20-161

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-

STATE OF WEST VIRGINIA, ex rel.

HEARTLAND OF BECKLEY WV, LLC
HEARTLAND OF CLARKSBURG WV, LLC
HEARTLAND OF MARTINSBURG WV, LLC
HEARTLAND OF RAINELLE WV, LLC
HEARTLAND-PRESTON COUNTY OF KINGWOOD, LLC
HEALTH CARE and RETIREMENT CORPORATION OF AMERICA, LLC
d/b/a HEARTLAND OF CHARLESTON,
Petitioners,

v.

WEST VIRGINIA BUREAU FOR MEDICAL SERVICES,
Respondent.

PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

Whether Petitioners are entitled to a writ of prohibition, requiring compliance with this Court's prior decision and, specifically, requiring the hearing examiner for the Bureau of Medical Services to issue a ruling based on the evidence presented at the remand hearing, rather than ordering a third evidentiary hearing?

II. STATEMENT OF THE CASE

A. Statement of Procedural History and Relevant Facts

This petition arises out of the failure of the Bureau for Medical Services ("the Bureau" or "BMS"), a division of the Department of Health and Human Resources ("DHHR"), to comply with a prior decision of this Court in this matter: *Heartland of Beckley WV, LLC v. Bureau for Medical Services*, No. 15-0595, 2016 WL 6248620 (W. Va. Oct. 26, 2016). In the prior decision, this Court reviewed the scope of "allowable costs" to be considered in the Bureau's payment formula for nursing home facilities that have high deductibles as part of their insurance policies. For such facilities, most expenses of malpractice defense are paid directly, rather than through the insurance carrier. Petitioners (collectively "HCR") included these costs as allowable malpractice insurance expenses on their cost reports, on which the BMS payments are based. In the decision under review in the prior appeal to this Court, the Bureau had held that the "practice of paying claims directly without entering into an agreement with an independent fiduciary" does not meet the provisions of the federal Provider Reimbursement Manual ("PRM") § 2162.7, and thus "such payments are not an allowable expense to the West Virginia Medicaid Program." A.R. 20, ¶ 18.

By memorandum decision dated October 26, 2016, this Court rejected that legal conclusion and reversed the circuit court's order affirming the Bureau's decision that settlement costs were not allowable expenses. *Heartland of Beckley WV, LLC*, 2016 WL 6248620. This Court found that the Bureau failed to apply governing federal regulatory guidance from a different section of

the PRM—PRM § 2162.5—which, subject to certain limits, expressly allows a nursing facility to "include first dollar losses within its liability insurance deductible as an allowable cost."

The Court noted, however, that federal regulatory guidance also provides some limitations, and that PRM § 2162.5 sets a limit on reimbursement to "reasonable costs" of services. The "reasonable cost" limitation in the PRM states:

> [P]roviders are reimbursed the actual costs of providing high quality care, regardless of how widely they may vary from provider to provider, except where a particular institution's costs are found to be substantially out of line with other institutions in the same area which are similar in size, scope of services, utilization, and other relevant factors.

Similarly, the Court pointed out the language of 42 C.F.R. § 413.9(c), which provides that nursing facility reimbursement under Medicare is "subject to a limitation if a particular institution's costs are found to be substantially out of line with other institutions in the same area that are similar in size, scope of services, utilization, and other relevant factors." *Heartland of Beckley WV, LLC*, 2016 WL 6248620, at *5.

Although the Court found that the Bureau was in error as to its legal position on high-deductible insurance plans, the Court remanded the matter so that the rate could be adjusted to include these costs and so that the parties could introduce evidence as to whether the costs were reasonable and not "substantially out of line" within the meaning of the regulations. *Id.* at *6.

The matter was set for evidentiary hearing on May 22, 2018. At the evidentiary hearing, the Bureau presented the testimony of Jeanne Snow of the Division of Finance of DHHR. Ms. Snow testified that she was aware of this Court's decision, but nevertheless admitted that, subsequent to this Court's decision, the Bureau did not perform any additional analysis of HCR's costs. A.R. 184 (Hr'g Tr. 17:5–12, May 22, 2018). The Bureau did not change its position at all on the payment to be made. In fact, Ms. Snow repeated the Bureau's position that directly paid

settlement costs were not allowable. A.R. 191 (Hr'g Tr. 44:13–22, May 22, 2018). Ms. Snow testified that no settlement costs had been knowingly included in the reimbursement formula. A.R. 237 (Hr'g Tr. 226:5–8, May 22, 2018).[1] Ms. Snow testified that the Bureau did not consider whether the amount of HCR's settlement costs was substantially out of line with similar institutions based on "size, scope of services, utilization, and other relevant factors." A.R. 193 (Hr'g Tr. 50:6–23, May 22, 2018). In short, the Bureau considered no further evidence after this Court's decision.

HCR's expert, Mr. Ellis, provided testimony that the costs reported by similar facilities, and the cost caps approved by the Bureau in the periods immediately before and after the cost report period at issue, set baseline levels for costs that cannot be "substantially out of line." Mr. Ellis also analyzed costs from the point of view of costs per bed, rather than costs per patient per day, to determine what costs would be considered "reasonable" and "not substantially out of line." A.R. 215 (Hr'g Tr. 141:15, May 22, 2018); A.R. 266. Each of two alternative approaches produced calculations for a "cap" to the Taxes & Insurance cost center that were very close—$47.07 and $46.08 per day. Both numbers were well below the amount submitted by the HCR facilities and were below the $60.60 cap calculated with the original costs fully included. A.R. 84 (Hr'g Tr. 41:17–21, Jan. 17, 2014).

The Bureau's hearing examiner issued a recommended decision, dated November 7, 2018, which found that the Bureau had failed to comply with the decision of this Court. A.R. 13. The hearing examiner found that under "the well-established doctrine of law of the case and the mandate rule, it is axiomatic that courts receiving the remand from the Supreme Court are required to follow its ruling [but] [i]n this instance, the law of the case and mandate have not been

[1] Because the Bureau made its calculations on HCR-companywide data rather than on West Virginia data, a small part of those costs was inadvertently included.

followed." A.R. 9. The hearing examiner also found that the Bureau's witness "credibly and candidly stated that she had performed no new analysis since the Heartland case was remanded" by this Court. A.R. 10.

Although finding that the Bureau had not complied with this Court's decision and mandate, the hearing examiner did not issue a ruling based on the "reasonableness" evidence in the record (including the calculations of HCR's expert). Instead, the hearing examiner recommended that the matter be remanded to allow the Bureau a second opportunity to present evidence on the issue as directed in this Court's prior ruling. A.R. 13. The Bureau adopted the recommended decision. A.R. 1.

III. SUMMARY OF ARGUMENT

BMS has already had two opportunities to address the correct legal standards. In the initial proceedings, prior to the appeal to this Court, the Bureau rejected the position of HCR on the applicability of PRM § 2162.5. On appeal, this Court agreed with HCR and held that PRM § 2162.5 was applicable and that settlement and direct liability costs were allowable, subject to stated restraints. The Court established guidelines for the parties to follow on remand to assess the reasonableness of the costs. At the remand hearing, the Bureau nevertheless adhered to its former position as to the total allowable costs and conceded that it had undertaken no additional factual investigation and assessment of any kind and had done nothing different in response to this Court's order. The Bureau's hearing examiner confirmed that the Bureau had disregarded this Court's order, but instead of making a ruling on the evidence, remanded to give the Bureau a third chance to muster evidence in support of its position.

The decision to remand for a second post-appeal hearing unfairly imposes on HCR the burden of a second hearing post-remand, for a total of three hearings. The remand hearing gives the Bureau the advantage of having seen the full case of HCR in advance. Most importantly, the

decision rewards an administrative agency for disregarding this Court's decision. Such an approach disregards both the law of the case and a fundamental requirement for the proper workings of justice.

This Court is entitled to have compliance with its decisions without debate or doubt, and without administrative agencies (or other tribunals) disregarding the decisions to see if they will be enforced. Allowing the Bureau to conduct yet another evidentiary hearing, after its own hearing examiner has determined that the Bureau ignored the decision of this Court, would set a harmful precedent.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary for this petition pursuant to W. Va. R. App. P. 16(d)(6) and 18(a). HCR submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process on the limited issue presented here would not be significantly aided by oral argument.

V. ARGUMENT

A. Issuance Of An Extraordinary Writ Is Appropriate Under The Standard Established By This Court.

This Court has held that "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari." *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 20–21, 483 S.E.2d 12, 20–21 (1996) (citations omitted). Prohibition lies not only to judicial tribunals, but also to inferior ministerial tribunals possessing incidentally judicial powers and known as quasi-judicial tribunals. *State ex rel. Affiliated Constr. Trades Found. v. Vieweg*, 205 W. Va. 687, 692, 520 S.E.2d 854, 859 (1999). The Bureau was acting in a quasi-judicial role in the hearing process over the challenge, by HCR, to the position of the Bureau

on settlement costs and consequent payment rates to HCR. This Court has granted writs of prohibition to correct improper action of administrative agencies exercising quasi-judicial powers on multiple occasions. *See, e.g.*, *State ex rel. Fillinger v. Rhodes*, 230 W. Va. 560, 741 S.E.2d 118 (2013) (issuing a writ of prohibition against the West Virginia Board of Examiners of Registered Professional Nurses directing it to dismiss two complaints accusing the Petitioner of misconduct because the Board failed to conduct an administrative hearing); *State ex rel. Tucker Cnty. Solid Waste Auth. v. W. Va. Div. of Lab.*, 222 W. Va. 588, 668 S.E.2d 217 (2008) (issuing a writ of prohibition against the Division of Labor to prohibit further administrative hearings regarding alleged violation of the Prevailing Wage Act); *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 482 S.E.2d 124 (1997) (issuing a writ of prohibition against the West Virginia Board of Medicine's hearing examiner requiring the examiner to issue certain subpoenas for discovery depositions before further proceeding with the hearing). Prohibition, therefore, is an appropriate remedy.

This Court has repeatedly summarized the general test for granting the writ as follows:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Town of Pratt v. Stucky, 229 W. Va. 700, 704, 735 S.E.2d 575, 579 (2012) (quoting Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12).

In general, under this standard, this Court has held that when an inferior tribunal "fails or refuses to obey or give effect to the mandate of this Court, misconstrues it, or acts beyond its province in carrying it out, the writ of prohibition is an appropriate means of enforcing compliance with the mandate." *See State ex rel. Affiliated Constr. Trades Found. v. Stucky*, 229 W. Va. 408, 411, 729 S.E.2d 243, 246 (2012) (quoting Syl. Pt. 5, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003)).

As noted above, the decision of an administrative agency on a particular case can be a quasi-judicial proceeding and one that is properly subject to correction by a writ of prohibition. To the extent, however, that the Court believes that a writ of mandamus is more appropriate, it is clear that those standards are also met, and HCR seeks, as an alternative, relief through issuance of a writ of mandamus. The elements required for a writ of mandamus to issue are: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law. *See* Syl. Pt. 1, *State ex rel. E. End Ass'n v. McCoy*, 198 W. Va. 458, 481 S.E.2d 764 (1996) (internal citations and quotation marks omitted); Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). As shown below, the Bureau has failed to comply with the clear duty to comply with this Court's mandate.

B. An Extraordinary Writ Is The Only Means Of Effective Relief

HCR cannot directly appeal an order remanding the case for further proceedings. HCR would have to undergo a third evidentiary hearing (the second one after this Court's decision) in order to obtain a final appealable decision, but that is the very harm HCR seeks to prevent. Allowing the Bureau another opportunity to present evidence it was required to present at the

remand hearing (which was already the second evidentiary hearing) will require HCR to endure continued delay and expense. HCR has been contesting this matter since late 2012. For purposes of judicial economy and efficiency, this issue should be decided now. *See State ex rel. Wiseman v. Henning*, 212 W. Va. 128, 132, 569 S.E.2d 204, 208 (2002) (holding, where the unreasonableness of the delay and expense is apparent, "[t]he remedy of appeal is usually deemed inadequate in these situations, and prohibition is therefore allowed"); *State ex rel. Hoover v. Berger*, 199 W. Va. at 21, 483 S.E.2d at 21 (granting prohibition where, in part, there was "no plain, speedy, and adequate remedy in the ordinary course of law" and where the "unreasonableness of the delay and expense is apparent").

C. The Lower Tribunal's Decision Is Clearly Erroneous And HCR Has A Clear Right To Relief.

Under the *Hoover* test for a writ of prohibition, not all factors need not be satisfied, and it is clear that the third factor, the existence of clear error as a matter of law, "should be given substantial weight." *State ex rel. Hoover v. Berger*, 199 W. Va. at 21, 483 S.E.2d at 21. The primacy of the "clear error" element is a reason for this Court's rule that prohibition is proper when an inferior tribunal "fails or refuses to obey or give effect to the mandate of this Court, misconstrues it, or acts beyond its province in carrying it out." *State ex rel. Affiliated Constr. Trades Found. v. Stucky*, 229 W. Va. at 411, 729 S.E.2d at 246 (internal citations and quotations omitted). Here, it is clear that the Bureau's decision was erroneous as a matter of law because (1) the Bureau violated this Court's mandate and the law of the case and (2) the Bureau's hearing examiner excused this violation and has allowed the Bureau a third bite at the apple to present evidence in response to the Bureau's disregard of this Court's ruling.

The general rule is that when a question has been definitively determined by an appellate court, "its decision is conclusive on parties, privies and courts." Syl. Pt. 1, *Mullins v. Green*, 145

W. Va. 469, 115 S.E.2d 320 (1960). The law of the case doctrine "generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case, provided that there has been no material changes in the facts since the prior appeal, such issues may not be relitigated in the trial court or re-examined in a second appeal." *Hatfield v. Painter*, 222 W. Va. 622, 632, 671 S.E.2d 453, 463 (2008) (citing 5 Am. Jur. 2d *Appellate Review* § 605, at 300 (1995)). When the appellate court's decision of a matter results in the case being remanded for additional proceedings, the appellate court's mandate controls the framework that the lower court must use in effecting the remand. *State ex rel. Frazier & Oxley, L.C.*, 214 W. Va. at 809, 591 S.E.2d at 735.

By memorandum decision dated October 26, 2016, this Court explicitly rejected the Bureau's position that settlement and related liability costs, paid directly as part of a facility's liability insurance deductible, were not allowable costs. *Heartland of Beckley WV, LLC*, 2016 WL 6248620, at *5. This Court's explicit holding established the law of the case for this proceeding. The matter was remanded so that the Bureau could recalculate its rate setting in a manner consistent with the Court's decision, which included reasonable settlement costs. On remand, a lower court must conduct a hearing consistent with the law of the case. Syl. Pt. 3, *State ex rel. Frazier & Oxley, L.C.*, 214 W. Va. 802, 591 S.E.2d 728 (holding that "[u]pon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal"). The Bureau, in holding the second evidentiary hearing after remand, was acting in a quasi-judicial fashion and should have complied with this Court's order, as would any other tribunal charged with making a decision on an individual claim subject to judicial review.

The Bureau did not attempt to apply the Court's ruling at all. Ms. Snow testified that during the *initial* rate setting (prior to the appeal), the Bureau made an approximation of the proportion

of total liability costs that were for settlements, based on HCR's nationwide (rather than West Virginia) numbers. A.R. 195 (Hr'g Tr. 61:6–11, May 22, 2018).[2] Ms. Snow admitted that the goal for the initial disallowance calculation was to exclude all settlement costs. A.R. 199 (Tr. II 76:13–20).

The Bureau did not recalculate its reimbursement to include reasonable settlement costs in accord with this Court's decision. In fact, the Bureau did not perform any additional analysis of HCR's costs. A.R. 184 (Tr. II 17:5–12). Despite this Court's explicit ruling that settlement costs were allowable, Ms. Snow again testified that the intent had been to remove *all* settlement and direct liability costs. A.R. 188 (Tr. II 31:7–32:9); A.R. 199 (Tr. II 76:13–20).[3] The relevant PRM provision cited by this Court as controlling requires assessment of other facilities or "relevant criteria," in determining reasonableness. The Bureau did not conduct any analysis after this Court's decision to determine reasonableness of the costs in light of the identified factors. A.R. 193 (Tr. II 50:6–23). The Bureau chose not to make an assessment of the factors needed to determine the point at which any costs of the HCR facilities become "substantially out of line." A.R. 193 (Tr. II 50:6–23); A.R. 237–38 (Tr. II 229:17–230:9).

Instead, the Bureau simply asserted that the prior deduction amounted to a reasonable rate, even though the Bureau had conducted no further research or analysis of the criteria the Court had established. As noted above, when the Bureau's witness was asked whether she had done "anything to analyze the cost any further after the Supreme Court decision was handed down," the

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[2] For convenience, the May 22, 2018 transcript from the remand hearing will be referred to as "Tr. II" hereafter.

[3] The Bureau has at times focused on the fact that, despite its intent, some of the settlement and direct costs were inadvertently included in the allowed rate. The initial disallowance was based on HCR's national data, not West Virginia-specific data. When Ms. Snow later got the West Virginia data, she testified that she recalculated the rates and the recalculated rates (not applied) would have been "a little bit" lower. A.R. 87–88 (Hr'g Tr. 50:8–54:11, Jan. 17, 2014). Ms. Snow's exhibit with those calculations showed that the inadvertent amounts included were indeed a "little bit"—the recalculated rates were less than 2% lower. *See* A.R. 245 (listing rates under "option 1"—awarded rate—and "option 3"—the re-calculated rate).

response was: "I would say no." A.R. 184 (Tr. II 17:7). The Bureau's hearing examiner recognized that "at no time prior to or after the Court's decision [on appeal] was this analysis conducted by the Bureau." A.R. 5.

The Remand Decision recognized the Bureau's failure, finding that the Bureau "did not apply the methodology mandated" by this Court and that "the Bureau did not apply the Medicare regulation which permits 'first dollar loses within its liability deductible as an allowable cost.'" A.R. 9. However, rather than making a decision based on the evidence presented at the remand hearing, the Bureau's hearing examiner granted the Bureau a third evidentiary hearing—the second evidentiary hearing after this Court's decision. A.R. 13. The Bureau's decision to disregard this Court's decision does not authorize a second chance. Excusing the Bureau's failure to follow this Court's mandate violates the very purpose of the mandate rule and the law of the case.

The law of the case doctrine is "grounded in important considerations related to stability in the decision making process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy." *In re Name Change of Jenna A.J.*, 234 W. Va. 271, 274, 765 S.E.2d 160, 163 (2014) (internal citations omitted) (holding plaintiff was not entitled to a second attempt to adduce evidence that she failed to present during the original hearing in a name change matter, prior to reversal of the decision on appeal). Generally, the law, based on considerations of efficiency and fairness, does not favor "do-overs," as various estoppel doctrines such as law of the case, res judicata, and double jeopardy attest. *See United States v. Gammage*, 580 F.3d 777, 780 (8th Cir. 2009) (holding that, because the government was clearly on notice that it was required to prove up defendant's convictions before he would be subject to the sentencing enhancement at issue, the district court on remand was to resentence defendant based on the record already before it). The United States Court of Appeals for the Federal Circuit has further explained

the fairness theory behind the law of the case doctrine, stating: "Its elementary logic is matched by elementary fairness—a litigant given one good bite at the apple should not have a second." *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 900 (Fed. Cir. 1984).

Although no decision of this Court appears to consider the identical circumstances existing here, the decision in *State ex rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor*, 222 W. Va. 588, 668 S.E.2d 217 (2008) is close. There, the petitioner (the Tucker County Solid Waste Authority or "Authority") was charged by the Division of Labor ("DOL") with failing to pay "prevailing wages" to employees hired to expand a landfill. 222 W. Va. at 592, 668 S.E.2d at 221. The parties disagreed on the interpretation of the relevant statutes and whether direct employees of "public authorities" were exempt. The matter proceeded to an administrative hearing in light of the conflicting legal positions of the parties. After the hearing, the DOL hearing examiner issued an order rejecting the position of the Authority and ordering a further hearing on additional issues. *Id.* at 593, 668 S.E.2d at 222. After the Authority filed a petition for writ of prohibition in this Court, the DOL raised, for the first time, an additional statutory argument to support the imposition of a prevailing wage standard. *Id.* at 601–02, 668 S.E.2d at 230–31. This Court granted the writ of prohibition, rejecting the position of the DOL as to the initial statutory disputes between the parties. *Id.* at 600, 668 S.E.2d at 229. Significantly, the Court refused to consider the supplemental arguments raised below by the DOL after the writ was sought and, in the final order, precluded the DOL from conducting any further hearings on the matter, foreclosing a second hearing on the new theory. *Id.* at 603, 668 S.E.2d at 232.

Other courts have confronted even more direct efforts by an agency to take "two bites at the apple." The Third Circuit noted, "where the government has the burden of production and persuasion . . . its case should ordinarily have to stand or fall on the record it makes the first time

around. It should not normally be afforded 'a second bite at the apple.'" *United States v. Dickler*, 64 F.3d 818, 832 (3d Cir. 1995) (citation omitted). A similar issue confronted the Sixth Circuit in *Mefford v. Gardner*, 383 F.2d 748 (6th Cir. 1967). There, a social security benefits claimant was denied benefits after an evidentiary hearing before a hearing examiner. On the initial appeal to a district court, that court reversed and remanded with directions to take additional evidence on whether suitable "light work" was available to the claimant in his area. 383 F.2d at 751. Rather than addressing the "light work" issue, the hearing examiner disregarded the district court decision and introduced additional evidence that claimant did not suffer from the claimed incapacity. *Id.* at 751–52. The district court reversed without allowing any further remand, and the court of appeals affirmed that position, summarizing the law as follows:

> [I]f the cause is remanded with specific directions, further proceedings in the trial court or agency from which appeal is taken must be in substantial compliance with such directions; and if the cause is remanded for a specified purpose, any proceedings inconsistent therewith is error; "*nor will a court remand to permit new proofs where it would merely be giving the party an opportunity to reopen the case to make his proofs stronger.*"

Id. at 758 (emphasis added) (quoting 14 *Cyclopedia of Federal Procedure* § 68.98 (3d ed.)).

The decision of the hearing examiner to allow another hearing would allow just such an opportunity to the Bureau. Doing so is not consistent with the respect due to this Court's judgments, nor fair to the other party. In the few cases in which similar events have arisen, no court appears to disagree. *See United States v. Turtle Mountain Band of Chippewa Indians*, 612 F.2d 517, 520 (Ct. Cl. 1979) ("No litigant deserves an opportunity to go over the same ground twice, hoping that the passage of time or changes in the composition of the court will provide a more favorable result the second time."); *Carlough v. Nationwide Mut. Fire Ins. Co.*, 609 So. 2d 770, 771–72 (Fla. Dist. Ct. App. 1992) ("Under the circumstances, upon remand, Nationwide

should not be given a second bite at the apple to present evidence which it failed to produce at the scheduled evidentiary hearing. 'Somewhere the curtain must ring down on litigation.'" (internal citation omitted) (quoting *Broward Cnty. v. Coe*, 376 So. 2d 1222, 1223 (Fla. Dist. Ct. App. 1979))).

The Bureau had its first opportunity to present evidence at the initial July 17, 2014, evidentiary hearing. Thereafter, this Court's decision of October 26, 2016, rejected the Bureau's view of the law and established the law of the case. The remand hearing did not take place until May of 2018. Yet, when the Bureau's witness was asked whether she had done "anything to analyze the cost any further after the Supreme Court decision was handed down," the response was: "I would say no." A.R. 184 (Hr'g Tr. 17:7, May 22, 2018). The Bureau simply stood on its prior decision, as the Hearing Examiner held: "It is clear that the Court directed the parties to apply PRM 2162.5 and 42 C.F.R. § 413.9 . . . [but] at no time prior or after the Court's decision was this analysis conducted by the Bureau to the facts herein." A.R. 5.

A writ of prohibition is an appropriate remedy where a lower tribunal fails or refuses to obey or give effect to the mandate of this Court, misconstrues it, or acts beyond its province in carrying it out. *See State ex rel. Frazier & Oxley, L.C.*, 214 W. Va. at 812, 591 S.E.2d at 738 ("When the opinion and mandate of this court prohibit relitigation of some issues on remand, or direct that only some expressly severed issues or causes may still be litigated, and the parties and trial court attempt relitigation beyond that which was expressly permitted, a writ of prohibition will issue to prohibit relitigation." (internal citation omitted)). In the remand hearing, HCR presented extensive testimony on the reasonableness of its costs, including on other comparable facilities and on the circumstances relevant to comparability. *See* A.R. 211–224 (Tr. II 125:10–176:20). HCR's expert testified that two different approaches resulted in setting a "cap" or limit

on the daily rate (as to the "taxes and insurance" cost center) that gave similar results: one approach resulted in $47.07 per day and the second in $46.08 per day. A.R. 218–222 (Tr. II 151:16–169:13). Each of those rates was well below the "cap" based on the costs as submitted, which were calculated by the Bureau as $60.60 per day. A.R. 84 (Hr'g Tr. 41:17–21, Jan. 17, 2014). The Bureau may not award itself another evidentiary hearing in light of its decision to disregard the express mandate of this Court. Thus, the matter should be returned to the hearing examiner with directions to select between the two calculations provided by HCR's expert, and with directions to the Bureau to thereafter make payment to the HCR facilities for the differential between the amount actually paid and the amount due, based on actual occupied bed days for the six-month rate period[4] at issue (October 2012 through March 2013).

VI. CONCLUSION

The Bureau has failed to give effect to the mandate of this Court. The Bureau is not entitled to award itself a second remand hearing simply because it chose not to comply with this Court's ruling. For the reasons set forth above, HCR respectfully asks the Court to issue a rule for shown cause and, thereafter, award a writ of prohibition that prohibits any additional evidentiary hearing and requires the Bureau to submit the matter to its hearing examiner for a decision as to the proper rates based on the evidence in the record.

[4] The cost report period at issue is January 1 to June 30, 2012, but that cost data is used to set the rate for October 1, 2012, through March 31, 2013. A.R. 79 (Hr'g Tr. 20:20–21:11, Jan. 17, 2014).

Respectfully submitted this 30th day of November, 2020.

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STATE OF OHIO

COUNTY OF Lucas

I, Martin D. Allen, being first duly sworn, state that I have read the foregoing PETITION FOR WRIT OF PROHIBITION and that the factual representations contained therein are true to the best of my knowledge information and belief, based on my personal knowledge, corporate records and records of this proceeding,

Mard D Allen

MARTIN D. ALLEN

Taken, subscribed, and sworn to before me this 30th day of November, 2020.

My Commission expires: 4/22/2022.

Luanne M. Trumbull

NOTARIAL SEAL
STATE OF OHIO

LuANNE M. TRUMBULL
NOTARY PUBLIC - OHIO
MY COMMISSION EXPIRES 04-22-2022

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December 2020, I served the foregoing "Petition for Writ of Prohibition" upon the following counsel of record and only individual upon whom a rule to show cause need by served, by depositing a true copy thereof in the U.S. Mail in a postage-paid envelope addressed as follows:

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