IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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SAMANTHA BURGESS; ALYSSA SKEENS; GEORGE GROVER; JESSICA HALSTEAD; AND SUNSHINE HOLSTEIN,

Petitioners Below, Petitioners,

v.

THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES

Respondent Below, Respondent.

Case No. 23-ICA-11
On Appeal from the West Virginia Department of Health and Human Resources, Bureau for Medical Services

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REPLY BRIEF OF INDIVIDUAL PETITIONERS

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III. ARGUMENT

Despite all the lawyer-speak in the briefs in this case, the fundamental question now before the Court, is whether, in its investigation of Holistic, Inc., which employed Petitioners, BMS may reasonably bar payments to or on behalf of your Petitioners when: (1) Petitioners had nothing whatsoever to do with billing other than reporting their time and work to their employer; and (2) four of the five Petitioners were not even employed by Holistic described in the Investigative report.

A. BMS DID NOT PROPERLY SUSPEND MEDICAID PAYMENTS AND MISINTERPRETS PETITIONERS' ARGUMENTS.

1. Petitioners do not challenge BMS's discretionary authority regarding good cause, which is irrelevant to this appeal.

BMS's first argument, that the Medicaid suspension was proper, completely misses the point of Petitioners' first argument raised in their Brief in Support.[1] Respondent repeats again and again that BMS has the discretion under 42 C.F.R. § 455.23 to determine whether good cause to forego a suspension exists. Respondent additionally points out that "Petitioners also fail to cite any law or regulations that deprives BMS of its regulatory discretion to determine if the suspension of Medicaid payments . . . is warranted under such circumstances."[2] Indeed, Petitioners did not cite any law for the assertion that BMS lacked discretion in the determination of good cause because Petitioners never made that assertion.

As Petitioners have previously and explicitly pointed out, they agree that the decision of whether good cause *warrants* a suspension is within the discretion of BMS.[3] BMS misunderstands

[1] *See* Petitioners' Brief in Support, Section VII.B.1.
[2] Response, at p. 11.
[3] Petitioners' Brief in Support, at p. 10 ("In other words, while the decision of whether a good cause exception *justifies* a decision not to suspend payments might be discretionary, the actual *performance of the evaluation* of whether good cause exists is mandatory.") (emphasis in original).

Petitioners' position that it is the *performance* of the good cause *analysis* that is mandatory. BMS can reasonably decide whether a good cause factor justifies withholding a suspension, but it has to make an effort to evaluate the existence of good cause before it reaches its decision. In other words, BMS cannot ignore its obligation to perform a good-faith analysis of the good cause (whole and partial) factors, which is exactly what it has done here. This is why Petitioners argue that BMS has acted arbitrarily and capriciously—the issue is not necessarily the decision to suspend itself, but rather the *method* by which BMS reached that decision.

Regardless of what Andrew Pack's letter states, the record clearly demonstrates that BMS did not perform its duty to evaluate the existence of good cause before it suspended Petitioners' Medicaid privileges. As Petitioners explained in their Brief in Support:

> BMS's own initial correspondence with Petitioners belies their assertions that these factors were ever considered. In the first Notice Letters dated May 2, there was no analysis *whatsoever* of these factors. It was only *after* Holistic demanded clarification that BMS sent a new letter with the conclusory and unenlightening statement that "BMS has reviewed all good cause exceptions to payment suspension allowed by statue and determined that none are applicable in this instance." This later addition to the Notice is all but an admission by BMS that it failed to consider these factors before issuing the suspension, and shows that it hastily tried to cover up its mistake in the second letter.[4]

This appeal is not, and never has been, about BMS's discretion to decide whether the existence of good cause justifies withholding a suspension; it is about BMS's failure to even ask the question of whether good cause existed before issuing the suspension. Andrew Pack's "analysis" of the good cause factors was not "reasonable," as Respondent avers, because Andrew Pack's only analysis was saying that he analyzed.[5] Put differently, *there is no good cause analysis at all.* The purpose of the analysis of the good cause factors (for whole and partial) that Petitioners

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[4] *Id.* at 11 (emphasis in original; citations to the record omitted).

[5] Response, at p.11. *See also* Record No. 1, Petition for Writ, at Ex. D (BMS May 16 Letter).

provided within their Brief in Support was to demonstrate just how completely nonexistent BMS's consideration of these factors was.[6] In other words, Petitioners' whole point was that the existence of good cause not to suspend in this case was so patently obvious that BMS could not have possibly considered the good cause factors properly.

2. The MFCU's acceptance of BMS's referral does not correct the deficiencies in BMS's initial suspension decision.

42 C.F.R. § 455.23(d)(3) provides that if the Medicaid Fraud Control Unit ("MFCU") "accepts the fraud referral for investigation, the payment suspension *may* be continued until such time as the investigation and any associated enforcement proceedings are completed."[7] This regulation permits the suspension to continue during the pendency of the investigation, but it does not permit BMS to perpetuate a suspension decision that was deficient in the first place. BMS attempts to rehabilitate the credibility of their shoddily-executed suspension decision by pointing out that the MFCU accepted its referral for investigation. The MFCU's acceptance, however, does not change the fact that BMS did not properly consider the good cause factors before issuing the suspension. In other words, BMS cannot hide behind the MFCU's acceptance of the referral as justification for the ongoing suspension if the referral by BMS was deficient in the first place.

Additionally, as Respondent has similarly argued in its favor concerning its discretionary power, the language at issue in § 455.23(d)(3) is permissive, not mandatory. The language within the regulation states that a suspension in place after the matter is accepted by the MFCU "*may* be continued;" it is not "must" or "shall" continue.[8] While 42 C.F.R. § 455.23(a) may obligate BMS to suspend Medicaid payments where there is a credible allegation of fraud (unless it finds good

[6] *See id.* at 11-15.
[7] (emphasis added).
[8] 42 C.F.R. § 455.23(d)(3) (emphasis added).

cause exists), it does not follow that BMS *has to* continue the suspension just because the MFCU investigation is still ongoing. Therefore, the decision to continue the suspension is under BMS's purview; it cannot pass the buck to the MFCU—whose only job is to investigate the allegations of fraud. BMS *can* continue the suspension if it receives quarterly certification from the MFCU that the investigation is ongoing,[9] but it does not *have to*.

While the pendency of an ongoing investigation by the MFCU *might* be a reason to continue a Medicaid suspension in other circumstances, BMS, in this particular case, cannot justify the continuance of the suspension against Petitioners by claiming the matter is still under investigation by the MFCU. BMS knows, as Petitioners have pointed out,[10] that the initial suspension decision in this case was deficient. This is due to both the lack of consideration of the good cause factors and the inadequacy of the pre-suspension notice.

B. A SUSPENSION CAN BE "INDEFINITE" EVEN WHEN THERE IS AN ONGOING INVESTIGATION BY THE MFCU.

Respondent attempts to deflect its responsibility for the suspension onto the pending MFCU investigation, but, as explained above, the MFCU is not the party whose conduct is challenged here. BMS is the responsible party because it is the entity who made (and continues to uphold) the suspension decision, and it is the entity responsible for compliance with the temporariness requirements of 42 C.F.R. § 455.23(c).

Most importantly, just because an investigation of Petitioners by the MFCU is still ongoing does not mean that the suspension is automatically "temporary" and not "indefinite."[11] Respondent

[9] 42 C.F.R. §455.23(d)(3)(ii).

[10] *See generally*, Petitioners' Brief in Support.

[11] *See* Alexandre v. Ill. Dept. of Healthcare & Family Services, Case No. 20 C 6745, 2021 WL 4206792 at *2, *9 (S.D. Ill. Sept. 15, 2021) (holding that suspension against provider was impermissibly "indefinite" even in spite of the fact that the state agency had received a 42 C.F.R. 455.23(d)(3)(iii) certification from the Illinois MFCU that the investigation of the provider was still ongoing).

acts as if 42 C.F.R. § 455.23(d)(3) operates as a free pass to continue the Petitioners' suspension as long as the MFCU continues its investigation. Indeed, as Respondent frankly admits, the current suspension "has only continued because the MFCU investigation is still ongoing."[12] However, BMS forgets its concurrent obligation to ensure that the suspension is "temporary" under 42 C.F.R. § 455.23(c). This obligation does not stop even when an MFCU investigation is ongoing.

"[A] State is not free to set the line between 'temporary' and 'indefinite' wherever it wishes."[13] The *Alexandre* court found that Dr. Alexandre's suspension, which lasted about a year-and-a-half, could be found by a factfinder to have moved from "temporary" to "indefinite" and this finding was in spite of the Illinois state agency's averment that there was still an ongoing MFCU investigation.[14] Coupled with the pre-suspension notice issues present in this case,[15] very similar circumstances exist here: it has now been over a year since Petitioners were first notified of their suspension, and the indefiniteness of the suspension violates Petitioners' due process rights.

Additionally, *Pressley Ridge*[16] is applicable to this case, contrary to Respondent's assertions. First, it is wholly irrelevant that the older version of 42 C.F.R. § 455.23(a) at issue in *Pressley Ridge* vested BMS with more discretion on whether or not to withhold Medicaid payments.[17] The amendment to § 455.23(a) modifying BMS's discretionary authority which now mandates BMS to suspend payments (save upon a good cause finding) has no bearing whatsoever on the regulation's other requirement that, in the event a suspension is issued, the suspension must

[12] Response, at p. 14.
[13] *Id.* at *8.
[14] *Id.* at *2, *9.
[15] See Section III.C, *infra*.
[16] Pressley Ridge Schools, Inc. v. Stottlemeyer, 947 F. Supp. 929 (S.D. W. Va. 1996).
[17] *See* Response, at p. 13.

be "temporary" in nature.[18] Second, although BMS did not explicitly refuse Petitioners administrative review as it did in *Pressley Ridge,*[19] BMS here only provided administrative review to Petitioners *after* the Writ of Prohibition proceedings, whereas Petitioners had requested an administrative hearing from BMS as early as May 6, 2022.[20] Third, the court's holding that BMS had violated 42 C.F.R. § 455.23(c) did not rest on the fact that BMS denied the plaintiff an administrative hearing on the prepayment review process; the court based this holding on the grounds that BMS had *used* the prepayment and postpayment review process in an attempt to avoid having to comply with the temporariness requirement of 42 C.F.R. § 455.23(c).[21]

Therefore, BMS has not properly suspended Medicaid payments to Petitioners because it failed to perform the required analysis of the good cause factors and because it continues to subject Petitioners to an indefinite suspension contrary to 42 C.F.R. § 455.23(c).

C. BMS DID NOT EVEN MEET THE "GENERAL ALLEGATIONS" STANDARD AND SO ACTED ARBITRARILY AND CAPRICIOUSLY BY FAILING TO PROVIDE PETITIONERS WITH ADEQUATE NOTICE.

First, Respondent claims that its lack of detail in the pre-suspension notice issued to Petitioners is justified by the "MFCU's concurrent duty to protect the privacy rights of individuals who provide the Unit with sensitive information related to its investigations that is established both in the federal regulations and the West Virginia Code."[22] Petitioners' demands for clarification on the nature of the allegations against them have never been about finding out *who* made the allegations, but rather to find out *what* the allegations are. The MFCU's duty to protect informants'

[18] 42 C.F.R. § 455.23(c).
[19] *Pressley Ridge,* 947 F. Supp. at 936 ("By letter of March 11, 1996, the Bureau denied Pressley Ridge's requests for administrative review of the prepayment review process…").
[20] Record No. 1, Verified Petition, at Ex. E.
[21] *Pressley Ridge*, 947 F. Supp. at 940.
[22] Response, at p. 15 (citations omitted).

privacy rights is therefore irrelevant to the question of whether BMS's pre-suspension notice was adequate because Petitioners' inquiry is about their *substance*, not their *source*.

Second, Respondent insists that *Snyder*[23] should control, and that this Court should determine that the pre-suspension notice is sufficient. Petitioners have already explained at length in their Brief in Support why *Snyder* should not apply, and will not belabor the same points here.[24]

Third, *Alexandre* should control here because the contents of the notice email in *Alexandre* are nearly identical to the notice letters Petitioners received from BMS. The short email in *Alexandre* reporting "allegations of receiving kickbacks and administering expired vaccines"[25] is virtually no different in the amount of detail provided than BMS's letter to Petitioners stating that the "investigation concerns allegations of knowingly billing for services never rendered."[26]

Fourth, while the Investigative Report and Referral Form *might* be a good start in providing Petitioners with notice of the allegations, this was never provided prior to or close in time to the suspension; it was disclosed during the Writ of Prohibition proceedings, and then only as an attachment to BMS's response to the Writ Petition.[27] However, regardless of the timing of the disclosures of these documents, neither the Referral Form nor the Investigation Report elaborate whether the billing codes described were for services that were provided by Petitioners. As Petitioners have previously explained, they were not responsible for billing while at Holistic,[28] and **four out of the five Petitioners were not even employed at Holistic during the time of the billing instances that are noted within the Investigation Report.** The Report and Referral Form,

[23] NSCH Rural Health Clinic v. Snyder, 321 So.3d 565 (Ct. App. Miss. 2020).
[24] *See* Petitioners' Brief in Support, at p. 23.
[25] *Alexandre*, 2021 WL 420692 at *2.
[26] Record No. 1, at Ex. D.
[27] Record No. 6, at Ex. 2.
[28] Record No. 10, Holistic Reply, at Ex. H ¶ 7 (Affidavit of Shawn Blankenship).

therefore, cannot serve as notice for at least four out of the five Petitioners, **because it is literally impossible for them to have been responsible for these billing occurrences.**

Therefore, BMS acted arbitrarily and capriciously by failing to provide Petitioners with notice of even the "general allegations as to the nature of the suspension" required under 42 C.F.R. § 455.23(b)(2)(ii).

IV. CONCLUSION

Therefore, in light of the forgoing, this Court should reverse the below administrative decision and reinstate Petitioners' Medicaid privileges retroactively because BMS acted arbitrarily and capriciously by refusing to adequately consider the existence of good cause, by subjecting Petitioners to an indefinite suspension, and through its failure to provide adequate notice regarding the suspension to Petitioners.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 8th, 2023, a true and correct copy of the foregoing ***"REPLY BRIEF OF PETITIONERS***" was served upon counsel of record by filing it with the court's electronic filing system, which will deliver a copy to the following counsel of record:

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