

No. 39807-9-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

FILED
STATE OF WASHINGTON
09 DEC 24 AM 10:55
COUNTY OF SNOHOMISH
COURT OF APPEALS

PUGET SOUND MEDICAL SUPPLY, Appellant,

and

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.

BRIEF OF APPELLANT

Kevin T. Steinacker, WSBA #35475
DICKSON STEINACKER PS
1201 Pacific Avenue, Suite 1401
Tacoma, WA 98409
Telephone: (253) 572-1000
Facsimile: (253) 572-1300

Attorneys for Puget Sound Medical Supply,
Appellant

ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR..... 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE..... 2

ARGUMENT..... 5

CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases

<i>Citizens for Mount Vernon v. City of Mount Vernon</i> , 133 Wn.2d 861, 947 P.2d 1208 (1997).....	5
<i>Harrington v. Spokane County</i> , 128 Wn. App. 202, 114 P.3d 1233 (2005).....	5, 8
<i>Simpson Tacoma Kraft Co. v. Department of Ecology</i> , 119 Wn.2d 640, 835 P.2d 1030 (1992).....	5
<i>Ward v. Bd. of Skagit County Comm'rs</i> , 86 Wn. App. 266, 936 P.3d 42 (1997).....	6

Statutes and Code Provisions

RCW 34.05.534	5
RCW 34.05.542	7
WAC 388-02-0525.....	7
WAC 388-02-0580.....	6
WAC 388-02-0605.....	7
WAC 388-02-0645.....	8

ASSIGNMENTS OF ERROR

1. The trial court erred in granting a motion to dismiss by order dated September 4, 2009.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court incorrectly dismissed the petition for judicial review for failure to exhaust administrative remedies when a request for further administrative review was filed and denied prior to filing the petition for judicial review. (Assignment of Error 1)

STATEMENT OF THE CASE

Appellant Puget Sound Medical Supply (“PSM”) is in the business of providing durable medical equipment products, including oral medical nutrition and incontinence supplies, to Medicaid patients in the State of Washington. CP 36. Because the medical and incontinence supplies are provided to Medicaid patients, the Washington State Department of Social and Health Services (“DSHS”) reimburses PSM for products that fall under the Medicaid program. CP 28-29.

On November 17, 2003, DSHS audited PSM’s records for products supplied to its customers from February 12, 2001, to September 29, 2003. CP 39. DSHS conducted a claim-by-claim audit of 372 out of 56,200 procedures, and extrapolated those results to determine that PSM had been overpaid by DSHS, and DSHS demanded repayment. *Id.*

Petitioner timely appealed and requested a hearing to challenge the overpayment assessed by DSHS. CP 37. The Office of Administrative Hearings (OAH) held a hearing November 13-15 & 19-20, in 2007, in response to the Petitioner’s request, before Administrative Law Judge Robert C. Krabill. CP 35-36.

On December 24, 2007, OAH issued the initial decision (hereinafter the December 24 OAH initial decision will be referenced as the “Initial Order”), supporting the extrapolation method and requesting

overpayment. CP 35-54. The Initial Order was received by PSM's counsel on December 26, 2007. CP 35. PSM filed a request for review by the DSHS Board of Appeals ("BOA") on January 15, 2008, twenty-two days after receipt of the Initial Order, and one day later than the window for automatic acceptance of a request for review as specified in WAC 388-02-0580(3). CP 56, 63. On January 29, 2008, Petitioner timely filed its explanation to BOA, explaining the reasons for the delayed filing. *Id*

BOA denied PSM's petition for review on March 7, 2008, and further rejected PSM's motion for reconsideration. CP 56-57, 63. PSM petitioned for judicial review of BOA's denial of the request for review, which was heard under Thurston County Superior Court cause no. 08-2-01074-8, and has since been appealed by PSM under Court of Appeals cause no. 391694-II. The appeal is still pending in Division 2.

While PSM's request for review before BOA was pending, it filed a petition for judicial review of the Initial Order on February 12, 2008, and an amended petition on February 13, 2008. CP 3, 29. This was done to preserve PSM's right to appeal, because the Initial Order became a final order as of January 14, 2008, according to WAC 388-02-0525, when the request for review was denied by BOA. If PSM had waited to file a petition for judicial review of the Initial Order until after receiving a

decision on its request for review to BOA in March, the 30-day period for requesting judicial review would have already expired.

After PSM filed its petition for judicial review of the Initial Order, the Department filed a motion to dismiss the appeal for failure to exhaust administrative remedies. CP 55. After oral argument, the Department's motion was granted in a letter opinion dated September 11, 2008. CP 70. A final order on the motion was entered September 4, 2009. CP 71. PSM timely filed this appeal.

ARGUMENT

The trial court erred when it granted the Department's motion to dismiss PSM petition for judicial review for failure to exhaust administrative remedies. A decision on a motion to dismiss for failure to exhaust administrative remedies is question of law that must be reviewed de novo. *E.g. Harrington v. Spokane County*, 128 Wn. App. 202, 114 P.3d 1233 (2005).

PSM sufficiently exhausted administrative remedies to allow its petition for judicial review of the Initial Order. RCW 34.05.534 provides that a party must "exhaust[] all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review" prior to filing a petition for judicial review. This means that available administrative remedies must be pursued. *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992). Exhaustion of administrative remedies is required in order to avoid "premature interruption of the administrative process," to allow for "full development of the facts," and to provide an opportunity for "the exercise of agency expertise." *Harrington*, 128 Wn. App. at 210 (citing *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997)).

PSM exhausted its administrative remedies. PSM first appealed the audit findings to OAH and then requested further review by BOA. When BOA elected to reject PSM's request for review, PSM's available administrative remedies were exhausted, and the requirements of the statute met. Although PSM's request for review by BOA was filed outside the 21-day window, WAC 388-02-0580 explicitly allows a petition for review to BOA to be filed between 21 and 30 days after the initial order if the petitioner has a "good reason." Thus, the fact that PSM filed its petition on the 22nd day is clearly not a jurisdictional issue, nor was the request even untimely provided there was good reason for the minimal delay. BOA had an opportunity to accept further review and elected not to. Although BOA exercised its discretion to deny the request for review, it could have easily accepted the request and continued the administrative review process. PSM exhausted available administrative remedies by filing the request for review, regardless of whether BOA accepted review.

This situation is distinguishable from that presented in *Ward v. Bd. of Skagit County Comm'rs*, 86 Wn. App. 266, 936 P.3d 42 (1997), cited by the Department in its motion to dismiss. In *Ward*, the petitioners failed to timely invoke their only avenue of administrative appeal. There was no opportunity in *Ward* to appeal after the 14-day deadline, and the ordinance did not grant discretion to the administrative body to accept an appeal after

the 14-day deadline. In contrast, PSM has already gone through one level of administrative appeal before OAH. PSM requested further review from BOA, but the request was rejected although BOA had authority and jurisdiction to accept the request for further review.

There is no statute or code provision requiring review by the DSHS Board of Appeals prior to seeking judicial review of an Initial Order of the Office of Administrative Hearings. Under the APA, a party may request review of a final agency action within 30 days of service of the final order. RCW 34.05.542. An initial order of the OAH becomes final 21 days after mailing “[i]f no one requests review of the initial order or if a review request is dismissed.” WAC 388-02-0525.¹

There is no WAC provision that explicitly requires the BOA to review an OAH initial order in order for a party to have a right to judicial review. WAC 388-02-0605, entitled “What if a party does not agree with a final order entered by *OAH or BOA*” (emphasis added), confirms that a party has the right to seek either reconsideration of the initial order or to petition for judicial review. In explaining the time for filing a petition for

¹ It should be noted that the Notice to Parties at the end of the Initial Order misstates the law as cited in WAC 388-02-0525, claiming that the order is final *on the date of mailing* unless a petition for review is filed: “This order becomes final on the date of mailing unless within 21 days of mailing of this order a petition for review is received by the DSHS Board of Appeals” CP 52. Under the WAC, an initial order is final 21 days later if there is no further review, not on the date of mailing. WAC 388-02-0525.

judicial review, WAC 388-02-0645(1) provides: “You must file your petition for judicial review with the superior court within thirty calendar days after *OAH or BOA* mails its final order.” (emphasis added.) This language clearly indicates that judicial review of final orders is not limited to those from BOA, but applies to final orders from OAH as well. Although a petition for review might usually come after review by BOA, judicial review of a final OAH order is not explicitly prohibited. *See* WAC 388-02-0645(2) (“Generally, you may file a petition for judicial review only after you have completed the administrative hearing process.” This sentence contemplates that a petition for judicial review may be filed in some cases without completing the administrative hearing process.)

Applying RCW 34.05.534 to preclude this petition for judicial review would not meet the purpose of the statute. As discussed above, the requirement of exhaustion of administrative is intended to avoid interruption of the administrative process, to allow the facts to be fully developed, and to provide an opportunity for the agency to exercise its expertise. *Harrington*, 128 Wn. App. at 210. In this matter, the administrative process has not been prematurely interrupted, because the BOA has had an opportunity to accept or reject PSM’s request for review. Further, the facts were fully developed at the hearing before OAH. Finally, BOA has had an opportunity to exercise its expertise in accepting

PSM's petition for review. In this case, dismissal of the petition for judicial review for failure to exhaust administrative remedies was improper and did not further the purpose of the requirement.

CONCLUSION

The trial court erred in granting the Department's motion to dismiss. PSM requested further review of the Initial Order by BOA. Thus, PSM attempted to seek further administrative review, and BOA had the opportunity to apply its expertise. BOA rejected the petition for review, thus ending the administrative process. The order dismissing PSM's petition for judicial review should be reversed, and the case remanded for further proceedings.

Respectfully submitted this 22nd day of December, 2009.

DICKSON STEINACKER PS



KEVIN T. STEINACKER, WSBA #35475
Attorneys for Puget Sound Medical Supply

Certificate of Service

I, the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that I caused the foregoing Brief of Appellant to be served upon:

Angela D. Coats McCarthy
7141 Cleanwater Dr. SW
P.O. Box 40124
Olympia, WA 98504-0001

Service was accomplished by:

Hand delivery
 First class mail
 Facsimile

DATED this 23rd day of December, 2009 at Tacoma, Washington.



Desirae Jones
Legal Assistant