THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

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SEP 21 2018
SC Court of Appeals

Appellate Case No. 2018-001502
Case No. 10-ALJ-08-0387-AP

Pee Dee Health Care, P.A., ... Respondent,

v.

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

RETURN TO MOTION TO DISMISS

The South Carolina Department of Health and Human Services, Appellant in this case, submits the following by way of Return to the Motion to Dismiss filed by Respondent Pee Dee Health Care, P.A. Respondent's motion is based on a claim that the orders under appeal were not final orders.

This case involves a challenge by one Medicaid provider to the methodology used by the Department of Health and Human Services for reimbursing Rural

Health Clinics under Medicaid. Pee Dee Health Care has conceded that the methodology used by DHHS prior to 2001 was correct. That methodology was a retrospective, or "cost-based" system. Under that system, an interim rate was paid, and then the actual reimbursement rate was determined after the services have been provided, rather than before. In 2000, Congress enacted the Benefits Improvement and Protection Act (BIPA). That statute, codified as 42 U.S.C. § 1396a(bb)(2), changed the method to a prospective system, that is, a method of reimbursement in which payments are made based on a predetermined, fixed amount.

The primary difference between the previous system and the revised system was in the choice of the time period on which the rate was set. The language used to describe the rate itself was unchanged. Thus, the Fourth Circuit noted in a case that arose under the 2000 statute that "at the end of 2000, Congress amended federal law to require States to implement prospective payment systems for funding qualified healthcare providers. The prospective payments prescribed, however, are based on a "reasonable cost" reimbursement requirement similar to the requirements previously applied." *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 460 (4th Cir. 2005)(emphasis added).

In the present case, Pee Dee has contended that the 2000 amendment "repealed" the former methodology. However, as traced by the Fourth Circuit in *Chase Brexton, supra,* the key language from 1989 and through and including the

2000 amendment remained unchanged. That language provided that reimbursement was to be based on "an amount . . . that is equal to [a percentage] of the average of the costs of the center or clinic of furnishing such services [during fiscal years that varied under different versions of the statute] which are [a] reasonable and related to the cost of furnishing such services, or [b] based on such other tests of reasonableness as the Secretary prescribes in regulations." (Emphases added.) The parts of the statutes that varied between 1989 and 2000 were the years on which the computation was based, and the percentages of the figures from those years. However, and to reiterate the point made by the Fourth Circuit in *Chase Brexton,* the definition of "reasonable costs," which is at the core of the present dispute, has never changed from 1989 until now.

Notwithstanding Pee Dee's concession that DHHS computed the pre-BIPA rate correctly, the ALC *sua sponte* held to the contrary:

> The Department's argument assumes that its pre-BIPA method of calculation was consistent with the prior reasonable costs language. Simply because the Department has calculated reimbursement by using the Medicare rate cap in the past, does not mean that its use of the cap was ever consistent with the language of the RHC reimbursement statute.[1]

(Emphasis added.) To the extent that this conclusion holds that the pre-BIPA method of computation was inconsistent with the statutes governing that

[1] The rate cap referenced in the quote is part of the definition of "reasonable costs."

computation, as it appears to do, it improperly overlooked the fact the Pee Dee has conceded otherwise and has never contended that DHHS's pre-BIPA methodology was incorrect. Instead, Pee Dee has always conceded that the prior rates were computed correctly, arguing only that BIPA in 2000 "repealed" prior methods of computing reasonable costs. In reversing on a basis not raised by the Pee Dee, the appellant in the ALC, that court was manifestly in error, all the more so given that Pee Dee conceded the point on which the ALC based its reversal.

In addition to reversing the DHHS Hearing Officer on a basis never raised by, and instead conceded by, Pee Dee, the ALC also never held that BIPA "repealed" anything. As a result, the ALC opinion was in error both in reversing on a basis never raised by Pee Dee, the appellant in that court, and then in not making the requisite finding that BIPA "repealed" prior law, a finding that could not be made in any event, and for which Pee Dee has never provided any support other than bare assertions.

The June 7, 2018 order of the Administrative Law Court, for which rehearing was later summarily denied, concluded with the following paragraph:

> **IT IS HEREBY ORDERED** that the order of the Department is **AFFIRMED** in part and **REVERSED** in part. This matter is **REMANDED** to the Department for a ruling by the Division of Appeals and Hearings. The exclusive issue before the Department is whether to apply option one or option two for the calculation of reasonable costs and the enunciation of test compliant therewith. The Department shall then calculate the

> reimbursement due to the Appellant for the period at issue in this case. The Department may then remit any additional money due to the Appellant or request repayment of any overage.

Order at 20-21 (emphases in original).

In referring to "option one" and "option two," the ALC order was not entirely clear, because the statute, 42 U.S.C. § § 1396a(bb)(2), actually provides for three options. The ALC declined DHHS's request for clarification on this (or any other) point. However, it seems likely that the options are the first two set forth in the statute, which provides that the amounts are to be "[a] reasonable and related to the cost of furnishing such services, or [b] based on such other tests of reasonableness as the Secretary prescribes in regulations." 42 U.S.C. § 1396a(bb)(2). By the use of the term "or," Congress clearly provided that state agencies could use either of the two listed methods.

The ALC order, as already noted, provided that the case was being remanded for DHHS "to apply option one or option two for the calculation of reasonable costs and the enunciation of [a] test compliant therewith." The order then provided that "The Department shall then calculate the reimbursement due to the Appellant for the period at issue in this case."

ARGUMENT

In its motion to dismiss this appeal, Pee Dee cites *Spalt v. S.C. Dep't of Motor Vehicles*, 423 S.C. 576, 816 S.E.2d 579 (2018) for the undisputed proposition that "[a] final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." 423 S.C. at 584, 816 S.E.2d at 583, quoting *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health & Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). However, there is a separate line of cases which holds that where a remand is "merely for a mathematical calculation . . . , rather than for any judgment on the merits[, a]ny further proceedings on remand are purely ministerial and do not require the exercise of independent judgment or discretion on the part of the commission." *Hicks v. Piedmont Cold Storage, Inc.*, 324 S.C. 628, 632, 479 S.E.2d 831, 834 (Ct. App. 1996), *rev'd on other grounds*, 335 S.C. 46, 515 S.E.2d 532 (1999). This general rule has been stated in CJS as follows:

> An appellate court will review a remand to the agency by the original reviewing court where the effect of the remand is to order the agency to perform a ministerial act as this effect is sufficient to constitute a final judgment. In other words, if, on remand, the agency has only to act in accordance with the directions of the court and conduct proceedings on uncontroverted incidental matters or merely make a mathematical calculation, then the order is final for purposes of appeal.

73A C.J.S. Public Administrative Law and Procedure § 561 (footnotes omitted). In ordering a remand to the agency for the "calculation of reasonable costs" and to "calculate the reimbursement due to the Appellant," the ALC order arguably falls within this "ministerial remand" rule, although admittedly the order also provides for "the enunciation of [a] test," which might move the issue on remand beyond that of mere calculation.

Even if the "ministerial remand" rule is not applicable here, however, DHHS submits that the ALC order on the correctness of DHHS's methodology was effectively final on that issue, and that to require hearings on remand would be wasteful, and could have the effect of rendering the ALC's conclusion unreviewable. There is ample precedent elsewhere for permitting review of an order under these circumstances even though the order remands the case, and the appellate courts of this state have never held to the contrary on this specific issue, as far as counsel for DHHS is aware.

The federal appellate jurisdiction statute, 28 U.S.C. § 1291, provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." (Emphasis added.) The applicable statute in this case, S.C. Code Ann. § 1-23-610(a)(1), similarly provides for "judicial review of a final decision of

an administrative law judge. . . ." (Emphasis added.) The U.S. Supreme Court has held as follows with respect to the use of the word "final" in § 1291:

> Under § 1291 an appeal may be taken from any "final" order of a district court. But as this Court often has pointed out, a decision "final" within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545. And our cases long have recognized that whether a ruling is "final" within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction."

Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964). *Accord, e.g., Sullivan v. Finkelstein,* 496 U.S. 617 (1990). The same rule of relying on practicality rather than technicality has been applied in a number of states, *see, e.g., Purser v. Corpus Christi State Nat. Bank*, 256 Ark. 452, 508 S.W.2d 549 (1974), although no South Carolina case has been found which mentions this specific point one way or the other.

It has frequently been held in situations such as the present one that a governmental agency can appeal a decision where at least some of the following circumstances are present: "(1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous

rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." *Collord v. U.S. Dep't of Interior*, 154 F.3d 933, 935 (9th Cir. 1998). Those three tests have been held to be " considerations, rather than strict prerequisites," *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1175 (9th Cir. 2011), citing *Skagit County Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir.1996) (holding that an agency remand that would not foreclose a later appeal was nevertheless "final and appealable"). The third of the three tests, the practical preclusion of review, is embodied in S.C. Code Ann. § 1-23-380, which provides that an order even if "preliminary, procedural, or intermediate[,] . . . is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

In a case that resembles the present case in some ways, the D.C. Circuit held that an order was immediately appealable when the district court invalidated the Treasury Department's method for calculating locality adjustments, and remanded with instructions to select a new methodology, which Treasury viewed as a new choice from among what it has considered to be less desirable alternatives. *Brown v. United States*, 327 F.3d 1198, 1202 (D.C. Cir. 2003). The court reasoned that an immediate appeal represented the agency's only opportunity to challenge the district court's ruling.

In the present case, it appears that the ALC, at a minimum, held that DHHS could not apply caps to the Medicaid reimbursement rate, even though such caps were part of the concededly-correct pre-2000 methodology, and are set forth in other statutes applying the same tests as in the BIPA statute, specifically 42 U.S.C. § 1395l(f). When that statute was enacted in 1987, the pertinent committee report, H.R. Conf. Rep. 100-495 (for P.L. 100–203, Omnibus Budget Reconciliation Act of 1987), noted that

> In determining the reasonable costs, the Secretary has established limits on the total costs per visit that may be considered reasonable.

H.R. Conf. Rep. 100-495, at p. 631, 1987 U.S.C.C.A.N. 2313-1377. This indicates that Congress regarded limits or caps as part of the concept of "reasonable costs," and in fact codified those caps in the statute.

It is possible that the ALC did not intend to hold that DHHS could not apply the same reimbursement rates if it arrived at them through some other rationale, but the ALC order is not sufficiently clear on the point so as to permit a definitive conclusion about what the ALC meant. The ALC declined to explain its order any further, although DHHS requested both clarification and reconsideration. It is also at least possible that DHHS could seek review of the ALC order later, after the remand hearings ordered by the ALC, but that is a most uncertain possibility. If the DHHS were to disagree with the result reached by its hearing officer on remand,

DHHS would then be required to figure out whether to appeal the hearing officer's decision back to the ALC, or to file a second notice of appeal of the ALC's June 2018 decision to this Court.[2] A similar situation was accurately described by the Supreme Court in *Nucor Corp. v. S.C. Dep't of Employment & Workforce*, 410 S.C. 507, 511, 765 S.E.2d 558, 560 (2014), as a "morass."

When the present appeal is viewed in its entirety, it is clear that at a minimum, "the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding," *Collord, supra.* In addition, there is a strong possibility that the ALC order might later be held to have "conclusively resolve[d]" a major legal issue, and that "review [might], as a practical matter, be foreclosed if an immediate appeal were unavailable." *Id.* The same result is mandated by § 1-23-380, which provides that an order even if "preliminary, procedural, or intermediate[,] . . . is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

CONCLUSION

In order to avoid a potentially useless and wasteful remand, as well as a procedural morass that would embody a high level of potential confusion, DHHS respectfully submits that Pee Dee's motion to dismiss should be denied.

[2] It should also be noted that while Pee Dee now claims that the present appeal is premature, Pee Dee has repeatedly tried to make "law of the case" arguments in the past, contending that DHHS did not appeal certain other issues to the ALC. (The ALC did not accept any of those arguments by Pee Dee.)

Alternatively, DHHS requests that this Court hold the motion to dismiss in abeyance, and decide the appealability issue after the merits of the appeal have been fully briefed. The present Return has sought to set forth the issues on appeal as simply as possible, but the case does involve the interpretation of a number of federal statutes and regulations, as well as federal agency interpretations of those statutes and regulations, and a more full explanation via briefing on the merits would permit a better understanding of the issues and why an appeal should be permitted at present.

Respectfully submitted,

DAVIDSON, WREN & PLYLER, P.A.

BY: /Kenneth Woodington/

WILLIAM H. DAVIDSON, II #1558
KENNETH P. WOODINGTON #6213
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant South Carolina Department Health and Human Services

Columbia, South Carolina

September 21, 2018

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson, Wren & Plyler, P.A., counsel for the Appellant, does hereby certify that service of the **Return to Motion to Dismiss** in the above-captioned action was made upon Respondent's counsel by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 21st day of September, 2018, addressed as follows:

James M. Griffin, Esquire
Margaret N. Fox, Esquire
GRIFFIN | DAVIS
1116 Blanding St
Columbia, South Carolina 29201

Tony R. Megna, Esquire
3400 West Avenue
Columbia, South Carolina 29203

Daniel J. Westbrook, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, South Carolina 29211-1070

Melissa S. Segear

DAVIDSON, WREN & PLYLER, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855

William H. Davidson, II
Michael B. Wren
Daniel C. Plyler

David A. DeMasters
Brandon M. Briggs

Of Counsel
Kenneth P. Woodington

Writer's Email: kwoodington@dml-law.com

September 21, 2018

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
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SC Court of Appeals

RE: Pee Dee Health Care, P.A. v. South Carolina Department of Health and Human Services
Civil Action Number: 10-ALJ-08-0387-AP
Our File Number: 104.6954

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the **Return to Motion to Dismiss** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of courier.

By copy of this letter, I am hereby serving copies on all counsel of record.

Thank you for your assistance in this matter.

With highest regards, I am

Sincerely yours,

DAVIDSON, WREN & PLYLER, P.A.

/s/

Kenneth P. Woodington

KPW/mss
Enclosures
cc: James M. Griffin, Esquire *(Via U.S. Mail Only)*
Margaret N. Fox, Esquire *(Via U.S. Mail Only)*
Daniel J. Westbrook, Esquire *(Via U.S. Mail Only)*
Tony R. Megna, Esquire *(Via U.S. Mail Only)*