task of the judicial system is to administer judicial functions only. Intervention in legislative, policy or executive functions is both unwarranted and in violation of the constitution. See, State ex rel. McLeod v. Younce, 274 S.C. 81, 261 S.E.2d 303, 306 (1979)

11. The General Assembly "may direct, by law, in what manner claims against the State may be established and adjusted." S.C. Const. art. X § 10.

LEGAL ARGUMENT

I. Appellant's initial cost report was subject to review by the SAO.

A. Appellant has no authority to intervene in the SCDHHS/SAO contract.

Appellant is not a party to the SCDHHS/SAO contract. Moreover its agreement with SCDHHS acknowledges that: "All decisions and determinations regarding the administration of the Medicaid program shall be made by SCDHHS." (R. p. 294, Appellant Contract Art. IX, ¶ GG "Single State Agency Responsible for Medicaid") Appellant's agreement also makes clear that SAO shall have access to Appellant's records for a period of six years following any contract, including amendments or extensions. (R. p. 284, Appellant Contract Art. V, ¶ G.2) The State Plan section on "Auditing" specifically authorizes on site audit of "all cost reports." (R. p. 242, State Plan Attachment 4.19-D ¶ II (H) "Auditing")

Appellant contends that it has third party beneficiary standing to challenge the SCDHHS/SAO contract. To establish standing on this ground, however, Appellant must show that the SCDHHS/SAO contract was intended to create a direct rather than incidental or consequential benefit to Medicaid providers. See, Wogan v. Kunze, 366 S.C. 583, 604, 623 S.E.2d 107, 118 (Ct. App. 2007) This year the United States Supreme Court confirmed that Medicaid laws are in the nature of contracts between governmental entities. In this context, the Supreme Court held that Medicaid agreements are entered "for the benefit of the infirm whom the providers serve, rather than for the benefit of the providers themselves." Armstrong v. Exceptional Child Center, Inc., ____ U.S. ___, 135 S. Ct. 1378, 1387 (2015) The Supreme Court further observed that under modern

jurisprudence, private parties are not entitled to sue or intervene into "contracts between two governments." Id. These controlling principles bar service providers such as Appellant from interfering in the relations between SAO and SCDHHS regarding administration of the State's Medicaid Program. Accordingly, Appellant's argument that SAO is contractually barred from examining more than two cost reports for purposes of issuing final audit reports is not a matter of controversy for disposition by this Court and the orders denying Appellant relief should be affirmed.[2]

Appellant further contends that "public interest" supports its intervention in the contract between SCDHHS and SAO. No authority offered by Appellant supports this argument. For example, Sloan Construction Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008) holds that a third party breach of contract claim may apply against a public entity only if supported by an expression of legislative intent. In Sloan, the required intent was expressed in a statute requiring contractors to maintain bonds protecting the interest of subcontractors on public projects. No such expression of intent is contained in the contract between SCDHHS and SAO. To the contrary, the public interest in confining Medicaid payments to costs documented as reasonable and necessary to achieve program purposes would be undermined by allowing providers to limit audit reviews in a manner inconsistent with the State Plan and controlling law. The limit proposed by Appellant would also subvert legislation incorporated in the

[2] Appellant asserts that "negotiations" between representatives of SCDHHS and Medicaid providers in the 1990's resulted in a two report review limitation. This issue was not addressed by the Administrative Law Judge and is not before the Court. Additionally, questions of credibility were properly reserved for administrative hearing officer. Finally, the parole evidence rule would bar testimony regarding the "intent" of contractual language. See, Gladden v. Keistler, 141 S.C. 524, 542, 140 S.E. 161, 167 (1927)(parole evidence is not admissible to add terms to a contract that expresses the whole agreement between the parties)

SCDHHS/SAO contract authorizing SAO to review Medicaid costs to the full extent available under state and federal law. (R. p. 300, SCDHHS/SAO Contract, "Recitals")

Finally, Appellant argues that the need for "future guidance" supports standing to intervene in the contractual relationship between SCDHHS and SAO, *citing* ATC South, Inc. v. Charleston County, 380 S.C. 191, 669 S.E.2d 337 (2008) Appellant's private interest in maintaining unearned public funds does not satisfy the "level of public importance" necessary to establish standing. Additionally, SCDHHS and SAO may modify their contractual agreement at any time without participation by Appellant or other providers of Medicaid services. Accordingly there is no public interest or future guidance to be served by allowing Appellant to intervene in the relationship between two executive branches of government.

Appellant's attempt to intervene in an agreement between two executive agencies is inconsistent with controlling law and constitutional separation of powers jealously guarded by all branches of government. See, S.C. Const. art. I § 8; Hampton v. Haley, 403 S.C. 395, 743 S.S.2d 258 (2013) (General Assembly plenary power to legislate and executive branch tasked with faithful execution) There being no contest between SCDHHS and SAO, and no violation of law, there is no justiciable controversy requiring intervention by this court in the relationship between two executive branches of government.

B. The SCDHHS/SAO contract does not limit review to two reporting periods.

Should the court wish to consider Appellant's argument, neither the record nor controlling law provide a basis for returning the overpayments requested. For

example, the SCDHHS/SAO contract provides that SAO shall conduct "all engagements to determine if the reimbursement rate or amount is in accordance with the provision of the provider contracts, State Plan, and all state and federal laws and regulations." (R. p. 302, SCDHHS/SAO Contract Art. III, ¶ B.3)) Limiting audit reviews in a manner inconsistent with governing law would be improper and exceed the authority of this Court.

The SCDHHS/SAO contract also states that it is the complete integration of all understandings between the parties. (R. p. 309, SCDHHS/SAO Contract Art. IX, ¶ H)) In keeping with the Armstrong decision, the contract's express purpose is to serve a "common and concurrent interest in ascertaining that the expenditure of Medicaid funds is in accordance with the Provider contracts and the State Plan." This purpose is echoed in the State Plan requirement that all necessary records maintained by Medicaid providers shall be available on demand to SAO. (R. p. 233, State Plan Attachment 4.19-D, ¶ I (E))

If the two reporting periods referenced in the contract were intended to limit audit reviews, a construction denied by SCDHHS, the audit review language would contain limiting terms such as "only." This limitation is not stated in the contract and may not be added to alter the agreement between the parties. (R. p. 303, SCDHHS/SAO Contract Art. III, ¶ D.1); See also, Lee v. University of South Carolina, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014); C.A.N. Enterprises, Inc. v. S.C. Health and Human Services Finance Commission, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988), *citing* Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E.2d 445 (1984)

Appellant contends that the C.A.N. Enterprises opinion requires a finding that audit report AC #3-RDM-E8 (addressing the cost report for the period November 29,

2007 through May 31, 2008 used to set the reimbursement rate through September 30, 2009) was issued in an untimely fashion as it relates to the period November 29, 2007 through September 30, 2008. As the Hearing Officer and Administrative Law Judge correctly observed, however, the C.A.N. opinion addressed language in a **former** contract between the **former** state Medicaid agency and a provider of services. The opinion does not involve interpretation of any agreement between state agencies.

The Hearing Officer and Administrative Law Judge further observed that the **former** Medicaid services contract contested in C.A.N. required audits to be conducted "during the contract period and . . . after termination of this contract and for a period of three years thereafter." 266 S.C. at 376, 373 S.E.2d at 585 The Supreme Court held this **former** Medicaid services contract language required audit reports to be issued within three years of the contract ending date. The audit periods applicable to current contracts are governed by the "**rate period** as defined by the South Carolina State Plan." (R. p. 277, Appellant Contract Art. II, Definitions "Contract Period")) The deadline for issuance of the challenged audit report differs from deadline addressed in the C.A.N. opinion. Accordingly, Appellant's reliance on C.A.N. is misplaced.

C. Appellant's interpretation of the SCDHHS/SAO contract would lead to an absurd result.

Appellant's reading of the contract between SCDHHS and SAO would restrict SAO from examining available records and prohibit SCDHHS from recovering unnecessary and undocumented costs even when a provider reports and certifies costs without required documentation. Neither the plain language of the contact nor the State Plan supports such an absurd outcome. Moreover, there is no evidence that Appellant

relied on the alleged limitation or has suffered any prejudice (apart from repaying unearned funds). As in any contractual relationship, it is for the parties to determine the nature of their agreement. Absent a dispute between SCDHHS and SAO or a statutory mandate, there is no basis to impose a limit on auditors' access to information or issuance of reports.[3] Accordingly, Appellant's attempt to intervene in the contractual relationship between SCDHHS and SAO is not supportable.

Appellant is responsible for documenting costs sufficient to demonstrate that purchases were made, used for patient care and meet all requirements for reimbursement. All transactions between related parties (entities that share common ownership or control) must be documented and limited to actual costs. Reporting undocumented related party costs is an irregularity warranting further review, even if the report related to a period outside the review process.

Terry Schmoyer testified as Appellant's expert and was responsible for preparing Appellant's cost reports. Mr. Schmoyer admitted that undocumented, undisclosed related party transactions were reported for reimbursement. Mr. Schmoyer further admitted that the related party and undocumented nature of these costs were known before the audit review. (R. pp. 161-162, 174-178, 181) Submitting costs that a provider knows or has reason to know are not "true, correct and accurate" violates the cost report certification required as a condition of obtaining reimbursement for Medicaid services. (R. pp. 759, 799) The reporting of undocumented costs authorized review of Appellant's initial report,

[3] Jeff Saxon is the person responsible for drafting both the SCDHHS/SAO contract and the contract assumed by Petitioner. In addition, Mr. Saxon is responsible for State Plan provisions. (R. pp. 190, 651-652) Any question concerning the construction of contractual or Plan language must take into account Mr. Saxon's testimony that, read together, these provisions are intended to allow SAO full access to Medicaid provider records.

regardless of the number or the timing of the report. (R. p. 306, SCDHHS/SAO Contract Art. VI. 6, ¶ A(2); R. pp. 283-284, Provider Contract Art. V, ¶ G; R. pp. 231-233, State Plan 4.19-D) Based upon this record, the Hearing Officer and Administrative Law Judge correctly determined that Appellant has no enforceable claim to maintain unearned public funds.[4]

II. SCDHHS is not barred from recovering overpayments to Appellant.

Appellant further argues that SCDHHS is barred from recovering identified overpayments in report AC #3-RDM-E8 (addressing the cost report for the period November 29, 2007 through May 31, 2008 used to set the reimbursement rate through September 30, 2009) as it relates to the period November 29, 2007 through September 30, 2008. Appellant contends that the language of its contract with SCDHHS supports this position.

The contract assumed by Appellant specifies that "the contract period will be the rate period as defined by the South Carolina State Plan." The State Plan identifies both initial cost reports (commonly called "six month reports" although the periods of less than a year may vary) and annual cost reports. Six month reports follow a change of ownership and allow the new owner an opportunity to obtain a new prospective reimbursement rate. The initial report set the rates for extended periods of time, here November 29, 2007 through September 30, 2009. Differences in reimbursements during

[4] Appellant argues that SAO is limited to review of two cost reports in the absence of "fraud." While fraudulent conduct renders any contractual "restrictions" irrelevant, the Hearing Officer and Administrative Law Judge properly rejected this argument. Notably, however, Appellant's conduct in withholding information regarding related party transactions would qualify as a basis for a fraud investigation in view of the falsity of Appellant's representation, materiality, knowledge of falsity or reckless disregard for truth or falsity, intent that the representation be relied upon and reasonable reliance upon the representation by DHHS. If allowed, Appellant's misrepresentation would have resulted in retention of substantial unearned funds. See generally, Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993)(identifying the nine elements of fraud)

this extended period are based on inflation and amendments to the State Plan, not changes in Appellant's costs. Because the "rate period" determined by Appellant's initial report extended far beyond the period reported and reviewed, Appellant enjoyed significantly enhanced reimbursements.

Appellant argues that because the State Plan offers no express definition, the term "rate period" means any time a rate changes, regardless of the reason. Appellant offers correspondence from SCDHHS using the term "rate period" in this fashion as evidence that the SAO exceeded its authority and that SCDHHS is barred from recouping overpayments. (R. pp. 321-322) It is well established, however, that the representations of public employees, even acting in the scope of employment, cannot alter controlling provisions of law or regulation. Ahrens v. State, 392 S.C. 340, 351, 709 S.E.2d 54, 59 (2011) (Retirement Systems' agents cannot alter benefits) Moreover, the correspondence offered by Appellant is countered by Mr. Saxon, author and recognized expert on the State Plan. Mr. Saxon testified that a "rate period" is the time frame determined by information contained in a cost report and is not limited to the report period itself. (R. pp. 124-128, 134-135, 651-652) Appellant's witness, Mr. Schmoyer, acknowledged that the State Plan must be read in its entirety if questions arise as to its application. (R. pp. 190, 617) Mr. Schmoyer also agreed that Appellant's initial cost report set the base for reimbursement through September 30, 2009. (R. pp. 181-182, 612-613) The challenged audit report was issued on November 22, 2011, well within the three year period following September 30, 2009.

Under the controlling standard of review, it was for the Hearing Officer to weigh the credibility of witnesses and to resolve factual disputes. Specifically,

"[w]here an expert's testimony is based upon facts sufficient to form an opinion, the trier of fact determines its probative value." Berkeley Elec. Co-op., Inc. v. SC Pub. Serv. Comm'n., 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1981); see also, Madden v. Cox, 284 S.C. 574, 583, 328 S.E.2d 108, 114 (Ct. App. 1985) Under this standard, Appellant cannot prevail by arguing that the Hearing Officer should have accepted Mr. Schmoyer's opinion over that of Mr. Saxon. See, Kearse v. State Health & Human Servs. Fin. Comm'n., 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995); Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996)

Reading the State Plan without reference to testimony from Mr. Saxon or Mr. Schmoyer confirms that a "rate period" is the period used to establish the foundation for a provider's reimbursement. The differing treatment afforded initial cost reports in setting extended rates and annual reports setting rates for one year only would make no sense under Appellant's interpretation. Appellant's interpretation of "rate period" would lead to the absurd result of setting different limitations periods for the **same costs**. Indeed, Appellant admits that the costs addressed in AC #3-RDM-E8 and AC #3-RDM-J8 overlap, each starting on November 29, 2007. Appellant does not contest the timeliness of AC #3-RDM-J8, so that overpayments identified in that report are subject to recovery by SCDHHS. Appellant argues, however, that AC #3-RDM-E8 has three reporting deadlines that would render some of the same overpayments shielded from recovery by SCDHHS.

Appellant's construction of the term "rate period" renders the distinction between initial and annual cost reports contained in the State Plan meaningless, ignores the advantages accepted by Appellant due to the extended application of its initial report, and

undermines the public interest in maintaining the fiscal integrity of the Medicaid program. In the absence of a definition section in the State Plan addressing the term "rate period," the meaning of this term must be ascertained by the purpose of the South Carolina Medicaid program and must take into account the whole of the State Plan. This exercise confirms that the meaning of "rate period" offered by Appellant is not consistent with the purpose of the Medicaid program or the State Plan as a whole and must be rejected. See, Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840, 845 (1938) (The meaning of statutory language is not governed by words found in one clause, sentence or part, but by consideration of the whole and the public purpose sought to be accomplished)

CONCLUSION

For the reasons stated in the Final Administrative Decision, the order of the Administrative Law Court and above, controlling law and substantial evidence establish that Appellant is not entitled to retain identified overpayments for Medicaid services. Accordingly, the orders denying Appellant relief should be affirmed.

Respectfully submitted,

By: _____

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December 9, 2015
Columbia, South Carolina

IN THE STATE OF SOUTH CAROLNA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Judge

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Appellate Case No.: 2015-001986

Countrywood Nursing, LLC.....Appellant,

v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

Daniel J. Westbrook, Esquire
Alice V. Harris, Esquire
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This 9th day of December, 2015.

NICKLES LAW FIRM, LLC

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December 9, 2015

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Countrywood Nursing, LLC v. S.C. Department of Health and Human Services; Appellate Case No.: 2015-001986

Dear Ms. Kitchings:

Enclosed for filing, please find Respondent's Initial Brief, Designation of Matter to be Included in the Record on Appeal and Certificate of Service in the above matter. Please file the originals and return the extra, clocked-in copies with the bearer. Thank you for your cooperation and assistance in this matter.

Sincerely,

W. Allen Nickles, III

WAN/pfb
Enclosures
cc: Daniel J. Westbrook, Esquire
Alice V. Harris, Esquire
File #12-089