IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-207

West Virginia HCR Manorcare Facilities, Heartland of Beckley, Heartland of Charleston, Heartland of Clarksburg, Heartland of Keyser, Heartland of Martinsburg, Heartland of Preston County and Heartland of Rainelle,

Petitioners Below, Petitioners

vs.

West Virginia Department of Health and Human Resources, Bureau for Medical Services, Respondent Below, Respondent

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REPLY BRIEF OF PETITIONERS

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INTRODUCTION

In its Response Brief ("Response" or "Resp."), the Bureau for Medical Services ("BMS" or "Bureau") not only fails to correct the errors in the Hearing Examiner decision, the Bureau persists in and enlarges the errors. Most consistently, the Bureau discusses *only* the full reported costs of the HCR facilities, arguing that those are substantially out of line. The Bureau does not, however, attempt to show the point at which costs actually *become* "substantially out of line."

The Bureau also provides no defense of its selection of $50,000 per facility as the sum to add back into the HCR facilities' "allowable costs" after the 81% reduction caused by the unlawful removal of all the estimated settlement costs of the facilities. The Response contains no word of explanation as to how that figure, applied uniformly to facilities ranging from 60 to 201 beds, would cause each facility's reported costs to land at the point beyond which the costs would be "substantially out of line." The Bureau does not dispute that the figure was selected by counsel, and the Bureau reinforces that point by (improperly) arguing that the detailed calculation of reimbursement due the facilities can be withheld on the basis of attorney-client privilege.

The Bureau's disregard of the Supreme Court's mandate on the need to assess where costs become "substantially out of line" is manifest in other ways. First, the Bureau persists in disregard of the Supreme Court's ruling and argues that the West Virginia Medicaid program cannot properly pay for any settlement costs. Second, the Bureau characterizes the result of its action as creating "reasonable" rates, but its recitation of the facts shows that the Bureau's disallowance had nothing to do with that. The disallowance was entirely based on the erroneous legal position that settlement costs could not be included in the rate calculations. The Bureau undertook no assessment of the "substantially out of line" question at the second evidentiary

hearing (as the Hearing Examiner found) and there were no such assessments at the third evidentiary hearing.

There is, therefore, no rational basis for the final figures reached by the Bureau as to the proper limit to allowable cost. BMS took a starting point reached by error of law and altered it by an arbitrary sum selected by counsel. The Bureau joins its failure to defend its position with a failure to meaningfully address the proposals of HCR and its experts. The response of the Bureau expends only three paragraphs on the issue. The Bureau rejects one HCR proposal on the unlawful basis that the underlying calculation included data from other facilities that incorporated paid settlements—thus expressly continuing the Bureau's disregard of the Supreme Court's decision. The Bureau rejects another because it was based on a cost limit approved by the Bureau in the immediately preceding rate period—ending one day before the period at issue. These perfunctory claims do nothing to show that the two proposals—which reach very similar results from different methodologies—are unreasonable.

This Court should, therefore, reverse the arbitrary and unsupported conclusion of the Bureau, and direct that, on remand, the Bureau accept one of the alternative methodologies that have support in data and in expert testimony, and are not the mere dictates of counsel.

ARGUMENT

I. THE RESPONSE BRIEF OF BMS CONFIRMS THE ABSENCE OF ANY ASSESSMENT BY BMS OF THE POINT AT WHICH LIABILITY COSTS WOULD BECOME "SUBSTANTIALLY OUT OF LINE."

The lack of any lawful basis for the Hearing Decision was confirmed in a number of ways by the Bureau's Response. First, the Response does not argue that there is any connection between any facility data or other evidence and the $50,000 figure adopted in the Hearing Decision as establishing the point at which costs are not just out of line, but "substantially" out of

line. That is not surprising, as the Response does not dispute that counsel selected the $50,000 figure. Instead, the Response simply asserts that the full liability costs reported by HCR were excessive, but without undertaking any assessment of the point at which they would become "substantially out of line." The Response merely proposes to add an arbitrary $50,000 to the reduced figure BMS derived on an unlawful basis. HCR will first turn to that starting point for the BMS position.

A. The Starting Point for the BMS Addition of $50,000 Arises from A Legal Error, not Assessment of the Point at which Costs are Excessive.

The BMS Response repeats the BMS claim that the Supreme Court was "incorrect" in the statement that BMS disallowed "all" of HCR's paid legal claims. Resp. at 1. BMS goes on to claim that it "only disallowed 81.23% of the paid legal claims in order to make the rates reasonable." *Id.* There are two errors in this claim.

First, the 81.23% disallowance, as the testimony of Jeanne Snow and her exhibit showed, was *not* 81.23% of the estimated "paid claims," but 81.23% of the estimated "liability expenses" in total, including legal expenses and insurance payments. *See*, A.R. 1353 at 8:9-9:5 and A.R. 1708. In fact, the Response states the matter correctly later on, recognizing that the 81.23% disallowance was as to "liability expenses" (not paid claims). Resp. at 9. The goal of the disallowance was disallowance of all settlements or paid claims, leaving in legal fees and insurance premiums (A.R. 1359 at 31:18-22 and 32:6-9). The initial estimated removal was, as BMS states, "very accurate" (Resp. at 4), but later information showed a small variance, which Ms. Snow's exhibits showed were about 2%. A.R. 1370 at 75:14- 76:12.

The second, and more important error lies in the claim that the reduction was a reduction "to a level determined to be reasonable." Resp. at 9. The reduction had nothing to do with any study or assessment of reasonableness. Instead, as Ms. Snow testified, the reduction was done to

remove all settlement costs. A.R. 1359 at 31:18-22. The Response indirectly confirmed that basis, by repeating the legally incorrect claim that "the cost of settlements . . . is not reimbursable by the West Virginia Medicaid Program." Resp. at 4. That claim was expressly rejected by the Supreme Court. *See Heartland of Beckley WV, LLC v. Bureau for Medical Services*, No. 15-0595, 2016 WL 6248620 (W. Va. Oct. 26, 2016). The Court held that "a nursing facility may include first dollar losses within its liability deductible as an allowable cost." *Id*. at *5.

The decision of BMS to repudiate the Supreme Court's ruling—in a brief to this Court—is in line with the persistent rejection of the Supreme Court's mandate to conduct an assessment of the point at which costs become "substantially out of line." The Hearing Decision simply proposes inclusion of $50,000 in additional costs, but starting from the massive reductions based on the legal error that settlement costs were not allowable. The starting point was erroneous and the addition, as shown below, was purely arbitrary.

B. BMS Does not Dispute that Counsel Selected the $50,000 Addition Adopted in the Hearing Decision, and it Improperly Asserts that as a Basis to Block Disclosure of the Calculations Underlying the Final Sums Awarded

As HCR noted in its opening brief, the Bureau's witness testified that the selection of the $50,000 figure was done by counsel. *See* A.R. 1477 at 24:8-11. The BMS Response does not dispute this point and does not claim that there is any methodology or data that result in the $50,000 figure. Because it is without substantial support in the record, the decision must be reversed on that ground alone. *See Syl. Pt. 1, Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010), citing Syl. Pt. 2, *Shepherdstown Volunteer Fire Dept. v. State ex rel. State of West Virginia Human Rights Com'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Because it lacks any reasoned explanation, the decision is arbitrary and capricious. *See St. Mary's Hospital v. State Health Planning and Development Agency,* 178 W. Va. 792, 364 S.E.2d 805, 809 (1987)

(reversing agency decision because it lacked "the 'reasoned explanation of the ultimate conclusion reached' which is required by basic principles of administrative law") (quoting *Harrison v. Ginsberg*, 169 W.Va. 162, 170, 286 S.E.2d 276, 281 (1982)).

Another confirmation and extension of this arbitrary action was carefully positioned by the Bureau at the end of its Response, where the Bureau asserted that the attorney-client privilege justifies withholding, from the Court and from HCR, the spreadsheets that implement the $50,000 addition. Resp. at 15. At the hearing, the Bureau produced an exhibit (DHHR 26) showing the alleged impact on reimbursement from adding the $50,000 to the reduced cost figures after the disallowance of the estimated settlement costs. A.R. 1511;1479 at 30:18-31:1. At the hearing, BMS refused to produce the spreadsheets that the witness (Jeanne Snow) used to produce the exhibit. A.R. 1480 at 35:16-36:23. The Bureau's Response extends that impropriety by asserting that the attorney-client privilege protects the actual basis of the $50,000 addition, and that HCR "does not know" the basis for the figure. Resp. at 15. In making that claim, the Response confirms the arbitrary basis for the Hearing Decision (attorney dictate) and extends the impropriety by asserting that there is a "hidden basis" that has not been addressed. By withholding the supposed basis for the $50,000 sum, and withholding the calculations implementing the increase, BMS asserts that an administrative agency may conceal from a reviewing court, from the party affected, and from the public, the basis for an agency decision, merely on the ground that the agency decision was recommended by an attorney or discussed with an attorney.

That contention is unprecedented, so far as HCR can determine. The Bureau provides no support for its position and does not explain how such concealment of the basis for administrative decisions is consistent with the rule of law. An agency acting without having to

explain its basis is an invitation to, at best, arbitrary and capricious action and, at worst, to sheer disregard of the law. In addition, the Bureau's position is inconsistent with well-settled rules of administrative law. The West Virginia Supreme Court has long held that an agency must give reasoned and articulated statement on the record for its decisions. "The law contemplates a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusion, along with an explanation of the methodology." Syl. Pt. 2, *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions,* 160 W. Va. 220, 233 S.E.2d 719 (1977). In addition, the Supreme Court has also held that an agency decision must be reversed if it lacks findings of fact and a "reasoned explanation" of the ultimate conclusion reached. *See* Syl. Pt. 2, *Harrison v. Ginsberg*, 169 W.Va. 162, 286 S.E.2d 276 (1982).

HCR, of course, does not dispute the right of an administrative agency to consult with counsel or even to rely on the advice of counsel. That reliance, however, does not excuse an administrative agency from stating the actual basis for its decision, which must exist apart from any approval or any advice given by counsel. In other words, HCR is not concerned with whether counsel approved or had any discussions regarding the Hearing Decision or positions of the Bureau. HCR simply wants to know the basis of that decision and the calculations by which the final reimbursement numbers were determined. In claiming that it can conceal such bases – and that the Court must accept the hidden bases – BMS departs from the rule of law.

C. The Response Continues the Errors of the Hearing Examiner and Provides No Justification for the Failure of BMS to Determine Where Costs Would Become "Substantially Out of Line."

The Response does not attempt to show that the $50,000 figure proposed by BMS and accepted by the Hearing Examiner is the point at which liability cost would be "substantially out

of line." The bulk of the argument in the Response compares the full, as-reported liability costs of the HCR facilities to a specific West Virginia nursing home chain (Genesis) or to the aggregate costs of all West Virginia facilities. Resp. at 11-14. In addition to the specific problems in the Response, the arguments fail because they assert only that the full reported expenses are out of line. The Response does not attempt to identify the point at which the costs become out of line and it does not show that the proposals of HCR are substantially out of line. The Response, like the Hearing Decision, thus fails to show how much should be deducted from the costs as reported so that they will no longer be "substantially" out of line with truly similar facilities.

The Response instead assumes that the original deduction is some kind of established starting point that just needs adjustment. But that "starting point" was based on a legal theory rejected by the Supreme Court, and not on any assessment or study of the level of costs beyond which costs would become "substantially out of line." Finally, the selection of the $50,000 figure is not a rational assessment of where costs become "substantially out of line" because it results in widely varying levels of what constitutes that point. For example, adding the $50,000 per facility applied to the 201 beds of Heartland of Beckley (A.R. 1712) results in a $248.75 per bed increase for that facility ($50,000 ÷ 201), but applying it to the 60 beds of Heartland of Rainelle (A.R. 1713) results in an increase of $833.33 ($50,000 ÷ 60) per bed. Both numbers are arbitrary, but their wide variance confirms that they cannot both be the point at which costs become substantially out of line.

D. The Various BMS Slurs against HCR are without Evidence and Are Unrelated to Compliance with The Mandate of the Supreme Court.

The Response repeatedly asserts that BMS and/or taxpayers cannot properly be charged the costs for HCR's "negligence" or "poor management." Resp. at 3, 4, 8 and 12. Nothing in the

West Virginia Medicaid reimbursement methodology, or in the Supreme Court's mandate, turn on an assessment by BMS of the level of negligence at any nursing facilities. The BMS complaints and slurs are therefore irrelevant to the actual issue. Moreover, all malpractice insurance programs in some sense pay, in part, for any care that is actually negligent. The insurance not only protects the facilities but provides payments to individuals who assert negligent care. The insurance thus serves a double good: keeping the facilities in operation for the state and protecting residents. The Bureau's express reimbursement methodology recognizes these goods and provides that liability insurance is an allowable cost. *See* West Virginia Medicaid Provider Manual § 514.302 (A.R. 2167).

The position taken in the Response is thus in violation of the actual methodology of the Bureau set out in the Medicaid Manual. Moreover, the position disregards the Supreme Court's decision in this case, which discusses the extensive federal regulation on liability insurance reimbursement and holds that settlement payments as part of an insurance deductible are allowable costs. *Heartland of Beckley WV, LLC v. Bureau for Medical Services*, No. 15-0595, 2016 WL 6248620 at *4-6 (W. Va. Oct. 26, 2016). The Bureau's complaints simply confirm its continuing resistance to the Supreme Court's ruling.

Finally, the claims that HCR's costs were driven by poor care is not supported by any evidence in the record. The only evidence on the point was that the West Virginia HCR facilities had the same level of care as other HCR facilities around the country, but that West Virginia had a very different level of cost compared to others. A.R. 277:12-278:17. The undisputed testimony was that HCR had become a target of aggressive plaintiff's attorneys, and that the liability costs had been driven by that reality. *Id.* at A.R. 195:4-196:8. The BMS attacks are, therefore, not only addressed to an irrelevant point, but factually unsupported.

E. BMS Improperly Attempts to Rely on Data the Hearing Examiner Rejected.

BMS devotes one section of its brief to the argument that the successor companies who purchased the HCR facilities reported lower liability costs in later cost report periods. Resp. at 12-13. The Hearing Decision, however, *rejected* reliance on those later reported costs, noting in part the lack of comparability in later cost report periods, because BMS had directed all nursing facilities not to report settlement costs. A.R. at 1624-25.

The Bureau's attempted reliance on those figures is also irrational in view of its position that HCR cannot rely on the approved rate from the immediately *prior* period—which had identical rules—simply because the Bureau's approval "was from a prior period." Resp. at 14. BMS provides no basis—much less a reasoned basis—for saying that approved costs in the immediately prior period are irrelevant to what would be "substantially out of line" in a period starting one day later, governed by the same reporting and reimbursement rules.

Finally, the reliance on later successor facility costs, under different reporting and reimbursement rule, does nothing to establish the point at which cost would become "substantially out of line." If the costs were genuinely relevant and had been supported with a proper basis in some way, they would show an acceptable level of cost, but not the point beyond which costs become "substantially" out of line.

F. The Bureau's Position Disregards Its Own Stated Methodology for Determining Costs That Are Out of Line.

In its Response, the Bureau points out approvingly the testimony of Lane Ellis, stating that the cap methodology is intended to monitor costs and determine "reasonable" costs. Resp. at 3. HCR agrees with the Bureau that the CAP methodology set out in the Bureau's Medicaid Manual is, in fact expressly designed to exclude costs that are unreasonable substantially out of line. As explained by the Bureau's own witness during the hearing, that methodology arrays

reported costs from all facilities in two different groups, from high to low, and discards costs that are above the 90th percentile. A.R. 64:18-65:12. That methodology resulted in discarding substantial HCR cost. The Bureau, however, concluded that it did not discard enough. Rather than reassessing its own methodology or providing a new methodology, the Bureau simply cast about for methodologies that gave it a result it liked. In doing so, it settled upon the theory that settlement costs are not allowable as a matter of law. The West Virginia Supreme Court corrected that error of law, but the Bureau has continued to disregard its decision.

II. THE HEARING DECISION ADOPTED BY BMS FOUND THAT THE NET WORTH TEST IS MET, AND BMS CANNOT CITE ITS OWN DECISION AS ERROR.

The Response of BMS complains that HCR refused to provide "documentation" of the HCR net worth. See Resp. at 8, 9. BMS proceeds from that baseless complaint to make a patently false claim that the Bureau cannot make the net worth "calculation provided in PRM Section 2162.5" due to the "refusal" by HCR to provide documentation. Resp. at 9. The Hearing Examiner, however, made that calculation based on the undisputed testimony, originally given in 2018 and confirmed in 2022, and found that the "net worth" test is met. A.R. 1622. BMS adopted the Hearing Examiner's conclusion on that point. A.R. 1634. BMS cannot assign as error its own actions.

Moreover, BMS misleads the Court in the claim that HCR "refused" to provide documentation. Counsel for BMS claimed—on two separate occasions in the third hearing—that BMS had previously requested that HCR provide documentation on net worth. A.R. 1482 at 43:1-6 ("I asked actually your witness at the last hearing if they had any documentation regarding their net worth and they said no."); *id.* at 44:24-45:3 ("What I said was that there was no documentation that was given to us to support the testimony at the last hearing, even though it was asked for."). Those claims were complete falsehoods. At the prior hearing (in 2018),

counsel for BMS not only did *not* ask the HCR witness on net worth (Mr. Martin Allen) for documentation regarding net worth, but she asked him no questions at all. A.R. 1374 at 93:15-16. And she asked no other HCR witnesses for documentation. A.R. at 1380-81; 1402-1405. The Bureau's witness, Jeanne Snow, testified that she had not asked HCR for any documentation on that point (A.R. 1482 at 43:1-17), despite being present at the 2018 hearing for the testimony of Mr. Allen. *Id.* at 43:20-44:4. BMS did not seek documentation in 2018 when the testimony was introduced and did not seek it in the four succeeding years prior to the 2022 hearing. HCR never "refused" to give any documentation to BMS.

III. THE RESPONSE PROVIDES NO REASONED BASIS FOR REJECTION OF THE ANALYSIS OF THE HCR EXPERTS.

As HCR noted in its initial brief (at 31), the Hearing Decision provides only a single paragraph in justification of the rejection of the two converging methodologies proposed by HCR's experts. A.R. 1655. In its Response, BMS does not defend the Hearing Decision or rebut the points made by HCR that the two reasons offered in the decision are inadequate as a matter of law to justify the agency's position. The Hearing Decision's complaint that the HCR methodologies include settlements (*id*.) is simply another rejection of the Supreme Court's decision in this case, and an error of law. The Hearing Decision's second complaint is that data from Kentucky—an adjacent state referred to as a "broader area"—was not shown to be available to BMS prior to the various hearings in this matter. *Id*. That, however, does not explain why the data would be rejected after being supplied at the 2018 hearing.

As attempted justification for rejecting the assessment of the HCR experts, BMS offers three paragraphs that discuss the HCR analyses. Resp. at 14-15. None address the inadequacies of the Hearing Decision or defend it.

BMS first asserts that the previously approved rates—from the cost report period ending one day before the period at issue here (December 31, 2011) are not "comparable to the liability expenses actually reported by HCR for the January-June 2012 cost reporting period." Resp. at 14. BMS does not explain how "comparability" bears on the issue, but presumably means to say that the information is not relevant, because from a slightly earlier period. BMS does not justify this position or provide any analysis of it at all, and it is facially arbitrary. Costs approved by BMS in an immediately prior period are pertinent as a matter of common sense. Indeed, a change in agency position as to what constituted reasonable costs would require an explanation of the change to avoid being arbitrary or capricious. *See C & P Tel. Co. of W.Va. v. Pub. Serv. Comm'n of W.Va.,* 171 W. Va. 708, 715, 301 S.E.2d 798, 804 (1983) (an agency reversing its course must "give must give reasonable notice and supporting rationale before it changes its standards, or its actions appear arbitrary and capricious.")

BMS next asserts that a methodology reflecting the liability insurance of a nursing facility of another national chain—Beverly Health Care Center—was impermissible because the reported costs of the Beverly facility were "disallowed because paid claims had been included." Resp. at 14. That, of course, merely continues the Bureau's disregard of the Supreme Court's ruling that settlement costs are allowable costs. The purported basis relies on a gross error of law.

The third paragraph contends that information from the AON study could not properly be considered as part of the second methodology provided by HCR's experts. *Id*. BMS claims that "without basic information" on the study, "HCR cannot rely on them to rebut" the position of BMS that the reported costs of HCR were too high. That claim has two errors. First, HCR is not suggesting that the AON study shows that the reported expenses should be allowed; the study

was simply part of an alternative analysis to determine a point at which costs become "substantially out of line." The methodology produced a *per diem* rate of $47.07 for taxes and insurance (A.R. 2175), well below the $60.60 figure BMS calculated by inclusion of the reported HCR expenses. A.R. 1710. Second, there was much more than "basic information" about the study. The Response notes that 52% of all facilities participated (Resp. at 14); HCR's witness testified to the use and reliability of the reports (A.R. 1377 at 103:24-104:15), and the Hearing Examiner admitted the report into evidence. A.R. 1381 at 124:21-22.

The Response therefore does not cure the deficiencies of the Hearing Decision and does not justify rejection of the converging methodologies of the HCR experts. Certainly, the HCR methodologies, which have data and expert support, are superior to the Bureau's proposal that consists of an arbitrary figure selected by counsel that was applied to a "base" derived from an error of law.

CONCLUSION

The Bureau for Medical Services has failed to provide any rational and non-arbitrary basis for its decision, which starts from an unlawful exclusion of all settlement costs, and then arbitrarily adds back a sum ($50,000) selected by counsel. The Bureau has not provided any reasoned and legally proper basis for rejecting the two alternative calculations offered by the HCR Facilities. For these reasons, and those set forth in the prior brief of the HCR Facilities, the Court should reverse the decision of the Bureau and direct it to implement one of the revised CAPs resulting from the methodologies proposed by HCR's experts.

Respectfully submitted this 25th day of October 2023.

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CERTIFICATE OF SERVICE

I certify that on this 25th day of October 2023, I served the foregoing ***"Reply Brief of Petitioners"*** by electronically filing a true copy thereof with the Court's designated electronic filing service, which will send notice thereof to the following counsel of record:

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