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IN THE INTERMEDIATE COURT OF APPEALS

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

BRIEF OF RESPONDENT

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I.STATEMENT OF THE CASE

On the 17th day of January, 2014, the Bureau for Medical Services (BMS) from the West Virginia Department of Health and Human Resources (DHHR), held a hearing before Administrative Law Judge, Jeffrey Blaydes, regarding HCR's Medicaid reimbursement rates. The ALJ's recommended decision, upholding the action of BMS, was adopted by BMS on September 8, 2014. That decision was upheld by the circuit court. After oral argument at the West Virginia Supreme Court of Appeals, (WVSCOA), on September 21, 2016, the matter was remanded for additional evidence regarding HCR's net worth and the comparability of HCR's expenses with other facilities. The WVSCOA's Memorandum Decision incorrectly stated BMS disallowed "all of HCR's paid legal claims, as opposed to reducing them to a level determined to be reasonable." BMS only disallowed 81.23% of the paid legal claims in order to make the rates reasonable. Even after that reduction, HCR still had some to the highest allowable costs. The hearing was reconvened on May 22, 2018 and a recommended decision adopted in November 2018. HCR filed a Writ of Prohibition with WVSCOA in December 2020, which was denied in May 2021. A third hearing was held October 19, 2022 and the new ALJ, Lewis Brewer, also recommended upholding the disallowance of some of the unreasonable expenses HCR had and continues to submit be included in the reimbursement rates.

HCR ManorCare owned and operated nursing home facilities in several states, including West Virginia. BMS is the single state agency administering the Medicaid program in West Virginia. W. Va. Code § 9-1-2(n). "Medicaid is a cooperative federal-state program in which the federal government provides financial assistance to the states. Participating states match federal funds with state funds and use this money to administer each state's Medicaid program." *Appalachian Regional Healthcare, Inc. v. WVDHHR, et. al.,* 752 S.E.2d 419, 422 (2013). The

funds are paid directly to Medicaid providers for providing Medicaid services to the indigent and disabled in the state, including nursing home services.

The rates paid to the nursing home facilities are calculated every six months by the Office of Accountability and Management Reporting (OAMR). 42 C.F.R. § 447.253(b)(1) requires:

> [t]he Medicaid agency pays for inpatient hospital services and **long-term care facility services through the use of rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers** to provide services in conformity with applicable State and Federal laws, regulations, and quality and safety standards.

Additionally, 42 C.F.R. §413.9(c) prohibits a nursing facility's costs from being "substantially out of line" from comparable institutions.

In setting rates, there are two 6 month cost reports submitted a year; the first is January-June and the second is July-December. January 14, 2014, Transcript, A.R. 68. The January- June cost report produces the rate used for the October-March rate period and the July-December cost report produces rates used for the April-September rate period. A.R. 68-69. These rates are often referred to as the June and December cost reports. Jan. Tr. p. 21. Since West Virginia nursing homes bill a month in arrears, the October- March rates are not used until November 1, so the rates are set by the third week in October while the July-December rates are not used until May 1 and thus are set by the third week in April. A.R. 73-74.

In determining the rates, the nursing homes are divided into large bed facilities, those with more than 90 beds, and small bed facilities, those with 90 or less beds. A.R.65. The per diem is calculated for each facility by dividing the total allowable costs by the total patient days. *Id.* The per diems are arrayed from high to low and the 90th percentile is calculated. *Id.* The 90th percentile becomes the CAP. *Id.*

As Lane Ellis, HCR's accountant and expert witness, acknowledged, the CAP is designed to monitor costs when he testified, "The purpose of the CAP is to put... ceilings and monitor costs... from the State's perspective to determine what's a reasonable and allowable cost. That's a part of the system. That's the way the system works." A.R. 307.

The rates being appealed in this litigation are related to the January 1, 2012- June 30, 2012 cost report. A.R. 78. But OAMR had concerns about HCR's cost reports prior to the June 2012, cost report. A.R. 63. In the periods prior to the June 2012, cost report, OAMR noticed that HCR was driving the CAPS higher and as rates started to become unreasonable, OAMR began investigating what was impacting the rates, as previously detailed in the briefs in this case. A.R. 84.

January 1, 2012- June 30, 2012 cost reports- Basis for Appeal

By the time the January 1, 2012 – June 30, 2012 cost reports, which are the basis of the appeal, were submitted, BMS again noticed HCR was driving the CAPS higher in setting the rates and the liability expenses submitted by HCR drove the rates up so high they were no longer reasonable and adequate to meet the costs of an efficiently and economically operated provider. A.R. 90-92, 95. After investigating HCR's expenses further, OAMR discovered HCR was including paid settlement claims in their liability expenses and passing the cost of their negligence on to the West Virginia Medicaid program. A.R.79-85, 434, 435, 436, 437, 438. OAMR disallowed only 81.23% of these expenses and set rates which were reasonable and adequate to meet the costs of an efficiently and economically operated provider. A.R.89, 439, 440.

Specifically, when the cost reports were submitted for the January 1, 2012 - June 30, 2012 period, HCR's liability expenses had dramatically increased. A.R.30, 432, 433. In particular, the expenses increased from about $6.5 million a month to about $33 million for the month of June

2012. A.R.80, 433. OAMR asked HCR to explain the increase. A.R.78-79. HCR submitted additional documentation. A.R.78-81, 434.

Based on the documentation, OAMR realized HCR was including paid liability claims in the liability insurance expenses included in the cost reports when documentation regarding settlements was submitted. A.R.82, 435. Medicaid can only pay for patient related care expense and medically necessary expense. A.R.82-82. Therefore, the cost of settlements, including those for the negligence of HCR in patient care, is not reimbursable by the West Virginia Medicaid program. A.R.83.

The deadline for setting the rates using these cost reports was looming and OAMR had to find a way to remove the settlement costs. A.R.85-86. Ms. Jeanne Snow, Director of Rate Setting for OAMR, developed a calculation to estimate and remove the settlement costs from the cost reports. A.R.85-88, 437, 438, 439, 440.

Ms. Snow's methodology for removing the costs was very accurate; however, not all of the submitted liability expenses were removed. A.R.98-103, 440, 443, 444, 446-448, 469, 1419, 1420, 1353. While preparing for this litigation, Ms. Snow received information from HCR regarding the actual paid claims and discovered that not all of the paid claims had been removed. A.R.9-103.

The amount removed from the rate calculation was $53,285,372 at the corporate level. This resulted in a disallowance percentage of 81.23%, which was applied to the individual facilities. A.R.88-89, 439, 440.

Once 81.23% of the settlement costs was excluded from the liability expenses, HCR was still included in calculating the CAP. A.R.94. When the CAP was calculated for the large bed group before 81.23% of HCR's settlement costs were excluded from the taxes and insurance, the CAP was $60.60, and HCR's six large bed facilities occupied the top six spots. A.R.90, 441. After

81.23% of HCR's settlement costs were excluded, the CAP for the large group decreased to $25.27 which was comparable to prior periods and resulted in reasonable rates. A.R.91. The June 2010 CAP was $27.82; the December 2010 CAP was $25.32; the June 2011 CAP was $28.31. Even the December 2011 CAP of $39.07 was more than $20 less than the $60.60 CAP if the settlement costs hadn't been excluded. A.R.91, 432, 441.

Prior to a portion of the reported expenses being removed, HCR's 6 large bed facilities reported the highest amounts of liability expenses. A.R.95, 443. The Heartland of Beckley facility reported the highest amount with approximately $1.6 million. A.R.96, 443. The Heartland of Clarksburg facility reported the sixth highest amount at just below $1 million. A.R.443. The amounts reported for the other HCR large bed facilities were between these amounts. A.R.9, 443.

In comparison, the highest non-HCR facility reported liability insurance of $284,064. A.R.96-97, 443.

When the liability expenses are calculated per bed, they resulted in per bed costs as follows:

1. Heartland of Beckley - $8,087 per bed
2. Heartland of Charleston - $8,079 per bed
3. Heartland of Keyser - $8,112 per bed
4. Heartland of Clarksburg - $8,108 per bed
5. Heartland of Martinsburg - $8,129 per bed
6. Heartland of Preston County - $8,115 per bed
7. Heartland of Rainelle - $8,113 per bed[1]

[1] HCR is no longer contesting the Heartland of Rainelle, the only small-bed facility. AR 1492.

The first non-HCR facility without a disallowance was Arbours at Fairmont reporting $2,387 per bed in liability expenses. A.R.2169[2].

Another way to compare these expenses is to look at the percentage of the expenses reported. In this case, the highest HCR facility reported liability expenses over 560% more than the highest non-HCR facility. Even the lowest HCR facility was still about 350% higher than the highest non-HCR facility.

For the small bed group, the Heartland of Rainelle facility had the highest reported liability expenses at nearly half a million dollars. A.R.444. The second highest facility was a non-HCR facility with reported liability expenses of just under $100,000. A.R.444. Again, by comparison, the HCR facility reported liability expenses over 520% more than the highest non-HCR facility.

The total amount claimed for liability expenses for the 51 facilities in the "large bed group" was $11,203,875. Of that amount, the **6 HCR facilities,** or less than 12% of the total facilities, reported $7,024,330 or **62.5%** of the total amount. The remaining **45 facilities**, or 88% of the total facilities, totaled $4,215,545 or merely **37.5%** of the total amount. This clearly demonstrates the amounts reported by the HCR facilities are unreasonable. A.R.443.

Once 81.23% of HCR's liability expenses were removed, HCR's six large bed homes were still in the top eight large bed facilities and HCR's Beckley facility still had the highest allowable liability expenses. A.R.440, 443. HCR's one small bed home still had the second highest allowable liability expenses among the small bed facilities, and that facility missed having the highest allowable expenses by a mere $1,000 A.R.2034. BMS did not disallow all the liability expenses

[2] Beverly Health Care Center, with 108 beds, has a disallowance, too, and therefore moved to the 48th position. AR 1408, 2169, 1499, 1511.

reported and the amounts allowed for the HCR facilities were still among the highest allowed amounts.

BMS removed a portion of the liability expenses in order to ensure the rates were reasonable pursuant to federal law. Prior to that, the rates were unreasonable and HCR's liability expenses were substantially out of line with comparable facilities. Once HCR's liability expenses were reduced to ensure the rates were reasonable, HCR's liability expenses were in line with comparable facilities, while still among the highest expenses reported.

HCR has continued to argue the reason HCR's liability expenses were so high in West Virginia is because West Virginia is a judicial hellhole. A.R.1377-1378. Specifically, HCR cites a verdict, including the 80 million punitive damages award, to support their theory that excessive liability expenses are simply the cost of doing business in West Virginia, without acknowledging responsibility for the management decisions that contributed to that verdict. A.R.207-208, 1378. However, other West Virginia facilities were not reporting liability expenses as high as HCR and HCR's argument is further undercut by the fact that HCR, a large national chain operating in 32 states in 2013, filed for bankruptcy in March of 2018, several years after HCR sold all the West Virginia facilities. A.R.1378, 1380, 2037. Clearly, HCR's problems went beyond the borders of West Virginia and simply stating that West Virginia is a judicial hellhole does not justify its excessive liability expenses. This case has been to the WVSCOA twice. The first time, the Memorandum Decision dated October 26, 2016, found BMS "erred by eliminating all of HCR's paid legal claims from its June 2012 cost report." A.R.1241. The Court also held the parties should present evidence regarding PRM Section 2162.5, including HCR'S net worth, and 42 CFR Section 413.9(c)'s substantially out of line provision. A.R.1241.

BMS did not allow all the claims, only disallowing 81.23% of the claims, however, BMS decided to add more of the disallowed claims back in. A.R.1514, 1516. Even then, HCR continued to occupy 6 of the top 7 spots. A.R.1516. BMS could not use the calculation contained in PRM Section 2162.5 because HCR refused to provide documentation regarding its net worth. However BMS showed several ways in which HCR was substantially out of line.

II.SUMMARY OF ARGUMENT

HCR, a company no longer doing business in West Virginia, refuses to address the clear evidence its negligence caused the Medicaid rates to become unreasonable when its liability expenses were substantially out of line with EVERY facility in West Virginia. Instead, HCR has argued high liability expenses are the cost of doing business in West Virginia and the taxpayers should have given a blank check to HCR to cover all of HCR's reported liability expenses. Taxpayers should not have to pay for HCR's negligence and, fortunately, federal law protects taxpayers. BMS and HCR both agree there must be cost containment. Therefore, BMS disallowed 81.23% of HCR's reported liability expenses. In a Memorandum Decision dated October 26, 2016, the WVSCOA found BMS "erred by eliminating all of HCR's paid legal claims from its June 2012 cost report." Subsequently, BMS added back some of the disallowed claims, but without having documentation regarding HCR's net worth, because HCR refused to provide it.

III.STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent does not request oral argument. This case has been before the West Virginia Supreme Court of Appeals twice and three administrative hearings have been held. The Respondent has simply complied with the Supreme Court's mandate.

IV. ARGUMENT

i. BMS Did Not Disallow All Liability Expenses, But Will Add Back Some of the Disallowed Expenses In Order to Comply with the WVSCOA.

When BMS recognized HCR's cost reports for January 2012 - June 2012 were resulting in unreasonable rates, BMS took action pursuant to 42 C.F.R. §447.253(b)(1) to ensure the rates were "reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers…." Given the time constraints in setting the rates at that time, BMS did not disallow all the liability expenses. A.R.1353, 440, 2033, 2034. Instead, BMS used a calculation which disallowed 81.23% of the reported liability expenses. *Id.* Even after only 81.23% of the reported liability expenses were disallowed, the 6 HCR large bed West Virginia facilities still had liability expenses that ranked in the top 8 facilities and the HCR facility in Beckley still had the highest allowable liability expenses at $305,128. *Id.* Among the small bed West Virginia facilities, HCR had the second highest allowable liability expenses at $91,382. *Id.* It was only later that BMS was provided information by HCR with the total amount of actual liability expenses, and BMS did not disallow all of those expenses. A.R.98-103, 2032. Far from disallowing all the liability expenses, BMS reduced the liability expenses to a level determined to be reasonable, while still allowing HCR's liability expenses to be among the highest allowable amounts.

However, BMS will add an additional $50,000 per large bed facility, in addition to amounts already included. A.R.1516. Even then, HCR will continue to occupy 6 of the top 7 facilities in terms of liability expenses reported. A.R.1516.

However, BMS cannot use the calculation provided in PRM Section 2162.5 because HCR will not provide documentation regarding its net worth. BMS has demonstrated HCR was substantially out of line.

ii. The Liability Expenses Reported BY HCR Were Substantially Out Of Line From Comparable Facilities.

In addition to the requirement that rates be reasonable as contained in 42 C.F.R. §447.253(b)(1), 42 C.F.R. § 413.9(c) prohibits a nursing facility's costs from being "substantially out of line" from comparable institutions. No matter which facilities are compared to the HCR facilities, HCR's expenses are substantially out of line in comparison because HCR's liability expenses were substantially out of line with EVERY facility.

1. HCR's liability expenses were substantially out of line when compared to similar bed size West Virginia facilities.

As the evidence at the first hearing demonstrated, HCR's reported liability expenses were substantially out of line with comparable facilities. A.R.2030. Among the large bed West Virginia facilities, the Heartland of Beckley facility reported the highest liability expenses at approximately 1.6 million dollars. Id. Heartland of Charleston reported expenses of approximately 1.5 million dollars. *Id.* Heartland of Clarksburg, Heartland of Keyser, Heartland of Martinsburg and Heartland of Preston County all reported expenses of nearly 1 million dollars. *Id.* In comparison, the highest amount for a non-HCR facility was approximately 284 thousand dollars.

Similarly, for the small bed West Virginia facilities, the only HCR facility in this group had the highest reported expenses at nearly half a million dollars. A.R.2031. In comparison, the second highest liability expenses reported for this group was a non-HCR facility at just under 100 thousand dollars. *Id.*

Just to sum it up, the liability expenses reported by the highest HCR facility were over 560% higher than the highest non-HCR facility and even the liability expenses reported by the lowest non-HCR facility were still over 350% higher than the highest non-HCR facility.

Clearly, HCR's liability expenses were clearly unreasonable and substantially out of line with comparable facilities.

2. HCR's liability expenses were substantially out of line compared to the other national chain in West Virginia.

HCR is a national chain, doing business in about 32 states in 2013. A.R.1378. Genesis Health Care was also a national chain operating in WV and during the relevant time period, Genesis had 9 large bed facilities in West Virginia, compared with HCR's 6 facilities, and 18 small bed facilities in West Virginia, compared with HCR's one facility. A.R.2035. If the HCR facilities are compared to large bed West Virginia facilities operated by a national chain, HCR's liability expenses are still substantially out of line with comparable facilities. *Id.* The highest amount of liability expenses reported by a Genesis facility, Heritage Center, was $132,948. *Id.* The amounts reported by Genesis facilities decrease from there: Valley Center- $104,961; Teays Valley Center- $98,912; Cedar Ridge Center-$93,717; Hilltop Center- $89,432; Brightwood Center- $84,765; Willows Center- $83,387; Tygart Center- $51,258; Pierpont Center- $36,652. *Id.* These amounts are clearly substantially less than the approximately 1 million to 1.6 million dollars of liability expenses reported by HCR's large bed facilities.

Similarly, the small bed HCR West Virginia facility, when compared to the small bed West Virginia facilities operated by the national chain Genesis, reported liability expenses substantially out of line to the 18 small bed facilities operated by Genesis. *Id.* In this case, the only HCR facility reported liability expenses of $486,839 compared to the highest amount reported by a Genesis facility, Marmet Center, of $70,916. *Id.* The lowest amount reported by a Genesis facility, Ansted Center, was $45,598. *Id.*

Clearly, the HCR facilities were substantially out of line when compared to the Genesis facilities. Even though Genesis had a much larger presence in West Virginia than HCR, Genesis did not have the significant liability expenses that HCR did.

3. Consequently, HCR's position is that HCR's facilities should not be compared to any other facilities.

In the end, no matter how you compare the nursing home facilities in West Virginia, HCR's liability expenses will always be substantially out of line when compared to the comparable facilities because the HCR facilities were substantially out of line compared to EVERY other facility in West Virginia. Therefore, HCR has no choice but to argue there are no comparable facilities in West Virginia and their liability expenses should only be compared to the other HCR facilities. However, this approach is not only a way to circumvent the requirements of comparability and reasonableness, but is also a way for the HCR facilities to demand a blank check from the West Virginia taxpayers to pay for the negligence and poor management decisions of HCR without limitation. Clearly, this result is not the intent of 42 C.F.R. § 413.9(c) and it does not meet the reasonableness requirements of 42 C.F.R. § 447.253(b)(1).

Interestingly, though, HCR began to sell its West Virginia facilities in 2013. DHHR Exhibit 23. By the fall of 2015, HCR was no longer doing business in West Virginia.

4. HCR's liability expenses were substantially out of line compared to those reported by HCR's successor for the facilities formerly owned by HCR.

HCR's liability expenses are substantially out of line with every other facility in the state so that no matter how you compare the facilities, HCR's liability expenses are substantially out of line. Therefore, HCR argues its facilities should only be compared to HCR facilities because none of the other 45 large bed West Virginia facilities compare to the 6 HCR large bed West Virginia

facilities and none of the 61 small bed West Virginia facilities compare to the one and only HCR small bed facility.

But HCR stopped doing business in West Virginia several years ago and the former HCR facilities are not reporting the same liability expenses that HCR did. DHHR Exhibit 24. In fact, during the most recent cost reporting period, none of the former HCR facilities had a disallowance. *Id.* The highest amount reported by a former HCR facility for the large bed West Virginia homes was $266,361 by the former Heartland of Beckley facility. The former Heartland of Charleston reported $204,941; the former Heartland of Clarksburg reported $191, 922; the former Heartland of Martinsburg reported $79,178; former Heartland of Preston County reported $78,838; and the former Heartland of Keyser reported $55,547. The one former HCR small bed West Virginia facility reported liability expenses of $18,390.

When these amounts are compared to the amounts reported by HCR for the relevant time period, HCR was clearly substantially out of line in comparison. But even if these amounts are compared to the amounts BMS allowed HCR to report for the relevant time period, HCR still had higher allowable amounts for each facility than the reported amounts for the former facilities.

Clearly, excessive liability expenses are NOT the cost of doing business in West Virginia.

iii. HCR's Liability Expenses were Clearly Unreasonable and Substantially Out of Line.

As discussed at length in prior briefing, the liability expenses submitted by HCR clearly resulted in unreasonable rates and BMS had an obligation under 42 C.F.R. § 447.253(b)(1) to take action to ensure the rates were reasonable. Therefore, a percentage of the reported liability expenses were disallowed. Also, the reported liability expenses were, clearly, substantially out of line with EVERY facility in West Virginia in violation of 42 C.F.R. § 413.9(c). Since the

methodology used by BMS to set rates, clearly, demonstrates both of these violations of federal law, HCR developed three creative theories to support its position that the costs were not "substantially out of line" and also tried to make another attempt to demonstrate, "here's an approach to look at reasonable costs." A.R.1387, 1393. All three theories fail.

First, HCR tries to use the $39.07 per patient day rate from December 2011 to support its argument its liability expenses from the January-June 2012 cost reporting period are reasonable. A.R.1393. However, the per patient day rate would not be comparable to the liability expenses actually reported by HCR for the January - June 2012 cost reporting period since it was from a prior period. A.R.1440, 1408. BMS only uses the costs reported for each 6 month period to set the rates. *Id.* For the relevant period, the per patient per day rate was $60.60, which resulted in unreasonable rates. A.R.1327.

Second, HCR uses a liability insurance level of $5,600 using the amount of liability expenses reported by Beverly Health Care Center during the relevant time period to demonstrate the reasonableness of their expenses. A.R.1443, 1392, 1393. However, a portion of the liability expenses reported by Beverly Health Care Center was also disallowed because paid claims had been included. A.R.1408, 1439. Therefore, HCR was incorrect to rely upon the $5,600 reported amount.

Finally, HCR relies upon a figure contained in the AON report, but HCR did not provide an expert to explain how the figures contained in the AON report were derived. A.R.1445. Without basic information regarding these figures, HCR cannot rely on them to rebut the clear evidence presented by BMS that HCR's reported liability expenses were unreasonable and substantially out of line with comparable facilities. For example, the AON report itself indicates only 52% of the total beds in the state participated in the study, but there is not information

regarding which facilities participated and how the information for those facilities would have impacted the numbers. A.R.1990.

iv. HCR does not know how BMS decided to add in additional claims because of the attorney-client privilege.

HCR claims BMS erred by relying on counsel in allowing additional claims to be included in the cost report. However, HCR does not know what was discussed with counsel as those conversations are protected by the attorney-client privilege.

V. CONCLUSION

The Bureau for Medical Services respectfully requests the Bureau's action to disallow a percentage of the reported liability expenses, which were substantially out of line with EVERY facility in West Virginia and resulted in unreasonable rates, be upheld.

RESPECTFULLY SUBMITTED BY:

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

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In Re: HCR ManorCare

CERTIFICATE OF SERVICE

I, Kimberly Stitzinger, Assistant Attorney General, counsel for the West Virginia Department of Health and Human Resources, Bureau for Medical Services, hereby certify that I have served the "Brief of Respondent" by electronically filing a true copy thereof with the Court's designated electronic filing service, which will serve as notice thereof to the following counsel of record:

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