SC89737

IN THE MISSOURI SUPREME COURT

BEVERLY ENTERPRISES-MISSOURI, INC.
d/b/a GLENNON PLACE NURSING CENTER, et al.,

Petitioners/Appellants,

v.

DEPARTMENT OF SOCIAL SERVICES,
MO HEALTHNET DIVISION,
f/k/a DIVISION OF MEDICAL SERVICES,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
Honorable Byron L. Kinder

RESPONDENT'S SUBSTITUTE REPLY BRIEF

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STATEMENT OF FACTS

The parties have, collectively, already filed three briefs in this matter. For the convenience of the Court, this Brief will recite only a brief summary of the relevant facts.

Since January 1, 1995, the per diem Medicaid reimbursement to Missouri nursing facilities is calculated through a "Reimbursement Plan" set out in 13 CSR 70-10.015. Appendix A-5, ¶ 22;[1] Jt. Ex. 86. It is a "prospective reimbursement plan." Tr. 264.

Each nursing facility submits an annual cost report to the Division, containing its expenses in caring for all of its patients, not just the Medicaid patients. Tr. 261, 476, 480, 496. To calculate each facility's per diem rate, the Division removes non-allowable costs, and the allowable costs are grouped into four cost components: patient care, ancillary, administration, and capital. 13 CSR 70-10.015(4)(Q), (11)(A)-(D). Appx. A-8, ¶ 33-35; J. Stip. ¶33, Tr. 258. The per diem rate is the sum of these individual cost components.

In 2004, Senate Bill 1123 was enacted, codified as § 208.225, RSMo Cum. Supp. 2004, and became effective on July 1, 2004. Appx. A-11, ¶ 50; J. Ex. 2; J. Stip. ¶48. The statute required the Division to recalculate Medicaid per diem rates, setting the administration cost ceiling at 110% of the median cost center. J. Stip. ¶49-50; J. Ex. 2. The Division also amended 13 CSR 70-10.015 so that the minimum utilization adjustment for the capital cost component went from 85% to 73%, and eliminated the 85% minimum utilization adjustment for the administration cost component. Tr. 322,

[1] The Appendix referred to is the one filed with Respondent's Substitute Brief.

327.

The minimum utilization percentage is a reasonableness and efficiency standard to prevent the Division from paying for an excessive number of empty beds. J. Ex. 6; Tr. 1267-68. Minimum utilization treats a facility with an occupancy rate below 85% as if it had 85% occupancy. 13 CSR 70-10.015(7)(O); J. Stip. ¶39. Minimum utilization spreads a facility's costs over more patient days, thereby decreasing the facility's per diem rate. Appx. A-9, ¶ 40, 42; J. Stip. ¶41. Here, eight of Beverly's 17 facilities had occupancy rates below 75% for 2001, and four had occupancy rates below 55%. J. Stip. ¶43.

The new per diem rates became effective on July 1, 2004, for state fiscal year 2005 (FY2005), which ran from July 1, 2004 through June 30, 2005. J. Ex. 8 – 29; J. Stip. ¶53. Beverly's facilities received an average increase in their Medicaid per diem rates of $6.35 from their previous per diem rates of FY 2004. Ex. U. In addition, Beverly's per diem rates for FY 2004, were $5.44 higher than their rates in FY 2003. Ex. C-S; Tr. 310.

The Division determined that its appropriation from the General Assembly was about $16 million less than was needed to fully fund the July 1, 2004 rate increase. Appx. A-13, ¶ 57, 60-61; J. Exs. 4, 47; J. Stip. ¶59. Without a supplemental appropriation, Medicaid payments to nursing homes for FY2005 would have ended in May 2005. Appx. A-13, ¶ 61; Tr. 158-159. In late January 2005, the Division learned that its supplemental appropriation request was not part of the Governor's supplemental requests. Appx. A-13, ¶ 59; LF 287. No supplemental funds were appropriated for FY2005. J. Stip. ¶60.

The Division examined options for an emergency rule amendment to enable it to make payments within the appropriated amount for FY2005. Tr. 155, 177. The Division reviewed the cost reports submitted by the nursing homes, constructed databases with that cost information, and examined various possible changes to the regulation, along with the impact each change would have on nursing homes. Ex. X; Tr. 235, 351, 356, 480, 496 The Division also consulted with representatives of the nursing home industry, and ran various cost assessment scenarios. Tr. 325-327

The Amendments to the Regulation

The Division filed an emergency amendment to 13 CSR 70-10.015 on March 3, 2005, but withdrew it before it went into effect so the Division could obtain additional public comment. J. Stip. ¶62-64; J. Ex. 48- 67. On March 21, 2005, the Division filed a new emergency amendment, to take effect on April 1, 2005. Appx. A16, ¶ 71-72; J. Ex. 4; J. Stip. ¶65. This emergency rule reset the regulation's minimum utilization adjustment for the capital and administration cost components back to 85%. J. Ex. 4; J. Stip. ¶47, 66; LF 509. The March 21 emergency rule was effective from April 1 to September 27, 2005. Appx. A-18, ¶ 79; J. Stip. ¶72.

Under the April 1, 2005 rates, every Missouri nursing facility received a higher per diem amount than it had on June 30, 2004, but a lower increase than it received from the July 1, 2004 rate. Appx. A-19-20, ¶ 85; Ex. U. On average, the April 1, 2005 per diem rate for Beverly's facilities increased $5.11 from the previous fiscal year. Ex. BB,

U. The AHC found that the average per diem for Beverly facilities was only reduced by $1.25 from the July 1, 2004 rate. Appx. A-19 to A-20; ¶ 85.

On June 20, 2005, the Division issued another emergency rule for July 1 through December 25, 2005, similar to the March 21 rule. Appx. A-19, ¶ 82; Jt. Ex. 7; LF 293. The Division also promulgated a permanent amendment to 13 CSR 70-10.015, which went into effect on August 15, 2005, as a final rule with minor changes. Appx. A-18, ¶ 81; J. Stip. ¶74; J. Ex. 6. The Division received approval of its rule changes from the Centers for Medicare and Medicaid Services (CMS), the federal agency that reviews for compliance with federal laws governing Medicaid. Ex. T and ZZ. The changes were incorporated into Missouri's federally-approved Medicaid State Plan. Ex. ZZ.

The Administrative Hearing Commission Proceedings

Each of Beverly's facilities filed a complaint with the Administrative Hearing Commission ("AHC") regarding its new per diem reimbursement rates effective April 1, 2005. LF 507. Following a hearing on the consolidated cases, the AHC issued its decision. Appx. A1. The AHC found that it did not have jurisdiction to declare the validity of the challenged rule amendments and only made findings of fact on the issue. Appx. A-30 to A-31. The AHC did not find that resetting the minimum utilization to 85% was improper. Appx. A-31. But the AHC did find that the Division's calculation of the administration cost ceiling under paragraph 11(C) of the regulation was incorrect by adjusting the cost figures for minimum utilization, and ordered a recalculation of the administration cost component ceiling for all of Beverly's facilities. Appx. A-21 to A-

29; LF 768-776. The AHC also denied an offer of proof by the Division concerning the financial condition of the Beverly homes. Tr. 960-977, 1276; LF 391-394.

The Circuit Court Proceeding and Appeal

Both Beverly and the Division sought judicial review of the AHC's decision in the Circuit Court of Cole County under § 536.100, *et. seq.*, RSMo. [2] LF 2, 12-26, 64-76. The circuit court entered judgment on October 1, 2007. Appx. A-33. The circuit court denied Beverly's challenges to the Division's rule amendments and to the minimum utilization percentage. Appx. A-36 to A-46. The circuit court also reversed the AHC's decision ordering a recalculation of the ceiling. Appx. A-46 to A-50.

From that decision, Beverly appealed to the Missouri Court of Appeals, Western District. The Court of Appeals issued a decision on September 9, 2008, finding in favor of the Division on all issues, and affirming the circuit court decision. This Court accepted transfer of the case on February 24, 2009.

[2] Unless otherwise noted, all statute references are to the Cum. Suppl. 2008.

ARGUMENT

The parties have already filed three briefs in this matter. While Beverly's brief raises a number of issues, only four issues require a reply: (1) whether State law incorporates the federal regulation that implemented the repealed Boren Amendment; (2) the proper determination of the administration cost ceiling under 13 CSR 70-10.015; (3) whether an emergency rule was proper; and, (4) the Division's proffer of proof concerning Beverly's financial situation.

I. The circuit court did not err in holding that the Division's emergency rules were lawful, as they were supported by substantial evidence and complied with state and federal law. [Responds to Points I and II of Beverly's Response Brief]

Points I and II of Beverly's Response Brief involve the same claim: that the Division's amendments to 13 CSR 70-10.015 must take into account the costs of efficiently and economically operated nursing home providers, and that failure to do so violates Missouri law.

But Beverly's position is based on a false premise. Neither the applicable statutes nor the regulations require the Division to base rates on the costs of efficiently and economically operated nursing home providers. The Division properly based its rule amendment on the available cost information (provided by the homes), the prior history of the per diem rates, the financial scenarios that it ran on the cost data from the homes, and consultation with representatives of the nursing home industry.

A. The federal statute and regulations do not support Beverly's position.

Beverly contends that § 208.152.8, RSMo required the Division to consider whether the new per diem rate would cover the costs of efficiently and economically operated nursing homes. That statute actually reads:

> Providers of long-term care services shall be reimbursed for their costs in accordance with the provisions of Section 1902 (a)(13)(A) of the Social Security Act, 42 U.S.C. 1396a, as amended, and regulations promulgated thereunder.

Since the 1997 repeal of the Boren Amendment (formerly codified at 42 U.S.C. §1396a(a)(13)(A)), 42 U.S.C. § 1396a simply requires that states provide "a public process" for determination of rates. *Children's Seashore House v. Waldman*, 197 F.3d 654, 656 (3rd Cir. 1999). The federal statute no longer supports Beverly's position.

What Beverly relies upon is the language of § 208.152.8, RSMo that also references the federal regulations. Despite the repeal of the Boren Amendment, the federal regulation implementing it, 42 C.F.R. 447.250, is still on the books, and reads:

> (a) This subpart implements section 1902(a)(13)(A) of the Act, which requires that the State plan provide for payment for hospital and long-term care facility services through the use of rates that the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities to provide services in

> conformity with State and Federal laws, regulations, and quality and safety standards.

Since the repeal of the Boren Amendment, Section 1902(a)(13)(A) of the Act no longer contains the "efficiently and economically operated facilities" requirement. That was the Boren Amendment's scheme. *Mo. Dep't of Soc. Servs. v. Great Plains Hosp., Inc.*, 930 S.W.2d 429, 431 (Mo.App. W.D. 1996). By the Boren Amendment's repeal, the implementing regulation has been effectively repealed by implication.

The federal regulation cannot impose a requirement that directly conflicts with the language of the federal statute. The Division had no obligation to follow the federal regulation's language, as it no longer implemented, nor stated, the relevant federal law.

B. The state statutes and regulations do not support Beverly's position.

Under § 536.014, RSMo, a rule is invalid when there is an absence of statutory authority for it, it conflicts with state law, or the rule is so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected. Despite Beverly's arguments, none of those criteria apply in this case.

Beverly claims that in promulgating the rule amendments, the Division did not comply with § 536.016, RSMo, as the resetting of the minimum utilization percentage to 85% was not based on substantial evidence. Section 536.016.1 states that rules should be "based upon substantial evidence on the record and a finding by the agency that the rule is necessary to carry out the purposes of the statute that granted such rulemaking authority."

Neither the AHC nor the circuit court found that resetting the minimum utilization percentage to 85% failed due to a lack of substantial evidence. Further, § 536.016.2, RSMo calls for "reasonably available empirical data" and "an assessment of the effectiveness and the cost of rules both to the state and to any private or public person or entity affected by such rules." Here, both requirements were met.

An agency acts unreasonably and arbitrarily if its findings are not based on substantial evidence. *Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882, 892 (Mo. App. 1995). The decision must use some kind of objective data rather than mere surmise, guesswork, or "gut feeling." *Id.* at 893. Here, the evidence established that the Division had both substantial evidence and reasonably available empirical data upon which to base its decision. The Division had the cost reports submitted to it by the facilities. Minimum utilization had been at 85% for 9.5 years before it was changed. The Division knew of the trends in nursing home occupancy rates, the history of nursing home costs, and the prior level of per diem payments.

Based on the available information, the Division ran scenarios calculating the financial impact on each facility's individual per diem rate for any contemplated change to the rule. Even after the April 1, 2005 rate went into effect, each Missouri home had a higher per diem rate than it had on June 30, 2004. Appx. A-19-20, ¶ 85; Ex. U. The Division's actions met the statutory requirements for substantial evidence or available empirical evidence.

C. The regulation's language does not support Beverly's position.

Beverly also claims that 13 CSR 70-015, at paragraph (3)(O), requires the Division to set rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities. But the actual wording of paragraph 3(O) makes such a consideration optional:

> The reimbursement rates authorized by this regulation may be reevaluated at least on an annual basis in light of the provider's cost experience to determine any adjustments needed to assure coverage of cost increases that must be incurred by efficiently and economically operated providers.

(Emphasis added). The regulation permits, but does not require, such an analysis.

Here, the Division was faced with an emergency situation due to the lack of funding. Based on the cost data and available information, the Division essentially returned certain cost components to the standards used just 9 months previously. Such an action did not violate the regulation's language.

D. Beverly's remaining arguments are not persuasive.

Beverly's attempt to characterize several of the Division's positions as "red herrings" (Response Brief, p. 25) highlights the inconsistencies of Beverly's arguments. First, Beverly contends that it is not alleging a violation of federal law (Response Brief,

p. 25), yet Beverly argues that the Division's rule changes conflict with § 208.152.8, RSMo, since the changes do not follow the repealed Boren Amendment's federal implementation regulation. That is an argument that the new rule does not comply with federal law.

Beverly also cites as a red herring the inadequacy of the appropriation amount. Reimbursement rates are set by regulation under § 208.152, RSMo, which provides for the payment of "reasonable costs," and the Division may define reasonable costs, charges, and fees. §§ 208.153.1 and 208.159, RSMo. But, state law also requires the Division to only spend within its appropriation authority. Mo. Const., Article III, §§ 36, 37 and 39, and Article IV, § 23; §§ 21.260 and 33.065, RSMo.

To support its argument, Beverly cites to the holding in *McNeil-Terry v. Roling*, 142 S.W.3d 828 (Mo.App. E.D. 2004), but that case is inapplicable here. In *McNeil-Terry*, the Division eliminated dental care services, due to a lack of appropriation funding. But the Court of Appeals held that because a state statute required the dental services, the Division could not amend its rules to exclude such services, as the rule would conflict with the statute. *Id*. at 834-835. *McNeil-Terry* does not require the Division to spend money in excess of its appropriation authority, nor does it prohibit the Division from taking action due to a lack of funding.

Here, unlike the situation in *McNeil-Terry*, no services have been deleted. Even though the effect of the amended regulation was to reduce the increase in the per diem rate paid to facilities, overall each facility ended up with a higher per diem rate on April

1, 2005 than the facility was paid prior to July 1, 2004. Ex. BB, U. There was no evidence presented that any Beverly facility (or any other facility) curbed, deleted, or modified any services due to the reduction in its per diem increase.

Beverly further claims it is a red herring for the Division to argue its general authority to promulgate Medicaid reimbursement rules. Response Brief, p. 28. But Beverly is challenging the Division's authority to promulgate a rule that it does not like, claiming a violation of § 536.016, RSMo. Medicaid rates are set by regulation, not by statute. As such, the Division's prior Brief to this Court contains a discussion of the Division's authority to set the rate by regulation, starting at page 39.

Finally, Beverly complains that the new rates are a decrease. But Beverly does admit that the April 1, 2005 per diem rate, even after the decrease, was higher than the rate it received on June 30, 2004. Still, Beverly laments this rate as too low, based on a previous State Auditor's report that opined that the reimbursement rates were too low. What Beverly neglects to mention is that the same Auditor also concluded that the nursing home industry in Missouri was overbuilt. Ex. 107.

None of Beverly's arguments demonstrate that the emergency rules violate state or federal law. This Court should affirm the circuit court's decision.

II. The Division properly promulgated the rule changes as emergency rules. [Responds to Point III of Beverly's Response Brief]

Beverly's brief, staring at page 32, claims that despite the lack of funding, there was no need for an emergency rule amendment, nor was there a compelling governmental interest. Beverly bases its argument on the fact that the Division knew for months that there was a budget shortfall.

Beverly complains that the Division did not follow the notice and comment requirements of § 536.021, RSMo. But subsection 7 of the statute excludes emergency rules promulgated under § 536.025, RSMo. The Division actually did promulgate a final rule amendment through the § 536.021 notice and comment process, and that rule is currently in effect. Furthermore, promulgating a rule under § 536.021, RSMo can take 6 months or more, and since there would be no money after May, there was no time to promulgate any rule, other than an emergency rule, after the supplemental request failed.

There was no reason for the Division to promulgate a rule change when it first determined that the appropriation amount was insufficient to meet the July 1, 2005 rates, as the Division intended to ask for a supplemental appropriation. The Division was not required to promulgate a rule amendment for the per diem amount, based on the contingency that its request for a supplemental appropriation would fail. And had it done so, Beverly's rates would merely have dropped earlier.

The emergency here was the inability to pay anything to nursing homes for almost two months. As the AHC found, that did not occur until late January 2005, when the Division learned that its supplemental appropriation request was not part of the Governor's supplemental appropriations request. Appx. A-13, ¶ 59; LF 287. Without the supplemental appropriation, Medicaid payments to nursing homes for FY2005 would have ended in May 2005. Appx. A-13, ¶ 61; Tr. 158-159.

The rule change complies with the requirements of § 536.025, RSMo, as there be an immediate danger to the public health, safety or welfare that required emergency action or the rule is necessary to preserve a compelling governmental interest that requires an early effective date. The emergency rule was enacted to avoid an immediate danger to the health, safety, and welfare of Medicaid-eligible nursing home patients: no reimbursement for their care to the nursing homes. Tr. 613; LF 287, 293. Missouri has a compelling governmental interest to provide care for nursing home patients, due to the state's payment for the patients' care. *Rolla Manor, Inc. v. Mo. Dep't of Soc. Servs., Div. of Med. Servs.*, 865 S.W.2d 812, 815-16 (Mo.App. S.D.1993).

Likewise, the Division could not spend more than its appropriation authority. LF 760; Ex. B. The AHC noted all of the Division's concerns in its findings. Appx. A-16 to 17, ¶ 71-73; A-19, ¶ 85; LF 763-4, 766. These concerns meet the requirements for an immediate danger and a compelling governmental interest.

The Division properly promulgated the emergency rules under § 536.025, RSMo. Therefore, this Court should affirm the decision of the circuit court.

III. The Division correctly calculated the administration cost ceiling figure.

[Responds to Point IV of Beverly's Response Brief]

The circuit court held that the AHC had incorrectly determined that the language of 13 CSR 70-10.015 required the calculation of the administration cost ceiling figure to be done without applying minimum utilization. An examination of the regulatory language shows that the circuit court, not the AHC, was correct on this issue.

The amount each nursing home receives for its administration cost component is calculated pursuant to 13 CSR 70-10.015.11(C). The amount is the lower of two figures: each individual home's per diem under 11(C)1; or the "per diem ceiling," which is 110% of the administration median as determined from the data bank under 11(C)2.

The fight here centers on the "per diem ceiling" figure, determined under 11(C)2, which is 110% of the administration median as determined from the data bank. The Division selected the middle value of all the per diems it calculated under 11(C)1, yielding a median of $19.45. Tr. 459, l. 1-14; 461, l. 8-14. Then the Division multiplied that median by 110%, yielding a ceiling figure of $21.40. Tr. 464, l. 20 – 465, l. 24; 13 CSR 70-10.015(4)(L). The Division has calculated the administration cost per diem ceiling in this manner since the inception of the Plan on January 1, 1995. Tr. 64, 68, 70.

The ACH erred in deciding that the calculation of the ceiling figure should not take into account minimum utilization. The ceiling figure under 11(C)2 is: "The per diem ceiling of one hundred ten percent (110%) of the administration median determined by the division from the data bank."

The AHC stated that the language of 11(C)2 requires that the Division use the allowable cost figures in the data bank, which are taken directly from the cost reports, to calculate each facility's per diem, and then determine the median of such figures from all facilities. Appx., A-26, LF 773. Yet the AHC decided that minimum utilization should not apply to determine the ceiling. Appx., A-26 to 27; LF 773-774. The calculation of the ceiling, by eliminating the application of minimum utilization to the individual homes' per diems was a figure of $23.96. LF 292, ¶ 78.

The AHC's decision means that allowable costs are used to calculate each facility's individual per diem amount, and that minimum utilization applies to that figure, but the median figure used to calculate the administration cost ceiling excludes minimum utilization. Yet the "Allowable Cost Areas" are detailed in paragraph (7) of 13 CSR 70-10.015, and paragraph 7(O) of that section is the provision that requires adjustment for minimum utilization. Ex. Z.

The regulation's provisions do not require calculating the ceiling in such a manner. The reference in 11(C)2 to using the "data bank" limits where the Division can look for data in determining the ceiling. But it does not specify the precise data that must be used. As the data bank includes costs not allowed under 13 CSR 70-10.015 – such as costs for non-Medicaid patients – any calculation of an amount to pay a Medicaid provider should be determined by data relevant to Medicaid, such as allowable costs.

The Division's calculation of the ceiling complies with the plain language of the rule. The AHC's decision on this point was incorrect, and should be reversed.

IV. The AHC incorrectly excluded the proffered financial evidence concerning the Beverly homes. [Responds to Point V of Beverly's Response Brief]

In light of its holding, the AHC denied the Division's offer of proof as to the profitability of the Beverly homes prior to the July 1, 2004 increase as irrelevant. The proposed proffer has been submitted to this Court under seal, and Beverly has moved to strike it.

While Beverly contends that any new per diem rate had to consider the financial consequences on efficiently and economically operated facilities, Beverly also opposed the introduction of evidence concerning its homes' profitability as irrelevant. To the extent that this Court finds that the Division had to consider the change in rates based on financial considerations, then this Court's remand should include a finding that the AHC should have permitted the proffered evidence to be admitted and considered.

One comment by Beverly on this issue must be addressed. On page 48 of its Response Brief, Beverly contends that the Division "unnecessarily protracted the proceedings by attempting to probe and ascertain the overall financial status of the facilities." As this statement is incorrect, it is understandable that Beverly makes no citation to the record to support this argument. Further, since this financial data was proffered by the Division, but not accepted by the AHC, it is difficult to understand how a matter that covered 7 days of hearing and 1200 pages of transcript were protracted by the proffer of this financial information.

CONCLUSION

This Court should reverse the Administrative Hearing Commission's decision as to the determination of the ceiling figure. This Court should affirm the Administrative Hearing Commission's and the Circuit Court's decisions on all other issues.

Respectfully submitted,

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Certification of Service and Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 15th day of May, 2009, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,296 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus free.

____
Assistant Attorney General