RENDERED: APRIL 14, 2006; 10:00 A.M.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000274-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
JAMES W. HOLSINGER M.D., IN HIS OFFICIAL
CAPACITY AS SECRETARY OF THE CABINET APPELLANT

v.

APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 04-CI-00101

EPI CORPORATION APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: BARBER, MINTON, AND TACKETT, JUDGES.

BARBER, JUDGE: This matter is an appeal from the Anderson Circuit Court of its granting of partial summary judgment to Appellee, EPI Corporation (EPI), per order entered December 3, 2004. The Appellant, Cabinet for Health and Family Services (Cabinet), had previously been awarded a judgment by the Administrative Hearings Branch of the Cabinet from which EPI appealed to the Anderson Circuit Court.

The primary issue in this current appeal is recoupment by the Cabinet for alleged overpayments of Medicaid benefits to EPI's long-term care facilities. There is a long history of disagreement between the parties spanning nearly three decades. However, we direct our attention only to the cost years that are the subject of this appeal before us, i.e. 1988 through 1996.

Each year, facilities participating in the Medicaid program are required to submit cost reports to the Cabinet in a timely manner per the Cabinet's regulations. Using these cost reports, the Cabinet sets prospective reimbursement rates for a facility that may or may not be adjusted at the end of the next cost year depending upon whether the Cabinet determines the same is appropriate. Neither party disputes that EPI promptly filed its cost reports for each cost year at issue.

For cost years 1988 through 1995, if a facility disputed a proposed adjustment, it would first request a re-evaluation by the Director, Division of Reimbursement Operations (f/k/a/ Division of Reimbursement and Contracts). 907 KAR 1:036E, Section 5 (1988); 907 KAR 1:036E, Section 6 (1989); 907 KAR 1:036E, Section 6 (1990); 907 KAR 1:025, Section 6 (1991); 907 KAR 1:025, Section 6 (1992); 907 KAR 1:025E, Section 6 (1993); 907 KAR 1:025E, Section 6 (1994); and 907 KAR 1:025E, Section 6 (1995). The Director would review the proposed adjustment and notify the facility of what action would be taken

by the Cabinet within twenty days of the request. Id. If the facility disagreed, it could then request a review by a standing review panel. Id. The panel consisted of three members: One from the Division of Reimbursement Operations (f/k/a/ Division of Reimbursement and Contracts), one from the Kentucky Association of Health Care Facilities, and one from the Department for Medicaid Services. Id. The panel would hold a hearing within twenty days of receiving the request and issue a binding decision within thirty days of said hearing. Id.

For cost year 1996, the Cabinet adopted a new appeal process. If a facility disputed a proposed adjustment, it would first request a program review meeting. 907 KAR 1:671, Section 10 (1996). If the Cabinet determined such a meeting was unnecessary, it would render a decision in lieu thereof. Id. However, if a program review meeting was held, the Cabinet had thirty days to schedule said meeting and another thirty days to render a decision following the meeting. Id. The program review meeting would be conducted by the Director or his designee rather than a three member panel described in the prior regulations. Id. If the facility disagreed with the decision, it could then request a full administrative hearing through the

Office of the Commissioner.[1] Id. We now review the procedural history in this matter.

On July 9, 2002, the Cabinet issued a decision letter regarding all outstanding appeals by EPI for cost years 1988 through 1996. EPI promptly appealed the decision letter and requested a full administrative hearing. The administrative hearing was held on January 27, January 28, January 29, January 31, and February 12, 2003. At the conclusion of the hearing, each party was directed to provide its recommended findings of fact, conclusions of law, and closing argument by late May 2003. Following submission thereof, the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order was issued February 9, 2004. The Hearing Officer concluded the proposed audit adjustments were not time-barred, because KRS 413.120(2), a fifteen year statute of limitation for actions based on written contracts, applied due to the provider agreements between the parties. EPI promptly filed its exceptions to the Hearing Officer's recommendations. However, the Cabinet issued a final order affirming the Hearing Officer's Findings of Facts, Conclusions of Law, and Recommended Order in its entirety. EPI then appealed to the Anderson Circuit Court.

A motion for partial summary judgment was filed by EPI on July 26, 2004, arguing that the Cabinet was barred by the

[1] The administrative hearings were to proceed in accordance with KRS Chapter 13B.

statute of limitations from pursuing recoupment against them. The Cabinet also filed a motion for partial summary judgment arguing its actions were not barred by the statute of limitations and it acted accordingly. On December 3, 2004, the circuit court entered an order for partial summary judgment on behalf of EPI. The Cabinet filed a motion to alter, amend, or vacate the partial summary judgment order, but was ultimately denied by the trial court on January 7, 2005. The Cabinet now appeals to our court.

The Cabinet has two primary arguments. First, the proper venue for the first level of the appellate process should have been Franklin Circuit Court rather than the Anderson Circuit Court.[2] Second, the Cabinet was not barred by a statute of limitation in recoupment of overpaid Medicaid benefits for any of the cost years at issue (i.e. 1988-1996). We review the Cabinet's first argument.

The Cabinet argues that Franklin Circuit Court was the proper venue for EPI's appeal, because EPI had two prior matters before the Franklin Circuit Court. One was protesting the Cabinet's recoupment efforts for years prior to those at issue here and the other action tried to enjoin the Cabinet's administrative procedures on the audits in the fiscal years in

[2] The Cabinet did file a Motion to Transfer on June 1, 2004, but it was not granted.

question. Neither of the two prior Franklin Circuit Court cases are appeals of the Cabinet's Findings of Fact, Conclusions of Law, and Final Order related to the audit adjustments for cost years 1988 through 1996.[3] We are not persuaded by the Cabinet's argument.

Kentucky Revised Statute 13B.140(1) states, in pertinent part, "If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business." The Cabinet admits that its enabling statutes do not contain a statement regarding venue for appeal and that one of EPI's nursing facilities is located in Anderson County. Also, absent compelling or unusual circumstances, which we do not believe are applicable in the instant case, a court is duty bound to hear cases within its vested jurisdiction. Roos v. Kentucky Education Association, 580 S.W.2d 508, 509 (Ky.App. 1979). Therefore, we believe the Anderson Circuit Court was a proper venue for the first level of appellate review.

The Cabinet's second argument is that the incorrect statute of limitation was applied by the Anderson Circuit Court.

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[3] One appeal was related to an issue in the 1980s. The other was related to the same fiscal years that are subject of this appeal as well as prior years, but it was a request to enjoin the Cabinet from proceeding with recoupment. EPI was granted partial summary judgment in relation to all cost years prior to 1988.

The Anderson Circuit Court found the appropriate statutes of limitations were KRS 413.120(2) and 42 CFR §405.1885.[4] The former imposes a five-year statute of limitation on an action upon a liability created by statute, when no other time is fixed by the statute creating the liability. The latter imposes a three-year statute of limitation in which to reopen a determination of an intermediary or a decision by a hearing officer or panel of hearing officers, by the Board, or the Secretary.

The Court of Appeals is authorized to review issues of law involving an administrative agency on a *de novo* basis. Liquor Outlet, LLC v. Alcoholic Beverage Control Board, 141 S.W. 3d 378, 381 (Ky.App. 2004), (citing Aubrey v. Office of the Attorney General, 994 S.W.2d 516 (Ky.App. 1998)). Determining whether an action is time-barred due to an applicable statute of limitation is a question of law. Lipsteuer v. CSX Transportation, Inc., 37 S.W.3d 732, 737 (Ky. 2000). In particular, an interpretation of a statute is a question of law and a reviewing court is not bound by the agency's interpretation of that statute. Liquor Outlet, supra, (citing Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky.App. 2000)). However, an administrative agency's interpretation of

[4] EPI argued this statute was applicable only to the Cabinet's audits of 1990-1992. It argued that it was barred because audits were not initiated by the Cabinet within three years of receipt of EPI's cost reports.

its own regulation is entitled to substantial deference. Cabinet for Health Services v. Family Home Health Care, Inc., 98 S.W.3d 524, 527 (Ky.App. 2003), (citing Camera Center, Inc. v. Revenue Cabinet, 34 S.W.3d 39 (Ky. 2000)). A reviewing court is not free to substitute its judgment as to the proper interpretation of the agency's regulations as long as that interpretation is compatible and consistent with the statute under which it was promulgated and is not otherwise defective as arbitrary or capricious. Id., (citing City of Louisville by Kuster v. Milligan, 798 S.W.2d 454, 458 (Ky. 1990)). Unfortunately, there are no state statutes dealing with recoupment of Medicaid funds. As such, we turn to the state regulations for guidance regarding recoupment of overpayments in the Medicaid system.

An agency must be bound by the regulations it promulgates. Hagan v. Farris, 807 S.W.2d 488, 490 (Ky. 1991), (citing Shearer v. Dailey, 226 S.W.2d 955 (Ky. 1950)). The regulations adopted by an agency have the force and effect of law. Id., (citing Linkous v. Darch, 323 S.W.2d 850 (Ky. 1959)). An agency's interpretation of a regulation is valid only if the interpretation complies with the actual language of the regulation. Id., (citing Fluor Constructors, Inc. v. Occupational Safety and Health Review Commission, 861 F.2d 936 (6th Cir. 1988)). Further, KRS 13A.130 prohibits an

administrative body from modifying an administrative regulation through internal policy or another form of action. Id.

For cost years 1988 through 1995, the following regulatory language was applicable:

> Section 2.
> Recoupment of Overpayments.
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> When it is determined that a provider has been overpaid, a letter shall[5] be mailed to the provider requesting payment in full within thirty (30) days. If a provider demonstrates to the program within the thirty (30) day time limit that full payment would create an undue hardship, a payment plan not to exceed six (6) months from the notification date shall[6] be established. If the full payment or payment plan request is not received within thirty (30) days of notification, the amount due shall[7] be deducted from current payments until the full amount is recouped. Once the payment plan has been established and a payment is not received by the agreed to date, the amount shall[8] be deducted from current payments.
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> Section 3.
> Exceptional Hardship Circumstances.
>
> When it is determined that a recoupment of an overpayment in accordance with Section 2 of this regulation would result in an exceptional hardship for the provider and have the direct or indirect effect of reducing the availability of services to program recipients . . ., the program may provide for a reasonable extension of the

[5] Prior to 1992, "will" was used in the regulation rather than "shall."

[6] Prior to 1992, "will" was used in the regulation rather than "shall."

[7] Prior to 1992, "will" was used in the regulation rather than "shall."

[8] Prior to 1992, "will" was used in the regulation rather than "shall."

> time period for recoupment. **The time period for recoupment shall[9] not exceed twelve (12) months from the date the overpayment is established, and shall[10] be accomplished within twenty-one (21) months from the end of the provider's cost reporting period** . . .[11] (Emphasis added.) 907 KAR 1:110(1988-1995).

Based on the plain language of these regulations, it is clear that time was of the essence for the Cabinet to seek recoupment from providers given an overpayment of Medicaid funds. Even in exceptional hardship circumstances, the most gracious time period for recoupment given by the Cabinet was twelve months from the date the overpayment was established and within twenty-one months from the end of the provider's cost reporting period. Id. The record reflects that the Cabinet did not recoup any funds for cost years 1988 through 1995 within twenty-one months from the end of the provider's cost reporting period. Therefore, it is now barred from recouping said funds in accordance with its own regulation.

The Cabinet may feel this is a harsh result, but we cannot attribute a different meaning to a regulation that is clear on its face. One could presume such a result is a reason why this regulation was modified in 1996.

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[9] Prior to 1992, "will" was used in the regulation rather than "shall."

[10] Prior to 1992, "must" was used in the regulation rather than "shall."

[11] The remainder of the regulation was applicable only to providers who were not reimbursed on the basis of cost reports.

We also note that these regulations were first included in EPI's appellate brief to which the Cabinet argued they could not be brought up at this point in the appellate process. We disagree. Applicable legal authority is not evidence and can be resorted to at any stage of the proceedings whether cited by the litigants or simply applied, *sua sponte*, by the adjudicator(s). Burton v. Foster Wheeler Corporation, 72 S.W.3d 925, 930 (Ky. 2002), (citing First National Bank of Louisville v. Progressive Casualty Insurance Co., 517 S.W.2d 226, 230 (Ky. 1974)).

In 1996, the regulatory language no longer contained the requirement that the time period for recoupment shall not exceed twelve months from the date the overpayment is established and shall be accomplished within twenty-one months from the end of the provider's cost reporting period.[12] See 907 KAR 1:671, Section 2 (1996). The new regulation also required a facility to pay the proposed adjustments even if that facility pursued appeals. Id. Because there was no longer a statute of limitation applicable to the recoupment of Medicaid overpayments contained in the regulations, we must determine which statute of limitation applied to cost year 1996.

The Hearing Officer concluded that the appropriate statute of limitation applicable to all cost years at issue was

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[12] There was also no state statute addressing the appropriate statute of limitation for Medicaid recoupment.

KRS 413.090(2), which allows fifteen years to commence an action based upon a written contract. However, the Anderson Circuit Court concluded that the appropriate statute of limitation applicable to all cost years at issue was KRS 413.120(2), which imposes a five-year statute of limitation on all actions upon a liability created by statute when no other time is fixed by the statute creating the liability.

The underlying theory of law asserted in a petition determines what statute of limitations should apply. Million v. Raymer, 139 S.W.3d 914, 918 (Ky. 2004). We believe this same reasoning is appropriate for matters originating in the administrative system. Following a review of the voluminous record, the Cabinet consistently primarily relied upon violations of either federal or state Medicaid and Medicare regulations in seeking to recoup alleged Medicaid overpayments. As such, we believe this entire action does not sound in contract as argued by the Cabinet.

An action[13] upon a liability created by statute, when no other time is fixed by the statute creating the liability, shall be commenced within five years after the cause of action accrued. KRS 413.120(2).[14] Also, this limitation applies to actions brought by or in the name of the Commonwealth the same

[13] There shall be one form of action to be known as "civil action." Ky. CR 2.

[14] This section of the present statute reads the same as it did in 1996.

as to actions by private persons, except where a different time is prescribed by statute. KRS 413.150.[15] An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action. KRS 413.250,[16] see also Ky. CR 3. We believe the law is clear that in actions undertaken by a state agency on behalf of the Commonwealth, the applicable statute of limitations to said actions shall be five years, unless there is a different time prescribed by statute. There are no state statutes or regulations that apply a specific statute of limitation to Medicaid recoupment for the 1996 cost year.

The Cabinet was given the authority to establish and implement all regulations for the Medicaid program. See KRS 194.050(1) (1996). In 1996, it removed the twenty-one month recoupment limitation and did not replace it with a new limitation. The Cabinet chose to remain silent on the issue. Therefore, we believe the five-year statute of limitation established in KRS 413.120(2) is applicable to the Cabinet's recoupment of alleged Medicaid overpayments for cost year 1996.

Neither party disputes that EPI's cost reports for 1996 were timely received. According to the Cabinet's brief,

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[15] The present statute reads the same as it did in 1996.

[16] The present statute reads the same as it did in 1996.

EPI was notified of the audit adjustments for the 1996 cost report year in 2000. Specifically, the Cabinet's brief states that EPI was notified of audit adjustments to its Glasgow Health Care facility in March 2000; its Briarwood facility in October 2000; and all remaining EPI facilities in June 2000. EPI does not deny being notified of the proposed audit adjustments in 2000 in its brief. Also, the record contained letters from EPI to the Cabinet which support the Cabinet's dates. They are as follows:

1. Two letters dated April 25, 2000, where EPI appealed the proposed audit adjustments to Glasgow and Heritage Hall. These letters stated EPI received the Cabinet's transmittal letter dated March 31, 2000.

2. Eleven letters dated July 19, 2000, where EPI appealed the proposed audit adjustments to Colonial Health & Rehabilitation Center, Green Valley Health & Rehabilitation Center, Jackson Manor, Richmond Health & Rehabilitation Complex-Kenwood, Richmond Health & Rehabilitation Complex-Madison, McCreary Health & Rehabilitation Center, Monroe Health Care Facility, North Hardin Health & Rehabilitation Center, Professional Care Health & Rehabilitation Center, Summit Manor Nursing Home, and Tanbark Health Care. These letters stated EPI received the Cabinet's transmittal letter dated June 30, 2000.

3. Letter dated November 29, 2000, where EPI appealed the proposed audit adjustments to Briarwood. The letter stated EPI received the Cabinet's transmittal letter dated October 31, 2000.

Two questions then arise: 1) when did the Cabinet's cause of action accrue and 2) what would be the action by the Cabinet to determine compliance with the five-year statute of limitation thereto. We examine first when the Cabinet's cause of action accrued.

A cause of action accrues when a state agency first has the right to institute an action of any kind, administrative or judicial. Commonwealth, Natural Resources and Environmental Protection Cabinet v. Kentucky Insurance Guaranty Association, 972 S.W.2d 276, 282 (Ky.App. 1997). We believe the cause of action accrued in the instant matter when EPI submitted its cost report to the Cabinet for cost year 1996. Upon submission, the Cabinet could then determine the amount of any Medicaid overpayments, if any. The Cabinet controls if and when an audit of a cost year will occur. Their delay in commencing with an audit should not extend their ability to collect overpayments.

EPI states in its brief that the audit for cost year 1996 was completed on May 15, 1998. The Cabinet does not dispute this date. Also, EPI was notified of the proposed audit adjustments in 2000. The completion of the audit and subsequent notification of proposed adjustments were clearly within the five-year statute of limitation. However, neither of these acts are an "action" as contemplated in KRS 413.150. As such, we must now determine what was the action of the Cabinet in

determining whether the Cabinet's recoupment efforts were time-barred?

As discussed earlier, beginning with the 1996 regulations, the Cabinet required a provider to prepay it for a proposed audit adjustment regardless if the provider disputed the adjustment and pursued an administrative appeal. If a provider failed to make a payment or took no action toward repayment, the Cabinet recouped the monies from future Medicaid payments. 907 KAR 1:671, Section 2(8). If the provider had insufficient funds available for recoupment through the payment in the first payment cycle following the due date, the Cabinet could refer the account for collection. Id. We believe the filing of a collection suit in a court of law to recoup the alleged Medicaid overpayments would be the action to determine whether the Cabinet adhered to the five-year statute of limitation.

According to the record, the Cabinet enforced its new regulation and required EPI to promptly pay back alleged overpayments for cost year 1996. This occurred shortly after EPI was notified of the audit adjustments, which was within five years of EPI's submission of its cost report for cost year 1996. When EPI paid the alleged overpayments, the Cabinet lost its ability to pursue collection in the court system (i.e. its action), because it became moot. In effect, the Cabinet had

already gotten from EPI what a judgment from a court of law could have granted. If the Cabinet had been forced into a collection suit against EPI or if the recoupment was past the five year limit, we may have reached a different result. However, EPI complied with the regulations. Therefore, we do not believe the Cabinet's recoupment of alleged Medicaid overpayments for cost year 1996 was time-barred.

On a final note, we would like to comment on the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order. At the close of the administrative hearing on February 12, 2003, the parties were given until late May to offer their proposed findings of fact and conclusions of law along with their closing arguments. Each party filed said documents on May 27, 2003. The Hearing Officer did not issue his Findings of Fact, Conclusions of Law, and Recommended Order until February 9, 2004. This was more than eight months following the submission of the case for a decision. The Hearing Officer's recommendation was to comply with KRS 13B.110. 907 KAR 1:671, Section 10(3)(f)(1996). Kentucky Revised Statute 13B.110(1)[17] allows a hearing officer sixty days to render a recommended order, including findings of fact and conclusions of law. The longest extension given to a Hearing Officer from this

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[17] The current statute reads the same as it did in 1996.

requirement is 30 days. KRS 13B.110(3). Clearly, the Hearing Officer failed in complying with his timeliness requirement.

Also, when the Hearing Officer did render his Findings of Fact, Conclusions of Law, and Recommended Order it was nearly verbatim of the Cabinet's eighty-one page proposed findings of fact and conclusions of law. The appellate courts of this state have universally condemned the practice of adopting findings of fact and conclusions of law prepared by counsel. Callahan v. Callahan, 579 S.W.2d 385, 387 (Ky.App. 1979); see also G.R.M. v. W.M.S., 618 S.W.2d 181, 183 (Ky.App. 1981). While we acknowledge that administrative hearing officers are not bound by Ky. CR 52.01, Board of Adjustments of the City of Richmond v. Flood, 581 S.W.2d 1, 2 (Ky. 1978); see also Ky. CR 1, we believe the same basic principle should apply that it is inappropriate for administrative hearing officers to delegate such an important part of his authority to a party in a matter before him.[18] It is critical to parties to be assured that the decision making process is completely under the control of the hearing officer. It is equally important for the appellate courts to be

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[18]The statute applicable to administrative hearings is KRS 13B.110(1), which states, in pertinent part,

> [T]he hearing officer shall complete and submit to the agency head, no later than sixty (60) days after receiving a copy of the official record of the proceeding, a written recommended order which shall include **his** findings of fact, conclusion of law, and recommended disposition of the hearing. . . . (Emphasis added.)

similarly confident if they become involved. While our ultimate decision was not based on these issues, we wanted each party to be aware of our feelings on this matter.

Based on the foregoing, we affirm the portion of the Anderson Circuit Court's judgment that the Cabinet's recoupment of Medicaid overpayments for cost years 1988 through 1995 were time-barred and the judgment of the Administrative Hearing Branch that recoupment for cost year 1996 was not time-barred, but for different reasons. We reverse the portion of the Anderson Circuit Court's judgment that 1996 was time-barred and the judgment of the Administrative Hearing Branch that cost years 1988 through 1995 were not time-barred. We remand to the Administrative Hearing Branch to enter a judgment consistent with this opinion.

ALL CONCUR.

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