

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: DECEMBER 18, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000348-DG

DATE 1-8-09 Kelly Klaber DC

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES

APPELLANT

V. ON REVIEW FROM COURT OF APPEALS
CASE NO 2005-CA-000274-MR
ANDERSON CIRCUIT COURT NO. 04-CI-00101

EPI CORPORATION

APPELLEE

OPINION OF THE COURT BY JUSTICE SCHRODER

AFFIRMING

The sole issue in this appeal is whether recoupment of overpaid Medicaid benefits by the Cabinet for Health and Family Services ("Cabinet") from 1988-1995 is barred by 907 KAR 1:110, Section 3 (21 months for recoupment to be accomplished) or KRS 413.120(2) (5-year statute of limitations for liability created by statute when no time limit fixed by statute), or whether recoupment is allowed under KRS 413.090(2) (15-year statute of limitations for actions based on contract). The Court of Appeals held that recoupment for that time period was barred by the 21-month limit in 907 KAR 1:110, Section 3. On discretionary review before this Court, the Cabinet argues that the 15-year statute of limitations for actions based on contract should apply to allow

recoupment, and that EPI should not have been allowed to raise the defense of the 21-month time limit in 907 KAR 1:110, Section 3 for the first time in the Court of Appeals. Upon review of the case, we agree with the Court of Appeals that the 21-month limitations period in 907 KAR 1:110, Section 3 applied to bar the Cabinet from recouping the overpaid benefits. Hence, we affirm.

Appellee, EPI Corporation (“EPI”), operates nursing homes throughout Kentucky and receives reimbursement from the Cabinet through the Medicaid program. From 1988-1995, the Cabinet used a prospective payment system to reimburse Medicaid participant providers whereby it would periodically advance funds to providers to cover their estimated costs based on the previous year’s cost reports. The Cabinet would subsequently make adjustments based on the providers’ reports of their actual costs. Recoupment, which is a set-off against future payments to providers, was a means provided in the Cabinet’s administrative regulations for recovering overpayments of Medicaid benefits from the providers. 907 KAR 1:110, Section 3.

For each cost reporting period, the Cabinet had the right to conduct audits annually or at less frequent intervals. It is undisputed that EPI filed its costs reports in a timely fashion “at the close of the facilities’ fiscal year.” Upon auditing EPI’s claims for 1988-1996, the Cabinet discovered \$6,866,881 in overpayments, and by letter dated February 5, 2002, informed EPI of the amount and of the Cabinet’s intent to recoup.

EPI pursued an administrative appeal under KRS Chapter 13B, disputing the amount of the overpayment and claiming that, because the

amount was calculated by regulation, recoupment was barred by the five-year statute of limitations in KRS 413.120(2) for actions based on a statute where the statute provides no limitations period. The administrative hearing officer confirmed the amount of the overpayment and determined that the Cabinet's recoupment rights originated in the provider agreement between EPI and the Cabinet, which stated that EPI was required to refund any overpayments resulting from inappropriate or inaccurate claims as calculated by federal and state law, including Medicaid regulations. Thus, the hearing officer allowed the recoupment, applying the 15-year statute of limitations in KRS 413.090(2) for actions based on contract. EPI appealed to the Anderson Circuit Court which granted EPI's motion for partial summary judgment, determining that recoupment was barred by the 5-year statute of limitations in KRS 413.120.

The Cabinet next appealed to the Court of Appeals. There, EPI argued for the first time that the proper statute of limitations for the years 1988-1995 was the 21-month limitations period for recoupments contained in 907 KAR 1:110, Section 3. In an opinion rendered on April 14, 2006, the Court of Appeals held that recoupment for the period 1988-1995 was barred by the 21-month limit in 907 KAR 1:110, Section 3. As to the recoupment claim for 1996, the Court of Appeals ruled that because the regulation had been amended that year removing the 21-month time limit, the 5-year statute of limitations in KRS 413.120(2) applied for that year. The Court of Appeals concluded that the 1996 recoupment claim was within the 5-year limitation period because EPI was notified by the Cabinet of the proposed audit

adjustments within five years of EPI's submission of its cost report for 1996. Hence, the Court of Appeals allowed recoupment for the 1996 cost year.

On review before this Court, the Cabinet argues that EPI should not have been allowed to raise the issue of the 21-month limitations period in 907 KAR 1:110, Section 3 for the first time in the Court of Appeals, and that the recoupment for the cost years 1988-1995 was not time-barred because the applicable limitations period was the 15-year statute of limitations in KRS 413.090(2) for actions based in contract.

As to the Cabinet's argument that EPI should not have been allowed to raise the issue of the application of 907 KAR 1:110, Section 3 for the first time on appeal, the Cabinet maintains that by raising the regulation at the Court of Appeals level, it was denied the chance to show how the regulation had been construed by the Cabinet in the past. See White v. Check Holders, Inc., 996 S.W.2d 496, 498 (Ky. 1999) (longstanding construction of regulation by agency entitled to controlling weight). However, the contemporaneous construction of a regulation by an agency cannot be based on the agency's mere inaction or the failure to follow the plain language of its own law. Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet, 133 S.W.3d 456, 463 (Ky. 2004). Moreover, it has been held that "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 Corp., 72 S.W.3d 925, 930 (Ky. 2002). Accordingly, it was not error for the

Court of Appeals to allow EPI to raise the limitation period in KAR 1:110, Section 3 for the first time on appeal.

We next turn to the question of what limitations period controls in this case. The administrative regulation at issue here, 907 KAR 1:110, entitled “Recoupment of overpayments”, provided from 1988-1995:

Section 1. Scope. This administrative regulation applies to all providers of medical assistance services where payments are made from Medicaid Program funds.

Section 2. Recoupment of Overpayments. When it is determined that a provider has been overpaid, a letter shall 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 be established. If the full payment or payment plan request is not received within thirty (30) days of notification, the amount due shall 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 be deducted from current payments.

Section 3. Exceptional Hardship Circumstances. When it is determined that a recoupment of an overpayment in accordance with Section 2 of this administrative 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 (e.g., by resulting in the bankruptcy and subsequent dissolution of the provider entity), the program may provide for a reasonable extension of the time period for recoupment. The time period for recoupment shall not exceed twelve (12) months from the date the overpayment is established, and shall be accomplished within twenty-one (21) months from the end of the provider’s cost reporting period or the receipt by the program of the billing invoice, request for payment or similar document for providers not reimbursed on the basis of cost reports.

The determination of whether an action is time-barred under a statutory or regulatory limitation period is a question of law and, thus, will be reviewed *de novo*. See Lipsteuer v. CSX Transp., Inc., 37 S.W.3d 732, 737 (Ky. 2000). An agency's regulations have the force and effect of law, and the agency is bound by the language of its own regulations. Hagan v. Farris, 807 S.W.2d 488, 490 (Ky. 1991). Regulations are subject to the same rules that govern statutory interpretation. Revenue Cabinet, Com. v. Gaba, 885 S.W.2d 706, 708 (Ky.App. 1994). If the literal language of a statute is clear and unambiguous, it must be given effect as written. Bailey v. Commonwealth, 70 S.W.3d 414, 416 (Ky. 2002).

From the plain reading of 907 KAR 1:110, Section 3, we believe it was intended as a time limit on the Cabinet's entitlement to collect the overpayments through the use of its recoupment remedy. The Cabinet's right of "recoupment", as a remedial offset process, is grounded in the regulatory provisions of 907 KAR 1:110 (under statutory authority of KRS 194.050) and is a remedy uniquely the Cabinet's, not the provider's. Section 2 provides for payment by the provider of the overpaid amount or a "payment plan." It provides that in the event the overpaid amount is not paid back by the provider, the payment plan request is not received, or payment is not timely made under the established payment plan, then recoupment of the amount is allowed "from current payments." Section 3 goes on to provide for a reasonable extension of the time period for the "recoupment" under exceptional hardship circumstances. Section 3 then sets the time period for recoupment to not

exceed twelve (12) months from the date the overpayment is established, and plainly states that recoupment “shall be accomplished within twenty-one (21) months from the end of the provider’s cost reporting period.”

The Cabinet argues that the 21-month limitation period in Section 3 is only meant to apply to payments made under exceptional hardship circumstances. However, 907 KAR 1:110 applies to all recoupments by the Cabinet, not just recoupments for exceptional hardship cases. And there is no reason that the time limitation for recoupment in exceptional hardship cases would be less gracious or shorter than for non-hardship cases. “A statute should not be interpreted so as to bring about an absurd or unreasonable result.” *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 500 (Ky. 1998). Accordingly, we do not see that the 21-month limitation period in 907 KAR 1:110, Section 3 can be read as anything other than a general limitation period for all recoupments of overpaid Medicaid benefits by the Cabinet.

The Cabinet cites to a number of federal cases in support of its assertion that the right of recoupment derives from the provider agreement between the provider and the government, therefore, the statute of limitations for actions based in contract should apply. However, none of these cases involve a specific administrative regulation which contains its own statute of limitations, as we have herein, 907 KAR 1.110, which relates specifically to recoupment of overpayments.

Although the result may seem extreme, we simply cannot ignore the plain meaning of the language in the regulation. We note that our ruling relates only to the Cabinet's remedy of recoupment, and we express no opinion on the Cabinet's ability to collect the monies through some other legal avenue.¹

For the reasons stated above, the judgment of the Court of Appeals is affirmed.

Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur. Minton, C.J., not sitting.

¹ We note that the regulations were amended in 1996 to eliminate the 21-month time limitation for recoupment. The current recoupment regulation, 907 KAR 1:671, contains no time frame within which recoupment must be accomplished.

COUNSEL FOR APPELLANT:

Alea Amber Arnett
Kerry Brent Harvey
Cabinet for Health and Family Services
Office of Legal Services
275 East Main Street 5W-B
Frankfort, KY 40621

COUNSEL FOR APPELLEE:

Frank F. Chuppe, Jr.
Stephen Richie Price
Virginia Hamilton Snell
Wyatt, Tarrant & Combs, LLP
500 West Jefferson Street, Suite 2800
Louisville, KY 40202