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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 45923-0-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
) NO. 13-2-07068-1
)
Plaintiff/Respondent,)
)
v.)
)
HAROLD BIRCUMSHAW)
)
)
Defendant/Appellant.)
_____)

APPELLANT'S REPLY BRIEF

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3. Other Page(s)

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CORRECTIONS AND REVISIONS

Appellant submits the following corrections and revisions to his opening brief with apologies to the court and counsel. Some of the citations and references used in the opening brief were to the verbatim transcript of proceedings before Administrative Law Judge Peterson and referred to the volume and page of the transcripts.

Unfortunately they were not correlated to the Clerk's Papers although Respondent's counsel seems to have had no trouble finding them. The corrections refer to Appellant's opening brief by page and then identify the existing citation and the citation to the Clerk's Papers.

Appellant's brief refers to the Records of Proceedings by volume and page numbers of the Verbatim Report of Proceedings about which there is no dispute. The Verbatim Report of Proceedings for the Office of Administrative Hearings Docket Number 06-2009-A-0512 may be found in the Clerk's Papers Numbers 5029 through 6359. The original agency record for review is at Clerk's Papers 94 through 389. Thus, the Verbatim Report of Proceedings is already part of the Clerk's Papers. The simplest and most efficient way to review this testimony is by review of the Verbatim Report as they were transcribed rather than trying to correlate the numerical system used by the clerk.

To assist the court Appellant provides these corrective and corresponding references to the clerk's papers by cross referencing the volume and page number of the Verbatim Reports of Proceedings.

APPELLANT'S
BRIEF

PAGE	ORIGINAL CITATION	CORRECTED CITATION
5	RP 2:PP14.187	CP 5208-5394 at Volume II, pp. 14-187
5	RP 6:100-102	CP 5995-6160 at Volume VI, pp. 100-102
6	ATR 4.57, page 29	CP 94-389, at Administrative Transcript of Record Par. 4.57, page 29, Fn. 11
6	Par. 4.26, page 8 Exh. 92& 93	CP 94-389, at Administrative Transcript of Record Par. 4.26, page 8, Exh. 92&93
6	RP 6: 46-48; 108	CP 5995-6160 at Volume VI, pp. 46-48; 108
6	RP 1:82-84	CP 5029-5207 at Volume 1, pp. 82-84
7	RP 6:72	CP 5995-6160 at Volume VI,

		p. 72
9	Initial Order, pages 9-10, May 12, 2010	CP 94-389, see Initial Order
9	RP Bates # 000140, Final Order Par. 15	CP 1-80 and 94-389
9	R Bates # 00350 Initial Order Par. 4.22	CP 1-80 and 94-389
10	RP 6:31	CP 5995-6160 at Volume VI, P.31
10	RP Vol. 1, p. 68, Lines 19-21	CP 5029-5209, at Volume 1, Page 68, Lines 19-21 and Page 60, Lines 1-25, and Page 51, Lines 1-13
13	RP Vol. VI, P. 54 RP Vol. 1, Pages 168 And 80	CP 5995-6160, at Vol. VI, P. 54 CP 5029-5209, at Volume I, Pages 168, and 80
14	RP Vol. VI, P. 31	CP 5995-6160, Vol. VI at P. 31
16	RP 1, Pages 14-187	CP 5029-5209, Vol. 1, at Pages 14, 187

18	RP 1, PP. 15, 17	CP 5029-5209, Volume 1, at Pages 15, 17
20	RP 6, PP. 46-48, 52-53, 56, 80 and 72	CP 5995-6160, Vol. VI, at Pages 46-48, 52-53, 56, 80 and 72
21	RP 4:67-68	CP 5592-5797, Vol. IV, PP 67-68
	RP Vol. II, P. 16	CP 5208-5394, Vol. II, at P. 16
	RP Vol. VI, P. 72	CP 5995-6160, Vol. VI, at 72
	RP Vol. I, P. 167-168	CP 5208-5394, Vol. I, PP. 167-168
22	RP Vol. VI, P. 54	CP 5995-6160, Vol. VI, at
	P. 50, 55	54, 50, 55
	RP Vol. II, P. 16	CP 5208-5394, Vol. II, at 16
	RP Vol. I, PP. 123-124	CP 5208-5394, Vol. I, PP 123-124
25	RP 6:31	CP 5995-6160, Vol. VI, at Pages 31

ARGUMENT

1. The State's brief concedes that the documents relied upon by the Administrative Law Judge and the OAH Appellate Division, are in fact, medical records.

One of the central issues in this case are the facts and records introduced by the state upon which the state and the judge relied. The state utilized its own form but ignored its designation and the facts contained therein. The State's Reply Brief describes the facts which are to be contained in the record. See Page 28. It is these very facts which were contained in the records examined by the inexperienced auditor who had no experience with vision charts but rather whose experience focused on dental charts. CP 14-137.

Respondent maintains that the evidence produced by the state is actually "substantial." Reply Brief at P. 11. Nevertheless the Office of Administrative Hearings Appellate Division reversed 10% of the findings. This is in sharp contrast to the State's claim that the methodology used resulted in 95% accuracy. CP 5592-5797, RP Vol. IV, P. 48. Either the State's methodology was flawed or it is not accurate. The State refers to the "confidence interval" in its own methodology as being 95% accurate. CP 5592-5797, RP Vol. IV, P. 48. Two deficiencies exist in this approach. First, 10% of its recoupment figure was reversed by the

Appellate Division so this new math cannot be accurate. Second, if the State adjusted its figures or acknowledged this fact it fails to acknowledge its impact on the rest of the audit's accuracy.

The state used the term "records" but does not define that term. The state's own statute and regulations do not supersede or change the federal statute and regulations which does use the term records. 42 USC. 1396 a (30) (A); 42 CFR 433.304; 447.45 (f) and 455.2. Moreover the state's own description of the order form is that it is a medical record. See State's Reply Brief, pages 17 and 35. Thus, the state's own records support the appellant's position that substantial adequate evidence existed in the records of the information necessary for the state to conduct the audit. This is more than a mere difference of opinion about the conclusions one could reach on these facts. Rather, the state takes a position that is consistent with Appellant's position when their own records provide the facts. It ignores the effect on the audit's accuracy of the Office of Administrative Hearings' reversal 10% of the findings. The State's conclusions do not give the state the authority to ignore their own facts. There is no acknowledgment that the state's own records contained a very information they were seeking. Both parties cite WAC 388-502-0230 (2003).

The issue before the court is whether these regulations somehow allow the state to ignore their own records. The court will note that the order form prepared for Airway Heights is created by the optometrist, here Dr. Bircumshaw. This medical record is actually created by the optometrist with information supplied by or derived from the patient directly during an examination and consultation. For example, how could the Spokane based Airway Heights order filler determine the refraction values or optometric measurements made on a Tacoma patient and only seen by Dr. Bircumshaw? Neither Airway Heights nor any auditor could make that determination. Despite the state's speculative claim that the Airway Heights' order form may have been obtained at a later time there is simply no evidence of that effort to create something new. See State's Reply Brief at Page 28-30. It also ignores the fact that the state's own records are the very ones providing the information. Joanne Bircumshaw's testimony regarding the records coupled with the records themselves appear to be unrebutted, the information is there for the Administrative Law Judge to see. This is not an evaluative process but a simple fact in the voluminous record introduced by the state.

These records are the very ones used to treat the patient, the goal of any medical procedure. The state never really addresses what is missing from the vast majority of approximately 375 records. See State's Brief,

Page 19. The state's claimed "broad authority" does not give it the liberty to ignore its own required and submitted records. State's Brief, Page 22.

There is no evidence that the services were not provided. The state's own records and exhibits in this case corroborated by the testimony of Dr. and Mrs. Bircumshaw demonstrate that the services were provided. None of the state's witnesses ever testified that the services were not provided. See testimony of Ordione, CP 14 through 187.

2. The Administrative Law Judge's decision was both clearly erroneous and arbitrary and capricious.

A close reading of the State's own cases support the Appellant. In Armstrong v. Dep't of Fisheries, 91 Wn. App. 530, 958 P.2d 1010 (1998), the court dealt with rule making authority and interpretation of rules. The court stated, 91 Wn. App. At 538:

"When words are not defined by statute, the court may refer to the dictionary definitions and two, and usage in light of the context in which the word is used."

The court went on to say that it could consider the subject matter within which the word is used. 91 Wn. App. at 539. In this case we are dealing with records as defined by the federal statute. A "record" is defined as "An account, as of information or facts, set down especially in writing as a means of preserving knowledge." The American Heritage Dictionary of

the English Language, Third Edition, Houghton Mifflin Co., 1992. The selected records provided the information on their face and are the state's own evidence.

In Callecod v. Washington State Patrol, 84 Wn. App. 663, 929 P.2d 510 (1997) the court denied a Washington State Patrol officer's request for disability and the appellate court upheld it. The court held that decisions which were arbitrary and capricious could be reversed even though the administrative process made its decision. The court went on to say that decisions which are willful, unreasoning and in disregard of the facts and circumstances are by definition arbitrary and capricious. 84 Wn. App. at 676. In this case ignoring the facts and records before the tribunal, the facts and records required and offered by the state and not in dispute, is an arbitrary and capricious decision and should be overturned as Appellant submits.

In Pierce County Sheriff v. Civil Service Comm'n of Pierce County, 98 Wn. 2d 690, 658 P.2d 648 (1983), the court addressed arbitrary and capricious actions involving a Pierce County Sheriff's Sergeant. The court held, 98 Wn. 2d at 693-94:

“The right to be free from such action is itself a fundamental right and hence any arbitrary and capricious action is subject to review.” Citing Williams v. Seattle School District No. 1, 97 Wn. 2d 215, 221-22, 643 P.2d 426 (1982).

3. This court may review de novo mixed questions of law and fact.

In Franklin County Sheriff's Office v. Sellers, 97 Wn. 2d 317, 646 P.2d 113 (1982), the court addressed a female applicant's challenge to a job opening that was only offered to men. The court used the "clearly erroneous" test to allow a broader, more intensive review of an agency's factual determinations. 97 Wn. 2d at 324. That case involved mixed questions of law and fact. The court determined that it had the authority to review mixed questions of law and fact "[W]here there is a dispute both as to the propriety of the inferences drawn by the agency from the raw facts and as to the meeting of the statutory term." 97 Wn. 2d at 330. Here the question of the records and the inferences to be drawn has two parts. First, what are the facts and those facts are contained in the records themselves. Second, what are the inferences to be drawn from the facts in terms of information available to the state? At no time does any state witness ever say they cannot determine the medical action undertaken by Dr. Bircumshaw required by WAC 588-502-0230; 0240. This court has the authority to address these questions because the state's own form calls it a medical record. The Appellant, the state and Airway Heights all relied on this form for facts. The State just wants to ignore inconvenient facts contained in its own records.

4. The State's effort to recover all of the Medicaid payments to Appellant is both arbitrary and capricious and unlawfully punitive.

In In re: Disciplinary Proceeding against Haskell, 136 Wn. 2d 300, 962 P.2d 813 (1998), the court addressed attorney discipline. The court overturned a disbarment of an attorney on proportionality grounds. 136 Wn. 2d at 321. Cited by the State, this case has relevance in this matter because the recapture of all the money paid to the appellants is entirely disproportionate to the state's actual proof. The state sought over \$200,000 which represents 63% of all of the money paid for Medicare or Medicaid patients. It is so disproportionate that it constitutes both an arbitrary and capricious action but also results in an unfair taking from the appellants. The total of the claims actually presented was about \$11,000. This represented about 5% of the total recovery the Administrative Law Judge found. This is so disproportionate as to be punitive. At best the state should be allowed only to recover those funds that they demonstrated particularly in light of the fact that about 10% of their claims were eliminated.

RESPECTFULLY SUBMITTED this 13th day of March, 2015.



Peter Kram, WSBA #7436
Attorney for Respondent

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STATE OF WASHINGTON
BY C. [Signature]
DEPUTY

ORIGINAL

NO. 45923-0-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 13-2-07068-1
)	
Plaintiff/Respondent,)	DECLARATION OF SERVICE BY MAIL
)	
v.)	
)	
HAROLD BIRCUMSHAW)	
)	
)	
Defendant/Appellant.)	

KNOW ALL PERSONS BY THESE PRESENTS: That I, Stacey McKee, the undersigned, of Tacoma, in the County of Pierce and State of Washington, have declared and do hereby declare:

That I am not a party to the above-entitled action, am over the age required and competent to be a witness;

That on the 13th day of March, 2015, I placed in the United States Mail with first class postage prepaid an envelope containing the following documents:

1. Appellant's Reply Brief,

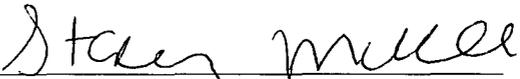
3. This Declaration of Service by Mail

Properly addressed to the following:

**Angela Coats McCarthy
Matthew Sailer King
P.O. Box 40124
7141 Cleanwater Dr SW
Olympia, WA 98504**

I declare under penalty of perjury under the laws of the State of Washington and of the United States that the foregoing is true and correct.

Signed at Tacoma, Pierce County, Washington this 13th day of March, 2015.



Stacey McKee

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