IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0961

STATE OF WEST VIRGINIA, ex rel.

HEARTLAND OF BECKLEY, WV KKC
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

RESPONSE BRIEF ON BEHALF OF THE WEST VIRGINIA BUREAU FOR MEDICAL SERVICES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE CASE

This matter, which this Court remanded for further proceedings in 2016, was most recently subject to a recommendation entered by an Administrative Law Judge ("ALJ") over two years ago recommending that the matter be remanded, following a hearing conducted pursuant to this Court's remand order. The Petitioners[1] failed to file a timely appeal of that recommendation to the circuit court and now argue that the ALJ's recommendation that the matter be remanded should be prohibited from adoption because this matter has been previously remanded upon the ALJ's recommendation. It is the Respondent's position that Petitioners failed to provide information necessary for the Respondent to reevaluate rates using the complex methodology prescribed by this Court in is decision, and instead seeks to have this Court to determine those rates.

In June 2012, the Respondent, West Virginia Bureau for Medical Services "BMS", discovered the Petitioners, at that time operating seven nursing home facilities in West Virginia collectively as "HCR", were attempting to pass their paid negligence claims onto the State of West Virginia when submitting its cost reports. (A.R. 64-65.) An evidentiary hearing was held in January 2014 and the ALJ issued a recommended decision finding the "record demonstrates the reimbursement sought for paid negligence claims was neither allowable or reasonable." (A.R. 48.) This recommendation was adopted by BMS, upheld in circuit court and eventually appealed to this Court. (A.R. 66.) Following oral argument, this Court remanded the matter back to circuit court; specifically, this Court held: 1) BMS should not have disallowed all of HCR's paid negligence claims; and, 2) should have allowed a reasonable amount up to ten percent of HCR's net worth subject to a federal regulation prohibiting "a nursing facility's costs from being 'substantially out

[1]Although this matter initially included all seven nursing facilities operated by HCR in West Virginia, this writ of prohibition is only requested for six of those facilities; specifically, the Heartland of Keyser facility is not included in this writ. HCR no longer owns or operates these facilities or any facilities in West Virginia.

of line' from comparable institutions." (A.R. 70.) The matter was then remanded to the circuit court upon issuance of this Court's *Mandate* to allow the parties to introduce evidence as to the net worth of HCR, among other requirements of a Medicare provision and the substantially out of line provision. (A.R. 70.) The circuit court remanded the matter back to BMS and a second hearing was held on May 22, 2018. (A.R. 73, 2.) On November 7, 2018, the ALJ recommended the matter be remanded for further proceedings, a recommendation BMS adopted on November 15, 2018. (A.R. 1-13.)

ARGUMENT

I. Petitioners Did Not File a Timely Appeal of the Recommended Decision to Remand.

On November 7, 2018, the ALJ issued a recommended decision recommending that the matter be remanded back to BMS for further proceedings and BMS adopted that recommendation on November 15, 2018. However, HCR did not timely appeal that decision and instead waited until December 3, 2020, to file a *Petition* seeking a writ of prohibition for the sole purpose of requesting that this Court determine the rate of reimbursement allowable for their negligence claims.

Under the collateral order doctrine, the ALJ's decision was immediately appealable to the circuit court. The collateral order doctrine is an exception to the rule of finality, which provides interlocutory orders are not immediately subject to appeal. *Coleman v. Sopher,* 194 W. Va. 90, 94, 459 S.E.2d 367, 371 (1995) ("[t]he usual prerequisite for our appellate jurisdiction is a final judgment, final in respect that it ends the case."). However, the "collateral order" doctrine provides an exception pursuant to *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and may allow appeal of an interlocutory order when three factors are met: "An interlocutory order would be subject to appeal under [the collateral order] doctrine if it (1) conclusively determines the disputed controversy, (2) resolves an important issue completely

separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment." *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 523, 745 S.E.2d 556, 561 (2013)(citing *Durm v. Heck's, Inc.*, 184 W. Va. 562, 566 n. 2, 401 S.E.2d 908, 912 n. 2 (1991).)

In this case, all three factors of the collateral order are met thereby permitting immediate appeal of the ALJ's most recent decision to the circuit court. First, the ALJ's decision recommending a remand of this matter back to BMS conclusively determines the Petitioners' claim that a remand order is prohibited by its very nature and thus, the first requirement is satisfied. *See Mitchell v. Forsyth,* 472 U.S. 511, 527, 105 S.Ct. 2806, 2816, 86 L.Ed2d 411 (1985) (finding a court's denial of summary judgment conclusively determines the defendant's claim of right to not stand trial). Second, the issue concerning whether the ALJ can remand the matter back to BMS is completely separate from the merits of the action, which involves rate setting for nursing facilities. *See Credit Acceptance Corp. v. Front,* supra, 563, 525 (finding little doubt the issue of arbitration is completely separate from the underlying claims in a given action). Third, if the Petitioners waited until the issuance of a final order addressing the merits of their claim to appeal the ALJ's decision recommending a remand, the issue of the remand would be unreviewable because the remand, and additional litigation, would have already occurred. *See Id.* (finding an order refusing to compel arbitration is effectively unreviewable on appeal. The result of such an order is litigation.).

Therefore, the factors of the collateral order test are satisfied and the Petitioners should have immediately appealed the ALJ's decision if they wished to challenge the recommendation of a remand. Instead, Petitioners waited over two years to take any action and are now attempting to seek a writ of prohibition to substitute for their failure to file a timely appeal, and have this Court determine their rates in a complex methodology, rather than the state agency. Based on the collateral order doctrine, the writ should be denied for failure to file a timely appeal.

A WRIT OF PROHIBITION IS NOT APPROPRIATE IN THIS CASE

I. The Petitioners Clearly Do Not Meet the Standard of Review For Granting a Writ of Prohibition.

In order to determine whether the writ of prohibition should be granted, we apply the following standard of review: 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. Syllabus Point 4, *State ex rel. Hoover v. Berger,* 199 W. Va. 12, 483 S.E.2d 12 (1996).

First, "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syllabus Point 1, *Crawford v. Taylor,* 138 W. Va. 207, 75 S.E.2d 370 (1953). Clearly, as argued *supra*, the ALJ's decision could have been immediately appealed and the petitioners are attempting to use a writ of prohibition to avoid their failure to file a timely appeal in this matter. Second, any

issues Petitioners had regarding the remand order could have been addressed if such an appeal had been filed.

The third factor, the existence of a clear error as a matter of law, which is given substantial weight, clearly is not met in this case. In determining whether the lower tribunal's order is clearly erroneous as a matter of law, "this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate..." *State, ex rel. Blackhawk Enterprises Inc. v. Bloom,* 219 W. Va. 333, 339, 633 S.E.2d 278, 284 (2006). There is not a statute, constitutional provision or common law mandate that prohibits matters such as these from being remanded as many times as is necessary to address the underlying issue. In fact, this matter has already been remanded by this Court and the circuit court. The ALJ has determined additional evidence is required, that can only be obtained via remand, for him to issue a decision in this case that will provide sufficient detail to avoid the need for the circuit court, and perhaps ultimately this Court, to remand the matter again in the future, which will preserve judicial economy and efficiency. *See Id.* ("this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts" (citing Syllabus Point 1 of *Hinkle v. Black,* 164 W. Va. 112, 262 S.E.2d 744 (1979)). Clearly, there is not a substantial, clear-cut legal error in contravention of a statutory, constitutional or common law mandate.

Neither the fourth of fifth factors are satisfied as the remand is not an oft repeated error nor does it raise new or important issues. Therefore, a writ of prohibition is not appropriate in this case.

II. Petitioners Did Not Provide Necessary Documentation Regarding the Net Worth of HCR.

In this case, the heart of Petitioners' argument does not address the ALJ's remand order or even the fact BMS adopted the recommended decision without modification to preserve judicial

economy and efficiency. Petitioners' *Petition* in actuality asks this Court to address the merits of this matter prematurely, and seeks to have this Court, rather than the appropriate state agency as this Court orders in its memorandum decision, utilize a complex methodology to determine their rate of reimbursement for allowable negligence claims.

By spending the bulk of the *Petition* arguing the merits of a matter not ripe for consideration by this Court, Petitioners acknowledge that the lower tribunal's remand order is not clearly erroneous as a matter of law. This matter was remanded by this Court and then the circuit court, which gave Petitioners a "second bite at the apple"[2] to argue the reasonableness of their rates, something they failed to do at the first hearing. In an effort to argue the rates resulting from their submitted cost reports are reasonable, which this Court rejected by holding that BMS should have eliminated some, but not all,[3] of the paid legal claims HCR tried to pass onto the taxpayers of West Virginia, the Petitioners presented three new ways to argue the reasonableness of the rates in their *Petition*. Each of these proposals fails for various reasons as the evidence adduced at the May 22, 2018 hearing demonstrates. (A.R. 231-232, 235.) However, according to this Court's *Memorandum Decision*, the remand hearing was supposed to be an opportunity for the parties "to introduce evidence as to whether HCR complied with the provisions of PRM § 2162.5 and 42 C.F.R. § 413.9(c)'s substantially out of line provision." (footnote omitted) (A.R. 70.) PRM § 2162.5 provides reasonable costs are allowable up to ten percent of HCR's net worth. Noticeably, the Petitioners failed to provide any documentation regarding the net worth of HCR during the

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[2]This seems to be their main objection to having another hearing: they don't want to give BMS "a third bite at the apple." (*Petition*, 8.) This, however, ignores the fact HCR failed to provide information regarding its net worth during the relevant period, as expected by this Court. (A.R. 70.)

[3]Although the issue on appeal involves the remand order and not the merits of the case, it is worth noting BMS did present evidence at the second evidentiary hearing that not ALL the liability expenses were initially eliminated by BMS and the costs that were left in were substantially in line with comparable facilities. (A.R. 182, 242, 251, 252.)

relevant time period, a piece of information BMS must have in order to recalculate rates. HCR did not provide any of the necessary documentation and yet repeatedly complains that BMS did not perform a recalculation, despite knowing that they failed to provide a critical variable of the applicable formula to BMS. Instead, Petitioners seek to have this Court determine its rates, still without the benefit of an important variable the petitioners have refused to provide.

CONCLUSION

Clearly, the ALJ sought to preserve judicial economy and efficiency by recommending that this matter be remanded for the collection of additional information before issuing an order which would once again make its way back to this Court, and its decision clearly furthering the directives set forth in this Court's memorandum decision should not be disturbed. WHEREFORE, the *Petition* seeking a writ of prohibition should be denied.

Respectfully Submitted,
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HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES
Respondent,
By Counsel,

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CERTIFICATE OF SERVICE

I, Kimberly L. Stitzinger, counsel for the West Virginia Department of Health & Human Resources, do hereby certify that on the 29th day of January, 2021 I caused a true copy of the foregoing Response Brief of the West Virginia Bureau For Medical Services to be served on all parties by depositing the same in the U.S. Mail, postage-prepaid, first-class, to each.

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