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

EVERGREEN WASHINGTON HEALTHCARE FRONTIER, L.L.C.
d/b/a Frontier Rehabilitation & Extended Care; ET AL.,

Appellants,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF
WASHINGTON,

Respondent.

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

A. Introduction

Respondent Department of Social and Health Services (“the Department”) denied to Appellants the benefit of Medicaid payment rates that were mandated by statute and in fact were paid to other, similarly situated nursing homes. The Department’s brief takes the position that no matter how contrary to law or the state constitution or arbitrary and capricious this denial is, it is unreviewable by the Court. The Department is wrong.

The Department’s defense to this action for a writ of mandate under RCW 7.16, and declaratory judgment, RCW 7.24, are its claims that (1) the Appellants had to seek review in 2006 and 2007 under a separate statutory remedy in order to be able to assert rights to a writ and declaration, or (2) appeal the Department’s December 2, 2009 denial of relief to the Superior Court under the Administrative Procedures Act.

The Department admits by not contesting the first and third elements of entitlement to a writ of mandate. *Eugster v. City of Spokane*, 118 Wn. App. 383, 409, 76 P.3d 741 (2003). While not specifically stated, its arguments are based upon the second requirement of RCW 7.16.160 that the Appellants establish that they had no “plain, speedy and adequate remedy in the ordinary course of law.”

The first exhaustion argument makes no sense, because it would mean that the Appellant's separate review rights under RCW 74.46.531(4) in 2008-09 could not be exercised unless Appellants had done a prior appeal under RCW 74.46.780 and WAC 388-96-904 in 2006 and 2007. But if they had done a prior appeal under WAC 388-96-904, they would have no need to seek review under RCW 74.46.531(4). This argument seeks to render RCW 74.46.531(4) mere surplusage.

Apparently realizing that the argument that they put to the Superior Court is illogical and unsustainable, the Department now raises a new claim that the Administrative Procedure Act is the exclusive remedy for Appellants and that the Appellants had to characterize their lawsuit as a petition for review under the APA. Again, the Department is wrong, because the Appellants' complaint and claims involve constitutional rights, and our Supreme Court has both heard such claims under actions for a writ of mandate and declaratory judgment in at least three cases involving rate actions by the Department and ruled that there is no requirement to exhaust administrative remedies where the claims involve constitutional issues.

This Court is empowered to review Respondent's denial of Appellants' request to be treated equally, which request was made pursuant to the "errors and omissions" statute, RCW 74.46.531(4).

Because this unique statute forecloses further administrative remedies but not judicial review, review pursuant to a writ of mandamus and/or declaratory judgment is appropriate. The Department has no authority to decide constitutional issues.

This case presents a unique statutory scheme for this Court to review. Unlike any other statutes that we have found in relating to administrative agencies in the State of Washington, this is the only one that has an initial administrative review process pursuant to procedures under the APA and also has a second review process of decisions in RCW 74.46.531. That statute itself removes decisions as to errors and omissions in rate setting from the purview of the Administrative Procedures Act and the administrative procedures in RCW 74.46 and the implementing regulations in WAC 388-96.

In addition, Appellants' complaint was not cognizable under the APA nor limited by RCW 34.05.510(1) because of that statute's explicit language, which provides that APA review is not the exclusive remedy where "the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim." Here, Appellants claim they are entitled to additional compensation because they were denied the statutorily required rate of payment, resulting in unconstitutional disparate treatment. As

discussed below, RCW 74.46.531(4) strips the Department of the statutory authority it would otherwise have for appellate review of a denial. Therefore, the APA is inapplicable, there is no “plain, speedy and adequate remedy at law,” and Appellants’ use of the writ of mandamus and declaratory judgment statutes is the appropriate method for this Court to review the Department’s actions.

As it has done throughout these proceedings, the Department takes the position that the Appellants were late in their request for correction to their 2006 and 2007 rates pursuant to the Errors and Omissions Statute RCW 74.46.531(4). In fact, they were not late at all. There is no limit on the time to bring a request for correction of errors and omissions pursuant to that statute.

The Department is wrong on all contentions.

B. REPLY TO DEPARTMENT’S ARGUMENTS

1. Department’s Characterization of This Case.

The Department in its counterstatement of the case, p. 5, cites *Life Care Centers of America, Inc. v. Department of Social and Health Services*, 162 Wn. App. 370, 373, 254 P.3d 919 (2011), for the proposition that the Administrative Procedures Act in RCW 34.05 governs the Court’s review of disputes over the methodology the Department uses to allocate Medicaid payment rates to specific facilities.

Actually, the *Life Care* Decision only holds that the APA governs appeals from a decision of the DSHS Board of Appeals. *Id.* at 373-74. *Life Care* involved a reimbursement issue unrelated to the issues before this Court and review of a decision of the Board of Appeals under WAC 388-96-904. 162 Wn. App. at 374. The Department cites no other case holding that all disputes involving an agency must be characterized as brought under the APA, nor can it.

Appellants agree that there are two methods to challenge rates. The first is under WAC 388-96-904, and the second is under RCW 74.46.531(4). The parties are not in dispute on these separate methods. We do disagree with the assertion on p. 7 that the Department may under RCW 74.46.531(4) “retroactively correct errors that the nursing home failed to timely appeal.” The statute makes no mention of any “failure” but simply takes its process out of the timelines of WAC 388-96-904. We agree that the Department’s appeals and exception review procedure is not available to review any denial of relief from an error or omission.

The Department on pp. 7 through 10 discusses how *Life Care* used the first appeal process (WAC 388-96-904) to obtain relief. Only a few comments need be made. First, Dale Patterson behalf of the Evergreen facilities tried to appeal their July 1, 2007 rates on the vendor rate increase issue and was told that it was not an appealable issue. See,

Patterson Decl., CP 298-99. Second, the Department states that Appellants were not part of the 2007 rates settlement that allowed the Life Care facilities and eight others (p. 10), but there is no evidence in this record that Appellants were offered a chance to be a part of that settlement. Third, the Department admits (p. 10) that it applied the methodology for the vendor rate increase as ordered by Judge Wickham to all Medicaid nursing homes in a retroactive rate adjustment to the July 1, 2008 rates. Finally, the Department offers no reason why the rate adjustment for 2008 was correct under the law but its refusal for July 2006 and July 2007 was justified. There was no change in the applicable sections of RCW 74.46 for any of 2006, 2007 or 2008. The VRI methodology in statute was exactly the same each year.

Appellants did attempt to exhaust any administrative remedy that they might have had under RCW 74.46.531, but the Review Judge ruled that he had no jurisdiction because of the language of the statute. (CP 154) The Department's December 2, 2009 denial of relief specified no way to challenge the decision, leaving the Appellants to guess what their rights were. Appellants agree that the Review Judge had no jurisdiction, and consequently he had no jurisdiction to enter the Findings of Fact that the Department now cites to this Court (p. 12 of Brief, CP 59-76).

The Department's reference to the Order entered by the Superior Court (p. 14; CP 597) reflects that Court's unique way of looking at the Doctrine of Exhaustion of Administrative Remedies, and its "new law." Summarized, the "new law" is that where two administrative remedies are available to a party, it must exhaust the first one in order to have rights under the second one. The Department cites no authority supporting such a proposition.

2. Standard of Review

Appellants agree that this Court reviews the lower court's summary judgment de novo but disagree with the claim that this Court must give substantial deference to the Department's view of the law. This case involves constitutional issues, resulting from the failure of the Department to follow the law as determined in a final judgment by Judge Wickham in the *Life Care* Superior Court case (CP 403-05), resulting in disparate treatment for the Appellants. The Department has no authority to interpret the state constitution and is entitled to no deference in its arguments.

The Department argues that this Court has no judicial oversight for its actions taken pursuant to RCW 74.46.531 based on three alternative theories: (1) Appellants had an adequate remedy at law under former RCW 74.46.780 and WAC 388-96-904, (2) RCW 74.46.531

forecloses judicial review by its terms, and (3) Appellants should have appealed under the APA's generic judicial review provisions in RCW 34.05. Each of these theories fails.

3. Appellants Had No Administrative Remedy from the December 2, 2009 Denial.

The Department's first argument, commencing on p. 17 of its Brief, is the one that was adopted by the Superior Court, that is, that by not appealing under WAC 388-96-904 in 2006 and 2007, the Appellants should be denied relief related to the rates for July 1, 2006 and 2007. The evidence is that the change in methodology was unknown to the Appellants and not described in the notices, so they did not appeal in 2006 and were not allowed to appeal in 2007.¹ Further, the WAC 388-96-904 appeal was not their exclusive way for getting relief, only the first way. They also had "errors and omissions" under RCW 74.46.531(4). The parties do not dispute this.

Former RCW 74.46.780 and WAC 388-96-904 did not offer an adequate remedy, or in fact any remedy, for the subject of Appellants' complaint, the denial of rate correction in 2009. The explicit wording of RCW 74.46.531(4) precludes administrative review. The Department improperly conflates the Agency's initial rate-setting action with the

¹ The Declarations establish that they did not know what the Department had done to change the VRI methodology. CP 299; CP 527-8; CP 180.

Agency's refusal to retroactively correct Appellants' rates after the *Life Care* decision.

Appellants challenge the Department's denial of its request, made under RCW 74.46.531(4), to correct the legal error as to their 2006 and 2007 rates, so that they will be treated equally for 2006 and 2007 with the *Life Care* nursing homes. The Department's denial did not occur until well after the brief period for review in former RCW 74.46.780 had expired. Therefore, Appellants' claim was not cognizable under former RCW 74.46.780 from the start, so there was no administrative remedy for them to pursue, as the Review Judge made clear. (CP 154)

The Department cites RCW 34.05.030(5) for the proposition that Department actions are governed by the APA. Actually, the statute says nothing of actions and broadly provides that the agency is subject to the Administrative Procedures Act. It makes no mention of what actions are and are not reviewable. In this case, the legislature has taken out of the purview of the Administrative Procedures Act decisions of the Department denying relief under RCW 74.46.531(4).

Moreover, rate-setting actions of the Department that are unconstitutional are subject to a correction pursuant to writ of mandate or declaratory judgment. *State ex rel. Living Services, Inc. v. Thompson*, 95 Wn.2d 753, 630 P.2d 925 (1983) (writ of mandate to compel rate-setting

consistent with Const. art. 2, §§ 19 and 37); *Caritas Services, Inc. v. DSHS*, 123 Wn.2d 391, 399, 413, 869 P.2d 28 (1994) (writ of mandate to compel compliance with Const. art. 1, § 23 (contracts clause) and due process); *United Nursing Homes, Inc. v. McNutt*, 35 Wn. App. 632, 669 P.2d 476 (1983) (declaratory judgment to declare right of nursing homes to payment under state Medicaid statute). These cases demonstrate simply that the Department's assertion about exclusivity of the APA is simply wrong.

The Department mischaracterizes the case before this Court. In their Petition for a Writ of Mandate and Declaratory Judgment, the Appellants have sought the declaration that the Department's denial of correction of their rates is unlawful and unconstitutional, entitling them to a writ of mandate to have their rates for 2006 and 2007 retroactively adjusted to be consistent with the rate-setting methodology afforded to the *Life Care* facilities. In our Opening Brief, we have discussed in detail why the Appellants are entitled to such relief, through application of the correct interpretation of the law as in the *Life Care* case, to avoid the unconstitutional disparate treatment caused by the Department's arbitrary denial of their errors or omissions request.

The Department's arguments concerning notice to the Appellants, pp. 18-19, do not support dismissal and can only be said to raise factual

issues. The Department relies upon the Department's Board and "Final Findings of Fact and Conclusions of Law" to refute the Appellants' statements in their declaration, but the Board did not have jurisdiction to hear the case and so stated in its Conclusions of Law (CP 128). Accordingly, any Findings of Fact as to notice by the Board have no validity whatsoever. If the Board had no jurisdiction, it had no jurisdiction to enter any Findings of Fact. As this Court has noted in the past, the only thing that a tribunal can do when it does not have jurisdiction is to dismiss the case.²

The Department argues, p. 20, that the Appellants had the right to challenge the Department's rate methodology administratively, but it also agrees that RCW 74.46.531(4) "denies a nursing facility the right to an administrative hearing." (p. 13) If it has no right to a hearing, the facility has no right to challenge the methodology administratively.

Appellants dismissed their APA challenge to the decision of the Department's Review Board because RCW 74.46.531(4) is explicit. The review judge was right in holding that he had no jurisdiction to hear the appeal raised by the Appellants in their attempt to get administrative review.

² See, e.g., *City of Bremerton v. Spears*, 134 Wn.2d 141, 150, 949 P.2d 347 (1998)

The Department repeatedly attempts to draw this Court's attention to the appeal rights that occurred in 2006 and 2007. However, that is not the issue before this Court. The issue is whether the Department's denial of correction to the July 1, 2006 and 2007 rates pursuant to its December 2, 2009 letter was contrary to law, contrary to the State Constitution, or arbitrary and capricious.

The Department asserts that mandamus and declaratory judgment are not available when an agency action is reviewable under the APA. This tautology does not answer the question before this Court. The Department's argument ignores the exceptions to the basic rule in RCW 34.05.510, which provides:

This chapter establishes the exclusive means of judicial review of agency action, except:

(1) The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2)

(3) To the extent that de novo review or jury trial review of agency action is expressly authorized by provision of law.

(Emphasis added.) Because the action before this Court involves a claim for money, the Department does not have the authority to determine the claims under the state constitution that are raised in the Appellants'

Complaint, and case law holds that mandate and declaratory judgment are applicable to constitutional claims, the APA is not the exclusive avenue of relief.

The Department fails to discuss the nursing home cases cited above³ in which a writ of mandate or declaratory judgment was issued to remedy unconstitutional acts of the Department. By issuing the writ or declaratory judgment, the courts had to conclude that the three elements under RCW 7.16.160 and entitlement under RCW 7.24 was appropriate in such cases.

It also completely ignores *South Hollywood Hills Citizens Ass'n for Preservation of Neighborhood Safety and the Environment v. King County*, 101 Wn.2d 68, 73-74, 677 P.2d 114 (1984) (“*South Hollywood*”), which explicitly holds that even if there is an administrative remedy, it is no bar to the court deciding a case raising constitutional claims:

Similarly, if the party is challenging the constitutionality of the agency's action or of the agency itself, the exhaustion requirement will be waived.

The cases the Department cites, starting on p. 21 of its brief, do not support its contention of the APA being the exclusive remedy in this case.

³*State ex rel. Living Services, Inc. v. Thompson; Caristas Services, Inc. v. DSHS; and United Nursing Homes, Inc. v. McNutt.*

Diehl v. Western Washington Growth Management Hearings Board, 153 Wn.2d 207, 213, 103 P.3d 193 (2004), cites RCW 34.05.510 and holds:

The APA establishes the exclusive means of judicial review for agency action with the exception of litigation in which the sole issue is a claim for money damages or compensation, or when the agency whose action is at issue does not have statutory authority to determine the claim.

(Emphasis added) The Department fails to discuss these two exceptions to the exclusivity of the APA, and these exceptions are some of the reasons the Department's arguments fail.

Judd v. American Tel. and Telegr. Co., 152 Wn.2d 195, 204-05, 95 P.3d 337 (2004), involved judicial review of a rule in which the Plaintiff had failed to name the agency that issued the rule. The court did note that, "the APA provides certain limited exceptions to the general rule that challenges to an agency action must be brought under the APA." *Id.* at 204.

Jones v. Department of Corrections, 46 Wn. App. 275, 279, 730 P.2d 112 (1986), does not appear to have any application to the present controversy.

In *Rutcosky v. Board of Trustees*, 14 Wn. App. 786, 789, 545 P.2d 567 (1976), the plaintiff failed to exercise his right to an administrative

hearing to contest his dismissal. Here, the Appellants did not have a right to administrative hearing. RCW 74.46.531(4)

The Department's argument under *Bock v. Board of Pilotage Commissioners*, 91 Wn.2d 94, 98, 586 P.2d 1173 (1978), is inapposite, because in *Bock*, unlike the present case, the plaintiff had an administrative hearing right to review the Board Pilotage Commissioner's refusal to issue a license to him.

Davis v. Department of Labor & Industries, 159 Wn. App. 437, 443, 245 P.3d 253 (2011), is not similar to this case at all. In *Davis*, the administrative remedies under the Industrial Insurance Act were exclusive, by explicit statute within the IIA and that by not getting a final board decision, the Plaintiffs in that case could not invoke the Court's appellate jurisdiction to review their claims. 159 Wn. App. at 442. The Superior Court lacks original jurisdiction over industrial insurance claims. RCW 51.04.010. In contrast to that statutory scheme, RCW 74.46.531(4) prohibits administrative review proceedings and prevents a decision that could be appealed to the Superior Court.

Davidson Serles v. City of Kirkland, 159 Wn. App. 616, 622, 246 P.3d 822 (2011), is also inapposite. Opposite the provisions of RCW 74.46.531(4), the City of Kirkland's comprehensive plan could be reviewed by the Growth Management Hearings Board and subsequently

the Board's Order could be reviewed by the Court's under the APA. In the present case, there is no such review right from the December 2, 2009 Decision.

The *Davidson* case, like the other cases cited by the Department, involves the typical statutory scheme where the administrative hearing and decision rights are spelled out in the statute and must be pursued before going to court. In this case, the statutory scheme prevents the Plaintiffs from using the administrative hearing remedies that are otherwise available, leaving the Plaintiffs only with the extraordinary writs, because there is no adequate remedy at law.

Finally, the Department is incorrect in its contentions as to the application of RCW 74.46.531 to these facts. Refusal to obey the law as determined by Judge Wickham to be the correct method for applying vendor rate increase is not a discretionary act. Second, there was no agency action that was reviewable under the APA, because of the preclusion of the APA remedies in RCW 74.46.531.

Commencing on p. 26, the Department agrees with Appellants that they did not have any appeal or administrative review procedure of decisions under RCW 74.46.531(4). However, it misreads RCW 74.46.531 as explicitly foreclosing all judicial review. The statute states that if a request is denied, "the contractor shall not be entitled to any

appeals or exception review procedure that the department may adopt under [former] RCW 74.46.780.” While the Department relies on the words “any appeals” to argue that all judicial review is foreclosed, *see, e.g.*, Brief of Respondent at 27, that phrase cannot be properly excerpted from its context. RCW 74.46.780 uses the precise phrase “appeals or exception review procedure” as a term of art to describe the procedure it sets forth.⁴ With that reference, it is clear that RCW 74.46.531 prohibits only review through the agency review process set forth in former RCW 74.46.780. It does not similarly prohibit all further judicial review, such as by writ of mandamus or declaratory action.

On p. 27, the Department cites *Spice v. Pierce County*, 149 Wn. App. 461, 204 P.3d 254 (2009) as supporting no jurisdiction. In *Spice*, the statute specifically barred judicial review of a land use decision. Here, no such prohibition exists in RCW 74.46.531(4) or anywhere else in RCW 74.46. This Court has both statutory authority in the declaratory

⁴ RCW 74.46.780 provides,

The department shall establish in rule, consistent with federal requirements for nursing facilities participating in the Medicaid program, *an appeals or exception procedure* that allows individual nursing care providers an opportunity to submit additional evidence and receive prompt administrative review of payment rates with respect to such issues as the department deems appropriate.

(Emphasis added).

judgment and mandamus statutes and under the Const. art. 4, § 6, to review the unlawful acts of the Department of Social and Health Services. The *Spice* case provides no support for the Department's arguments, as it involves an entirely different statutory scheme.

The Department next argues that *Your Home Visiting Nurse Services, Inc. v. Shalala*, 525 U.S. 449, 119 S.Ct. 930, 142 L.Ed.2d 919 (1999), provides guidance to this Court. It does not and is not apposite. That case arises under the federal Medicare Act and the limited jurisdiction of Art. III courts (federal district courts). In *Your Home*, the Court analyzed the limited administrative remedy before the provider reimbursement review board where a reopener of a rate was denied. The statute required that the facility seek review within 180 days in order to invoke jurisdiction to the PRRB. Because the facility had not complied with the 180 day limit for seeking review of the second remedy available to them, the reopener, they were barred from PRRB review and court review. Here, there are no such limits in RCW 74.46.531 or anywhere else in RCW 74.46. We also note that the *Your Home* case did not involve any constitutional issues such as in this present case.

Ultimately, the Department both argues that this is not an APA case and that it is an APA case with an exclusive remedy. However, this

cannot be an APA case, and there is no exclusive remedy, because there is no APA remedy at all.

On p. 31, the Department asserts that the Department's Board, the Superior Court and this Court lack jurisdiction to review the decision of the Office of Rates Management refusing to modify the rates (the December 2, 2009 decision). RCW 74.46.531(4) cuts off APA review, but unlike the Medicare Act in *Your Home*, it does not state that the Courts shall not have jurisdiction to review that decision. The Department *sub silencio* is asking this Court to add the words "**or under any other statute**" to the end of the sentence in RCW 74.46.531(4) that reads:

"However, if the request is denied, the contractor shall not be entitled to any appeals or exception review procedure that the Department may adopt under RCW 74.46.780.

This Court has no authority to add to, modify or otherwise change the meaning of the statute as adopted by the legislature. *Caritas Services*, 123 Wn.2d at 409.

Commencing on p. 31, the Department argues that the so-called "Budget Dial" statute, RCW 74.46.421, prohibits the Department from making the correction. That statute does not apply to the matter before the Court because: (1) the only issue raised by the Department now is whether the Court has jurisdiction to hear this case; (2) whether the limit

would apply is a factual issue that may require trial; (3) the amount of the award in this case will be litigated, including issues such as the effect of the budget dial statute, if any; and (4) the award may be subject to being paid by supplemental appropriation. The trial court did not rule on these issues, nor was it a portion of the Department's motion in the Superior Court. Finally, the "budget dial" statute does not allow the Department to escape its duty to equally pay similarly situated nursing homes the statutorily set rates.

The Department returns to its familiar arguments on p. 35 that judicial review would be available only under the APA, again without discussing the exceptions to the exclusivity in RCW 34.05.510 and the case law. The Appellants' Opening Brief and discussion above distinguishes this case, because it involves an unconstitutional decision by the Department representative, and the Department concedes that it has no authority to determine the constitutionality of its actions. Such decisions are exclusive to the courts, as was determined in *South Hollywood Hills, State ex rel. Living Services, Inc. v. Thompson, United Nursing Homes, Inc. v. McNutt*, and *Caritas Services, supra*.

Appellants had no plain, speedy and adequate remedy under the APA because APA review was cut off by the plain language of the statute. The Department claims that the Appellants should have

characterized their action as a petition for review of the December 2, 2009 decision under the APA. While the Department, in its new argument, seems to think that this is an obvious thing, it was not so obvious on December 2, 2009, because there is no notice to the Appellants that they had to appeal to Superior Court if they disagreed with the denial. There is no statement at all as to their rights and remedies. (CP 530-32)

The Department fails to assert that it could decide the constitutionality raised in these proceedings. As a matter of law, it cannot. WAC 388-96-901.

The Department's failure to address *South Hollywood Hills, supra*, and its explicit statement that the Appellants do not have to seek administrative remedies where their claims involve constitutional issues, is an admission that both the exceptions to APA exclusivity in RCW 34.05.510 and the principles established in *South Hollywood Hills* and its predecessors expressly take this case out of the purview of the APA and squarely into the elements to establish a writ of mandate and a declaratory judgment. This Court must hold that it has jurisdiction dismissal of this action for lack of jurisdiction and remand the matter for further proceedings.

C. Reply to Department Response to Appellants' Claims under the Elements of Writ of Mandate and Declaratory Judgment.

In the last part of its Brief, the Department addresses the arguments in the Appellant's Opening Brief in favor of their motion for summary judgment and order establishing liability. We have only a few points to add.

First, denial of relief that perpetuates error of law is not a discretionary decision but an unlawful one. A denial that results in disparate treatment such as in this case is unconstitutional under the State Const. art. 1, § 12. Finally, failure to agree that it has made a mistake when the Superior Court in *Life Care* has ruled that it did commit error of law in establishing the vendor rate increase and the Department has acceded to that decision in a retroactive adjustment as to the 2008 rates, is arbitrary and capricious. No case holds that an administrative agency may act unlawfully, arbitrarily and capriciously, under the guise that its decision is discretionary.

Second, the Department is estopped to claim that it was correct in establishing the 2006 and 2007 rates. The four elements of collateral estoppel are established in this case.

The four elements are: (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2)

the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Reninger v. Department of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998); *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997).

Appellants' Opening Brief discusses the application of the elements of estoppel in detail. The Department's assertion that all parties had to be the same is simply wrong and adds a fifth element, that the parties had to be identical. No case holds that.

Third, *Kramarevcky v. DSHS*, 122 Wn.2d 738, 863 P.2d 635 (1993), holds that the Department of Social and Health Services can be and was estopped. The Department's assertions of "nonmutual estoppel" in the cited federal cases are not to be found in the case law of the State of Washington.

Fourth, there is no evidence that the Department justifiably relied on the finality of the Appellant's 2006 and 2007 Medicaid rates. The Department is well aware of RCW 74.46.531(4), which makes all rates subject to further review after the initial review period in WAC 388-96-904. In addition, the Department acted unlawfully and refused to correct

its unlawful action on December 2, 2009. (CP 530-32) There can be no justifiable reliance.

Finally, the Department claims the legislature clarified the vendor rate increase statute, RCW 74.46.421. When the legislature adds language to a statute such as was done in 2009, prohibiting the compounding required by Judge Wickham under the prior version of the statute, the statute is prospective only because: (1) amendments are presumed to be prospective only, *Densley v. Dep't of Retirement Systems*, 162 Wn.2d 210, 223, 173 P.3d 885 (2007); (2) retroactive application is disfavored, *Id.*; and (3) there is no legislative history that a “clarification” was intended, especially where the exact opposite meaning was achieved by the amendment, not a technical correction.

Next, the Department’s denial was arbitrary and capricious, that is, because it was willful and unreasoning action. As the Department concedes on p. 48, it denied the relief because “it does not feel that an error was made.” As a matter of law, it did make an error. Judge Wickham has so determined in a final decision binding on the Department. (CP 403-405) Accordingly, one can only conclude that the Department’s denial was willful and unreasoning disregard of the facts and circumstances. *Overlake Hospital Association v. Department of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010).

Finally, the Department violated the equal protection rights of the appellants, as argued in our Opening Brief. The Appellants are similarly situated to the *Life Care* original appellants and the *Life Care* joiners (the 29 total facilities) because they are all nursing homes that are participants in the Medicaid program, which sets rates based upon the same statute applicable to all. They are entitled to be treated lawfully and as required to be done under the law as to the *Life Care* facilities.

Accordingly, this Court must find that the Department has violated the constitutional rights of the Appellants.

II. CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court (1) reverse the Superior Court's grant of the Department's motion for summary judgment and denial of its own motion and (2) grant the Appellants' motion as to liability of the Department.

Respectfully submitted this 28th day of December, 2011.

RYAN, SWANSON & CLEVELAND,
PLLC

By 
Thomas H. Grimm, WSBA #3858
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
Telephone: (206) 464-4224
Facsimile: (206) 583-0359

Attorneys for Appellants

COURT OF APPEALS
DIVISION II

11 DEC 29 AM 10:05

STATE OF WASHINGTON
BY [Signature]
DEPUTY

DECLARATION OF SERVICE

I declare that on the 27th day of December, 2011, I caused to be filed with the Court, via courier, the original of the following documents:

APPELLANTS' REPLY BRIEF

and served copies of the above-named documents upon the following addresses via courier:

Attorneys for Respondents

Katy A. Hatfield (formerly King)
Asst. Attorney General of Washington
7141 Cleanwater Drive SW
Olympia, WA 98504-0124
Fax: 360-586-6659
KatyK1@ATG.WA.GOV

- U.S. Mail
- Hand Delivery
- E-mail
- Facsimile
- Federal Express

[Signature]
Linda Blanchard

Dated: December 27, 2011

Place: Seattle, WA

APPENDIX - EXCERPTS FROM CLERK'S PAPERS

- A. CP 297-99 Patterson Declaration
- B. CP 526-28 Declaration of Ulrich
- C. CP 179-81 Declaration of Seils
- D. CP 530-32 December 2, 2009 Decision of DSHS
denying relief under RCW 74.46.531(4)
- E. CP 113-32 Review Judge Decision
- F. CP 403-405 Order Reversing Administrative Decision,
Life Care Centers of America, Inc v DSHS,
Thurston County Docket No. 07-2-2172-5

88

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2011 JAN 13 PM 3:01

BETTY J. GOULD, CLERK

1 **EXPEDITE** (if filing within 5 court days of hearing)
 2 No hearing set
 3 XX Hearing is set:
 4 Date: February 11, 2011
 Time: 11:00 a.m.
 Judge/Calendar: Honorable Paula Casey

9 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 10 IN AND FOR THE COUNTY OF THURSTON

11 EVERGREEN WASHINGTON HEALTHCARE
 12 FRONTIER, L.L.C. d/b/a Frontier Rehabilitation &
 Extended Care; ET AL.,

13 Petitioners,

14 vs.

15 DEPARTMENT OF SOCIAL AND HEALTH
 16 SERVICES, STATE OF WASHINGTON,

17 Respondents.

The Honorable Paula Casey

CASE NO. 10-2-01832-5

**DECLARATION OF DALE
 PATTERSON IN SUPPORT OF
 PETITIONERS' MOTION FOR
 SUMMARY JUDGMENT**

18 I, Dale Patterson, declare as follows:

19 1. I am the Chief Financial Officer for EHC Financial Services, L.L.C., (formerly
 20 known as Evergreen Healthcare Management), hereafter referred to as ("Evergreen") and
 21 regularly work with the above-named Evergreen facilities in connection with reimbursement
 22 under chapter 74.46, RCW. I make this declaration of my own personal knowledge. I am over
 23 18 years old and otherwise competent to testify. I am familiar with the facts related to the
 24 Department's rate-settings for the July 1, 2006 and July 1, 2007 Medicaid rates for the named
 25 Petitioners that are Evergreen facilities.

26 2. I make this declaration in support of the Petitioners' motion for summary
 judgment and in opposition to the Department's motion to dismiss.

DECLARATION OF DALE PATTERSON - 1

635928.03

EXHIBIT A ORIGINAL



Ryan, Swanson & Cleveland, PLLC
 1201 Third Avenue, Suite 3400
 Seattle, WA 98101-3034
 206.464.4224 | Fax 206.583.0359

0-000000297

1 3. I reviewed rate notifications for all of the Evergreen Washington facilities for
2 both the July 1, 2006 and July 1, 2007 rate-settings. Attached to this Declaration as **Appendix**
3 **A** is a true copy of the July 1, 2006 rate notification for Evergreen's Frontier Rehabilitation and
4 Extended Care Care Facility. We were unable to locate a copy of the June 30, 2006 letter cover
5 sheet from Bonnie Hawkins and have attached the one posted on the Department's website. It
6 is the same as actually received by Evergreen. This notification is typical of the rate
7 notifications I reviewed. All had the same "Dear Nursing Facility/Home Administrator" cover
8 sheet and "Description of July 2006 Nursing Facility Medicaid Payment Rate Setting" attached.
9 The notification is typical of what was sent to all facilities. Nothing in these rate notifications
10 explained that the Department had changed its methodology for calculating the vendor rate
11 increase factor from what had been normal previously.

12 4. Attached to this Declaration as **Appendix B** is a true copy of the July 1 2007
13 rate notification for Evergreen's Frontier Rehabilitation and Extended Care Care Facility. Like
14 in 2006, this notification is typical of the rate notifications I reviewed for July 2007. All had
15 the same "Dear Nursing Facility/Home Administrator" cover sheet and "Description of July
16 2007 Nursing Facility Medicaid Payment Rate Setting" attached. The notification is typical of
17 what was sent to all facilities. Again, the Department did not inform the industry of how it
18 calculated the vendor rate increase.

19 5. The Department sometimes uses separate "Dear Administrator" letters sent to
20 each facility to notify them that a change in reimbursement has occurred, whether by statute or
21 court order. The Department did not send out a "Dear Administrator" letter to any facilities or
22 any other form of communication to inform them it was changing the way it calculated the
23 VRI.

24 6. Evergreen appealed its July 1, 2007 rates and raised as an issue the inflation
25 adjustment factor. We did not know what was wrong, but we knew that the inflation factor was
26 lower. Attached to this Declaration as **Appendix C** is a true copy of the letter dated October

DECLARATION OF DALE PATTERSON - 2



1 26, 2007 from Ed Southon responding to the appeal of Evergreen of its July 1, 2007 rates (and
2 subsequent updates), in which the Department denied that the Evergreen Petitioners had the
3 right to appeal under the provisions of WAC 388-96-904 the vendor rate increase because of
4 WAC 388-96-901(3). The Department refused to consider an administrative review of matters
5 related to the application of the vendor rate increase in the biennial appropriations act. See
6 Paragraph 3 on p. 9. I was left with the belief that an action such as the present one was
7 necessary to get the relief and reserved all rights to do so in response to Mr. Southon.

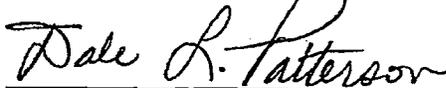
8 7. Consequently, neither I nor anyone else in reimbursement for Evergreen was
9 aware that in fact the Department had changed the calculations and lowered the amount of
10 payment rates to the Evergreen (and all other) facilities, until news of the Order Reversing
11 Administrative Decision in *Life Care Centers of America, Inc., et. al. v. DSHS*, Thurston
12 County Cause No. 07-2-02172-5 ("*Life Care*") got out in October 2008.

13 8. Evergreen tried to get similar treatment and the rate error correction from the
14 Department thereafter, but was unsuccessful. The Department denied relief by letter dated
15 December 2, 2009 from Ed Southon (Ulrich Decl., App. A).

16 9. Evergreen tried to appeal Mr. Southon's December 2, 2009 determination but
17 had its appeals dismissed by the Department's Review Judge, for the reasons stated in the
18 decision appealed and pending before this Court in Docket No. 10-2-01833-3. In summary, the
19 Review Judge said that the exclusive means of review of the Department's rate-settings was
20 under WAC 388-96-904, which is exactly the opposite of what Mr. Southon said in his October
21 26, 2007 letter.

22 I make this declaration under penalty of the perjury laws of the State of Washington.

23 Executed this 6th day of January, 2011 at Vancouver, Washington.

24
25 

26 Dale Patterson

DECLARATION OF DALE PATTERSON - 3

635928.03



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0-000000299

2011 JAN 13 PM 3:00

1 **EXPEDITE** (if filing within 5 court days of hearing)

2 No hearing set

3 XX Hearing is set:

4 Date: February 11, 2011

BETTY J. GOULD, CLERK

5 Time: 11:00 a.m.

6 Judge/Calendar: Honorable Paula Casey

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8
9 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

10 EVERGREEN WASHINGTON HEALTHCARE
11 FRONTIER, L.L.C. d/b/a Frontier Rehabilitation &
Extended Care; et al.,

12 Petitioners,

13 vs.

14 DEPARTMENT OF SOCIAL AND HEALTH
15 SERVICES, STATE OF WASHINGTON,

16 Respondents.

The Honorable Paula Casey

CASE NO. 10-2-01832-5

**DECLARATION OF BILL J.
ULRICH IN SUPPORT OF
PETITIONER'S MOTION FOR
SUMMARY JUDGMENT**

17
18 I, Bill Ulrich, declare as follows:

19 1. I am a cost reimbursement accountant regularly working with and representing
20 many of the above-named facilities in connection with reimbursement under chapter 74.46,
21 RCW. I make this declaration of my own personal knowledge. I am over 18 years old and
22 otherwise competent to testify. I am familiar with the facts related to the Department's rate-
23 settings for the July 1, 2006 and July 1, 2007 Medicaid rates for the named Petitioners.

24 2. I make this declaration in support of the Petitioners' motion for summary
25 judgment that the Department is bound to treat the Petitioners in the same way that it did for the
26

DECLARATION OF BILL J. ULRICH - 1

EXHIBIT B ORIGINAL



1 facilities involved in *Life Care Centers of America, Inc. et al. v. Department of Social and*
2 *Health Services*, Thurston County Docket No. 07-02172-5 (the "*Life Care Case*").

3 3. Attached to this Declaration as Appendix A is a letter dated December 2, 2009
4 from Ed Southon of the Department, in which he denies to anyone not in the *Life Care Case* the
5 relief ordered by the Thurston County Superior Court.
6

7 4. Attached to this Declaration as Appendix B is a letter dated February 23, 2009
8 from Kathy Marshall of the Department, in which the Department extends the *Life Care*
9 decision to all nursing homes in the Medicaid system for the July 1, 2008 rate-setting and rate
10 year. The Department retroactively re-set all Medicaid facilities' rates and adjusted upward all
11 facilities rates, as indicated in the letter.
12

13 5. I have reviewed rate notifications for many of the Petitioner facilities for both
14 the July 1, 2006 and July 1, 2007 rate-settings, as well as for July 1, 2008. I have also reviewed
15 the rate notifications attached to the Declarations of Sandra Whitley as Appendices A through
16 C (Kindred), Amy Seils as Appendices A through C (Extendicare) and Dale Patterson as
17 Appendices A and B (Evergreen) thereto, and agree that as to the vendor rate increase factor,
18 all of the rate notifications were the same for Kindred, Extendicare and Evergreen as for the
19 other Petitioners in each period.
20

21 6. The Department's rate notifications for each of the July 1, 2006, July 1, 2007
22 and July 1, 2008 did not state that the Department had changed its method of calculating the
23 vendor rate increase applicable to the base year costs. As stated by Patterson, Seils and
24 Whitley in the Declarations, even though I am a professional dealing with reimbursement
25 matters with DSHS on a regular basis, I was not informed and did not realize that the
26

DECLARATION OF BILL J. ULRICH - 2

635929.02



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Seattle, WA 98101-3034
206.464.4224 | Fax 206.583.0359

0-000000527

1 Department had changed its VRI calculation methodology starting July 1, 2006 to the detriment
2 of the providers.

3 I make this declaration under penalty of the perjury laws of the State of Washington.

4 Executed this 11th day of January, 2011 at Spokane, Washington.

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6 _____

7 Bill J. Ulrich

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DECLARATION OF BILL J. ULRICH - 3

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635929.02

0-000000528

118

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2011 JAN 13 PM 3:00

BETTY J. GOULD, CLERK

1 **EXPEDITE** (if filing within 5 court days of hearing)
 2 No hearing set
 3 **XX** Hearing is set:
 Date: February 11, 2011
 Time: 11:00 a.m.
 Judge/Calendar: Honorable Paula Casey

9 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 10 IN AND FOR THE COUNTY OF THURSTON

11 EVERGREEN WASHINGTON HEALTHCARE
 12 FRONTIER, L.L.C. d/b/a Frontier Rehabilitation &
 13 Extended Care; et al.,

13 Petitioners,

14 vs.

15 DEPARTMENT OF SOCIAL AND HEALTH
 16 SERVICES, STATE OF WASHINGTON,

17 Respondents.

The Honorable Paula Casey

CASE NO. 10-2-01832-5

**DECLARATION OF AMY SEILS
 IN SUPPORT OF PETITIONER'S
 MOTION FOR SUMMARY
 JUDGMENT**

18 I, Amy Seils, declare as follows:

19 1. I am one of the reimbursement managers for Extendicare Health Facilities, Inc.
 20 ("Extendicare") and regularly work with many of the above-named Extendicare facilities in
 21 connection with reimbursement under chapter 74.46, RCW. I make this declaration of my own
 22 personal knowledge. I am over 18 years old and otherwise competent to testify. I am familiar
 23 with the facts related to the Department's rate-settings for the July 1, 2006 and July 1, 2007
 24 Medicaid rates for the named Petitioners that are Extendicare facilities.

25 2. I make this declaration in support of the Petitioners' motion for summary
 26 judgment and in opposition to the Department's motion to dismiss.

DECLARATION OF AMY SEILS - 1

EXHIBIT C ORIGINAL



1 3. I reviewed rate notifications for all of the Extendicare's Washington facilities
2 for both the July 1, 2006 and July 1, 2007 rate-settings. Attached to this Declaration as
3 Appendices A through C are samples of the rate notifications to Extendicare facilities for July
4 1, 2006, July 1 2007 and July 1, 2008 rate-settings. As to the vendor rate increase, all of the
5 rate notifications were the same for each period.

6 4. Nothing in these rate notifications explained that the Department had changed
7 its methodology for calculating the vendor rate increase ("VRI") factor from what had been
8 normal previously. There is no detail on the method used by the Department as to the VRI,
9 though there are many calculations in the rate notification for each facility. Even if I had been
10 informed of the change, there is nothing that showed what the change was.

11 5. The Department sometimes uses "Dear Administrator" letters sent to each
12 facility to notify them that a change in reimbursement has occurred, whether by statute or court
13 order. The Department did not send out a "Dear Administrator" letter to any facilities or any
14 other form of communication to inform them it was changing the way it calculated the VRI.

15 6. Consequently, neither I nor anyone else in reimbursement for Extendicare was
16 aware that in fact the Department had changed the calculations and lowered the amount of
17 payment rates to the Extendicare facilities, until news of the Order Reversing Administrative
18 Decision in *Life Care Centers of America, Inc., et. al. v. DSHS*, Thurston County Cause No. 07-
19 2-02172-5 ("*Life Care*") got out in October 2008.

21 7. Extendicare tried to get similar treatment and the rate error correction for its
22 facilities from the Department thereafter, but was unsuccessful. The Department denied relief
23 by letter dated December 2, 2009 from Ed Southon. That letter is attached to Bill Ulrich's
24 Declaration as Appendix A.
25
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DECLARATION OF AMY SEILS - 2

636799.02

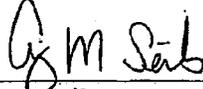
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I make this declaration under penalty of the perjury laws of the State of Washington.

Executed this 12 day of January, 2011 at Milwaukee, Wisconsin.



Amy Seils

DECLARATION OF AMY SEILS - 3

639930.02



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0-000000181



STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
AGING AND DISABILITY SERVICES ADMINISTRATION
PO Box 45600 * Olympia, WA 98504-5600

December 2, 2009

Vendor Rate Increase Appeals

Your facility has appealed its rates from July 1, 2006 through June 30, 2008, and/or its July 1, 2008 and later rates, on the ground that the Department incorrectly applied the vendor rate increase when calculating such rates. For the reasons described below, your appeal is denied.

Your appeal is based on the September 5, 2008 decision of the Thurston County Superior Court in Life Care Center of America v. DSHS, No. 07-2-02172-5. There, the court ruled that the Department had erred in applying the vendor rate increase when calculating the facilities' Medicaid rates for July 1, 2006. In doing so, the court overruled the decision of the administrative law judge in the matter, who had previously ruled in favor of the Department. The Department chose not to appeal the ruling; however, that did not mean that the Department agreed with the order, or felt that it had acted incorrectly. Quite to the contrary, the Department believes that its method of applying the vendor rate increase was exactly in keeping with the Legislature's intention in passing the relevant appropriations act. We would note that in its 2009 session, the Legislature acted to clarify that the Department's method of applying the vendor rate increase was in fact what it had intended.

The Department recalculated the July 1, 2006 through June 30, 2008 rates of the facilities that were named plaintiffs in the Life Care case. The Department did not extend the Life Care ruling to facilities such as yours, which were not included in the suit, and the Department declines to do so now, as well. The Department's position has three bases:

First, the doctrine of "exhaustion of administrative remedies" applies. When the July 1, 2006 rates were sent out, the Department's method of applying the vendor rate increase was apparent. Other than the Life Care appellants, no facilities objected to the Department's method by filing appeals - which would seem to indicate that they agreed with the Department's understanding of how the vendor rate increase was to be calculated. Because these facilities, including yours, did not avail themselves of the administrative remedy available to them at the time, they forever lost the right to raise the issue.

Second, the Department does not believe that equity demands a different result. The Department did nothing to discourage any facility from filing an appeal on this issue, nor did it ever indicate that it would voluntarily extend the ruling to all facilities. The Department will not invoke RCW 74.46.531, the "errors and omissions" section, because it does not feel that an error was made. Believing as it does that the superior court ruling was contrary to the Legislature's intent, the Department has no reason to compound the mistake by extending it to all facilities. Further, the April 1, 2008 rates were mailed out in late March of 2008; so requests based on the Life Care decision - which were not made until after the court's ruling in September of 2008 - were obviously well past the statutory deadline for appeals. RCW 74.46.531 provides that, while the Department must review requests filed under it even when made untimely, any denial of such a late-filed request is final and may not be appealed further.

Third, there were - and are - no funds in the relevant appropriation period to pay for an extension of the ruling to all facilities; the settlement with the named plaintiffs in the Life Care case effectively exhausted the appropriated funds for SFYs 2007 and 2008, the relevant periods. Again, the Department would point to this as additional proof that its application of the vendor rate increase was correct. These funds were not in the appropriation for the simple reason that the Legislature never intended the vendor rate increase to be applied as the superior court ordered. Extending what the Department believes to be the court's erroneous decision to all facilities would require the Legislature to appropriate additional funds for the affected periods. The Department believed that in the budget circumstances of 2009 the Legislature would have absolutely no interest in doing so.

July 1, 2008 and later rates

We emphasize that the Department did extend the court's order in Life Care to rates for all facilities for the period July 1, 2008 through June 30, 2009. This was because the Department decided it had no choice but to apply the order to the Life Care appellants for the same period, even though by its own terms the superior court's order applied only to the period from July 1, 2006 to June 30, 2008. However, faced with having to extend the ruling to this later period for the Life Care appellants, we felt that, in this instance, equity did require extension of the ruling to all other facilities as well. That decision was described in the Notice that was mailed to all facilities on February 23, 2009. The resulting additional payments started to appear in Remittance Advices mailed to facilities beginning in April, 2009. Therefore, any appeal of July 1, 2008 to June 30, 2009 rates based on this issue was mooted.

As noted previously, in 2009 the Legislature clarified that vendor rate increases are not intended to be applied cumulatively, thus effectively terminating any applicability of the Life Care ruling. Sec. 206 of c. 564, Laws of 2009, the operating budget for the period July 1, 2009 through June 30, 2011, provides in part:

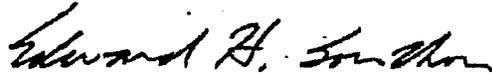
RHC0240

There will be no adjustments for economic trends and conditions in fiscal years 2010 and 2011. The economic trends and conditions factor or factors defined in the biennial appropriations act shall not be compounded with the economic trends and conditions factor or factors defined in any other biennial appropriations acts before applying it to the component rate allocations established in accordance with chapter 74.46 RCW. When no economic trends and conditions factor for either fiscal year is defined in a biennial appropriations act, no economic trends and conditions factor defined in any earlier biennial appropriations act shall be applied solely or compounded to the component rate allocations established in accordance with chapter 74.46 RCW.

The Legislature's clarification was applied to the July 1, 2009 rates of all facilities.

Finally, we note that where multiple facilities under common ownership have filed appeals, only one letter has been sent to the common mailing address.

Sincerely,



Edward H. Southon, Manager
Nursing Home Rates

RECEIVED

JUL 16 2010

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES
BOARD OF APPEALS

MAILED
JUL 15 2010
DSHS
BOARD OF APPEALS

In Re:	Docket No.
FRONTIER REHAB & EXTENDED CARE FACILITY	01-2010-N-0214
EVERGREEN AMERICANA HEALTH & REHAB CENTER	01-2010-N-0215
EVERGREEN TACOMA HEALTH & REHAB CENTER	01-2010-N-0216
EVERGREEN CENTRALIA HEALTH & REHAB CENTER	01-2010-N-0217
WHITMAN HEALTH & REHAB CENTER	01-2010-N-0219
SEATTLE MEDICAL & REHAB CENTER	01-2010-N-0220
HEALTH & REHAB OF NORTH SEATTLE	01-2010-N-0221
TALBOT CENTER FOR REHAB & HEALTHCARE	01-2010-N-0222
EVERGREEN SHELTON HEALTH & REHAB CENTER	01-2010-N-0226
EVERGREEN BREMERTON HEALTH & REHAB	01-2010-N-0229
EVERGREEN PARK ROYAL HEALTH & REHAB	01-2010-N-0231
EVERGREEN ENUMCLAW HEALTH & REHAB	01-2010-N-0233
CANTERBURY HOUSE	01-2010-N-0235
EVERGREEN NO CASCADES HEALTH & REHAB	01-2010-N-0237
SEQUIM HEALTH AND REHABILITATION	01-2010-N-0241
PORT ANGELES CARE CENTER	01-2010-N-0242
CRESTWOOD CONVALESCENT CENTER	01-2010-N-0243
NORTH AUBURN REHABILITATION AND HEALTH CENTER	01-2010-N-0244
ISLAND HEALTH AND REHABILITATION CENTER	01-2010-N-0245
EVERGREEN NURSING AND REHABILITATION CENTER	01-2010-N-0246
PUGET SOUND HEALTHCARE CENTER	01-2010-N-0247
PACIFIC SPECIALTY AND REHABILITATIVE CARE	01-2010-N-0249
RIVERSIDE NURSING AND REHABILITATION CENTER	01-2010-N-0251
KITTITAS VALLEY HEALTH AND REHABILITATION CENTER	01-2010-N-0252
THE GARDENS ON UNIVERSITY	01-2010-N-0253
FRANKLIN HILLS HEALTH AND REHABILITATION CENTER	01-2010-N-0254
ALDERCREST HEALTH AND REHABILITATION CENTER	01-2010-N-0256
FIR LANE HEALTH AND REHABILITATION CENTER	01-2010-N-0257

COPY

EXHIBIT E

0-000000113

BREMERTON HEALTH AND REHABILITATION CENTER	01-2010-N-0259
FOREST RIDGE HEALTH AND REHABILITATION CENTER	01-2010-N-0260
AVAMERE OLYMPIC REHAB OF SEQUIM	01-2010-N-0313
AVAMERE HERITAGE REHAB OF TACOMA	01-2010-N-0314
ST FRANCIS OF BELLINGHAM	01-2010-N-0315
AVAMERE SKILLED NURSING OF TACOMA	01-2010-N-0332
AVAMERE BEL AIR OF TACOMA	01-2010-N-0334
AVAMERE HIGHLANDS MEMORY CARE & REHAB	01-2010-N-0336
RICHMOND BEACH REHAB LLC	01-2010-N-0338
AVAMERE GEORGIAN HOUSE OF LAKEWOOD	01-2010-N-0340
DISCOVERY NURSING & REHAB CENTER	01-2010-N-0463
TOPPENISH NURSING & REHAB	01-2010-N-0466
SULLIVAN PARK CARE CENTER	01-2010-N-0467
PRESTIGE CARE OF EDMONDS	01-2010-N-0468
ROYAL VISTA CARE CENTER	01-2010-N-0469
SAN JUAN REHAB & CARE CENTER	01-2010-N-0470
SHUKSAN HEALTHCARE CENTER	01-2010-N-0471
FIDALGO CARE CENTER	01-2010-N-0472
HOQUIAM HEALTHCARE INC dba PACIFIC CARE CENTER	01-2010-N-0473
EMERALD HILLS HEALTHCARE CENTER	01-2010-N-0474
PARK MANOR HEALTHCARE LLC	01-2010-N-0475
WASHINGTON CARE CENTER	01-2010-N-0651
ORCHARD PARK	01-2010-N-0655
EMERALD CARE	01-2010-N-0699
MADELEINE VILLA HEALTH CARE CENTER	01-2010-N-0711
LEON SULLIVAN HEALTH CARE CENTER	01-2010-N-0716
SELAH CONVALESCENT	01-2010-N-0717
MIRA VISTA CARE CENTER	01-2010-N-0722
FOREST VIEW TRANSITIONAL HEALTH CARE CENTER	01-2010-N-0866
GOOD SAMARITAN HEALTH CARE CENTER	01-2010-N-0867
MT BAKER CARE CENTER	01-2010-N-0868
MT SI TRANSITIONAL HEALTH CARE CENTER	01-2010-N-0869
OLYMPIA MANOR	01-2010-N-0870
PARK ROSE CARE CENTER	01-2010-N-0871
REGENCY CARE CENTER AT ARLINGTON	01-2010-N-0872
REGENCY AUBURN	01-2010-N-0873
REGENCY CARE CENTER AT MONROE	01-2010-N-0874
REGENCY MANOR	01-2010-N-0875
REGENCY AT NORTHPOINTE	01-2010-N-0876

REGENCY AT THE PARK	01-2010-N-0877
REGENCY AT PUYALLUP	01-2010-N-0878
REGENCY AT RENTON	01-2010-N-0879
REGENCY AT TACOMA	01-2010-N-0880
SHARON CARE CENTER	01-2010-N-0881
VALLEY CARE CENTER	01-2010-N-0882
ARDEN REHABILITATION & HEALTHCARE	01-2010-N-0883
NORTHWEST CONTINUUM	01-2010-N-0884
BELLINGHAM HEALTH CARE & REHAB SERVICES	01-2010-N-0885
RAINIER VISTA CARE CENTER	01-2010-N-0886
LAKESWOOD	01-2010-N-0887
VENCOR OF VANCOUVER	01-2010-N-0888
HERITAGE HEALTHCARE	01-2010-N-0889
EDMONDS REHAB & HEALTHCARE	01-2010-N-0890
QUEEN ANNE HEALTHCARE	01-2010-N-0891
NORTH CENTRAL CARE CENTER	01-2010-N-0892
WILLOW SPRINGS CARE	01-2010-N-0893
FOSS HOME AND VILLAGE	02-2010-N-1038
CAREAGE OF WHIDBEY	02-2010-N-1226
LINDEN GROVE	02-2010-N-1291
CRESCENT HEALTH CARE	02-2010-N-1292
LIVING CARE RETIREMENT COMMUNITY	02-2010-N-1293
MESSENGER HOUSE	02-2010-N-1511
NISQUALLY VALLEY	02-2010-N-1513
UNIVERSITY PLACE	02-2010-N-1516
BETHANY AT PACIFIC	02-2010-N-1518
BETHANY AT SILVER LAKE	02-2010-N-1519
CAROLINE KLINE GALLAND HOME	02-2010-N-1522
KIN ON HEALTH CARE CENTER	02-2010-N-1524
MISSION HEALTHCARE AT BELLEVUE	02-2010-N-1525
WESLEY HOMES HEALTH CENTER	02-2010-N-1527
IDA CULVER HOUSE	02-2010-N-1627
SEATTLE KEIRO	02-2010-N-2259
JOSEPHINE SUNSET HOME	03-2010-N-0721
MARTHA AND MARY HEALTH SERVICES	03-2010-N-1060

Appellants

ORDER ON MOTION TO DISMISS
(NHR)

NATURE OF ACTION AND FINDINGS OF FACT RELEVANT TO MOTION TO DISMISS

1. The Department of Social and Health Services ("DSHS," or "Department") administers the cooperative federal-state Medicaid program in Washington pursuant to Title XIX of the Social Security Act (42 U.S.C. §1396-1396v). As part of this program, the Department compensates nursing care facilities for services to their Medicaid-eligible residents by means of the "nursing facility Medicaid payment system." See *RCW 74.46.010 et seq.* The Office of

Rates Management, within the Department's Aging and Disability Services Administration (ADSA), administers the nursing facility Medicaid payment system.

2. The Appellants are skilled nursing homes operating in the state of Washington and are contractors with the Department in the Medicaid program under Title XIX of the federal Social Security Act.

3. The amount of Medicaid reimbursement paid to licensed nursing homes by the Department is facility-specific and is determined using adjusted cost reports submitted by each of the facilities. Notice of each facility's prospective per patient per day rate (rate) is mailed in late June of each year with the rate effective July 1 of that year. The rate is made up of adjusted costs reported in seven separate areas of care and investment activities. These areas include *Direct Care* (RCW 74.46.506), *Therapy Care* (RCW 74.46.511), *Support Services* (RCW 74.46.515), *Operations* (RCW 74.46.521), *Property* (RCW 74.46.435), *Financing Allowance* (RCW 74.46.437), and *Variable Return* (RCW 74.46.433). Because the reported costs vary among the facilities, the rate paid by the Department to each of the nursing homes will also vary.

4. The Legislature directed that the *Direct Care* and *Operations* components of the rate effective July 1, 2006, be based on each facility's 2003 cost reports (commonly referred to as *rebasing*). The *Therapy Care* and *Support Services* components of the rate were not *rebased* during the 2006 legislative session and continued to be based on the facilities' 1999 cost reports. The *Property* and *Financing Allowance* components are rebased annually.

5. After determining the *Direct Care* and *Operations* components of the Appellants' July 1, 2006 rate based on the 2003 cost reports, the Department adjusted the component rates for economic trends and conditions by a factor of 1.3 percent, an amount set forth in the biennial appropriations act for fiscal year 2007 (July 1, 2006 through June 30, 2007). This is referred to as a *vendor rate increase (VRI)* and was made pursuant to the then applicable statute RCW 74.46.431(4)(d), (7)(b), and the biennial appropriations act for fiscal year 2007.

6. On or before June 30, 2006, the Department sent each of the contracting licensed nursing homes in the state a cover letter titled *July 1, 2006 MEDICAID RATES FOR NURSING HOMES*, a rate computation worksheet, and a document titled *DESCRIPTION OF JULY 2006 NURSING FACILITY MEDICAID PAYMENT RATE SETTING*.¹ The cover letter contained the following information relevant to this decision:²

The July 1, 2006 Medicaid payment rate is subject to administrative review in accordance with RCW 74.46.770 and WAC 388-96-901 and -904. To appeal this rate, you must submit a written request in writing within twenty-eight (28) calendar days after receiving this notice of the rate. The contractor or a partner, officer, or authorized employee of the contractor must sign the request for administrative review. The request must state the reasons for the appeal and include all necessary supporting documentation. The appeal should be mailed to the Office of Rates Management at the address above.

If proof of the date of receipt of the Department's rate notification letter exists, then that date shall be used to determine the timeliness of your request for an administrative review conference. If there is no proof of the date of receipt of the Department's rate notification letter, then you will be deemed to have received notice by July 5, 2006 in accordance with WAC 388-96-904(1).

7. The July 2006 rate computation worksheets provide a step-by-step explanation as to how the facilities' rate components are calculated. For the *Direct Care* component, *Item*

¹ The material facts set forth in this decision are derived from the Department's June 18, 2010 Motion to Dismiss, Declarations, and attachments as well as the Appellant's response, Declarations, and attachments. The Appellants' requests for hearing have also been added to the record. The Appellants, in their response, did not challenge the facts as set forth in the Department's motion. Nor did the Appellants challenge the use of only two facilities' *Rate Computation Worksheets* as representative of rate notifications sent to all licensed facilities within the state. The Department has done this for administrative convenience and based on the unchallenged fact that the identifying parts of all appellant facilities' *Rate Computation Worksheets* are identical within the year issued (the *Item* number and *Item* description). The documents produced in discovery and copied to the BOA support this assertion. The undersigned notes that the July 2006 rate computation worksheet submitted by the Department as an example is for the nursing facility Staffolt Good Samaritan Center located in Blaine and is not an appellant in this case (Good Samaritan Health Care located in Yakima is an appellant in this case listed under Docket Number 01-2010-N-0867). Although Staffolt is not one of the 21 Life Care facilities which had timely challenged the July 1, 2006 rate, that facility is listed as one of the additional 8 facilities that did timely challenge the July 1, 2007, rate and is named as an appellant in the *Stipulation and Agreed Order* entered on September 30, 2008. See Declaration of Katy A. King, Attachment C, p. 4. Because the July 1, 2006 rate computation worksheet was submitted only for the purpose of illustrating how the rate computation was presented to all the state's contracted nursing home, because the Department's representative has asserted that the rate computation worksheets for each of the appellant facilities are available and can be provided upon request, and because the Appellants have not objected to the use of the Staffolt July 1, 2006, rate computation worksheet, the undersigned will accept it for purposes of this decision.

² Declaration of Edward Southon, Attachment A.

41 sets forth the total direct care costs taken from the individual facility's 2003 cost reports. This amount, after any adjustments, is divided by the facility's patient days for direct care reported in 2003 (Item 32) resulting in the facility's adjusted *Direct Care* cost per patient day or PPD (Item 44). This direct care PPD is then divided by the *Facility Average Case Mix* (FACMI - Item 38) resulting in the facility's cost per case mix and any limitations based on averaging (ceilings or corridors) are applied (Item 48). This amount is then multiplied by each facility's *Medicaid Average Case Mix* (MACMI - Item 39), resulting in the facility's *Case Mix Direct Care Rate PPD* (Item 49).³ This amount is then multiplied by the *Vendor Rate Increase* (VRI), which was 1.3 percent (multiplier of 1.013 - Item 50) for fiscal year 2007 pursuant to the biennial appropriations act. This direct care amount is adjusted further for low-wage worker/fee add-on considerations as well as any component allocated *Budget Dial* requirements (Items 128 and 140 - only low-wage worker adjustments affected the *Direct Care* component amount in the examples provided for this motion to dismiss). This final *Direct Care* component amount of the rate is then set forth at Item 141 and on the last page of the rate computation worksheets in summarizing the component allotment and the facility's total prospective per patient per day Medicaid rate.⁴

8. The July 2006 rate computation worksheets provide similar step-by-step explanations for the computation of the other rate components including the *Operations* component of the rate. The worksheets at Section V, Item 75 reflect that the *Operations* component of the rate was also adjusted by the same amount (1.3 percent) for VRI. The two other components subject to VRI that were not rebased on the 2003 cost reports, (*Therapy Care* and *Support Services*), were adjusted for VRI based on cumulative increases from fiscal

³ The FACMI and MACMI are numerical values associated with the resident care acuity of a nursing facility based on average minutes of registered nurse, license practical nurse, and certified nursing assistance care provided to the residents. See RCW 74.46.496.

⁴ See Declaration of Edward Southon, Attachment B, pp. 1, 2, 5, 6, and 7.

years 2000 through 2007 as reflected in Section III, Item 61, and Section IV, Item 68, respectively, of the rate computation worksheets.⁵

9. The Description of July 2006 Nursing Facility Medicaid Payment Rate Setting document generally addresses application of the VRI by informing the facilities:

Beginning with July 1, 2006 rates, the Direct Care and Operations component rates are rebased to the 2003 cost report and subject to a vendor rate increase (VRI) of 1.3%. Therapy Care and Support Services component rates continue to be based on the 1999 cost report. Allowable costs in Therapy Care and Support Services were adjusted by a 2.1% VRI effective July 2001, a 1.5% VRI effective July 2002, a 3.0% VRI effective July 2003, a 2.4% VRI effective July 2004, and a 1.3% VRI effective July 2005. Effective July 1, 2006, a VRI of 1.3% is applied to Therapy Care and Support Services.

The description letter specifically identifies application of the 1.3% VRI effective July 1, 2006, in discussing individually the *Direct Care* and *Operations* components of the rate as well as the application of VRIs, effective in July of each year from 2001 through 2006, for the *Therapy Care* and *Support Services* components of the rate.⁶

10. Within 28 days of issuance of the July 1, 2006 Medicaid rates, twenty-one licensed nursing facilities operating in the State of Washington under the ownership of Life Care Centers of America Northwest Division, none of which are appellants in this case, filed requests for administrative review conferences (ARC) to challenge the Department's methodology of applying the multiplier of 1.013 to the *Direct Care* and *Operations* portions of the rate, rather than applying a multiplier based on the cumulative VRIs for fiscal years 2004 through 2006. It has not been argued and there is no evidence in the record that the 102 Appellant's named in the current case requested ARCs within 28 days of issuance of the rate notices to challenge the Department's use of 1.013 as the multiplier in applying the VRI to the *Direct Care* and *Operations* components of the July 1, 2006 Medicaid rate.

~~11. In 2007, the Legislature directed that the *Direct Care*, *Therapy Care*, *Support Services*, and *Operations* components of the rate be rebased on the 2005 cost reports. After~~

⁵ *Id.* at p. 3.

⁶ See Declaration of Edward Southon, Attachment C, pp. 2, 3; and 4.

determining the *Direct Care, Therapy Care, Support Services, and Operations* components of the Appellants' July 1, 2007 rate based on the 2005 cost reports, the Department adjusted the component rates for economic trends and conditions by a factor of 3.2 percent (multiplier 1.032), the amount set forth in the biennial appropriations act for the 2008 fiscal year (July 1, 2007 through June 30, 2008). Again, this adjustment was made pursuant to the then applicable statute RCW 74.46.431 and the biennial appropriations act.

12. As in the previous year, the Department sent each of the contracting licensed nursing homes in the state a cover letter titled *July 2007 MEDICAID RATES FOR NURSING HOMES*, a rate computation worksheet, and a document titled *DESCRIPTION OF JULY 2007 NURSING FACILITY MEDICAID PAYMENT RATE SETTING*. The cover letter contained the following information relevant to this decision:⁷

The July 1, 2007 Medicaid payment rate is subject to administrative review in accordance with RCW 74.46.770 and WAC 388-96-901 and -904. To appeal this rate, you must submit a request in writing within twenty-eight (28) calendar days after receiving this notice of the rate. The contractor, partner, officer, or authorized employee of the contractor must sign the request for administrative review. In the request, you must state the reasons for the appeal and include all necessary supporting documentation. Mail your appeal to the Office of Rates Management at the address above.

If proof of the date of receipt of the department's rate notification letter exists, then that date shall be used to determine the timeliness of your request for an administrative review conference. If there is no proof of the date of receipt of the department's rate notification letter, then you will be deemed to have received notice by July 5, 2007 in accordance with WAC 388-96-904(1).

13. The July 2007 rate computation worksheets, again, provided a step-by-step explanation of the calculations used in determining each of the seven components of the facilities' Medicaid rate. The July 2007 rate computation worksheets, at *Section II, Part C, Item 50*, reflect that the *Direct Care* components of the rates were adjusted by 3.2 percent (multiplier of 1.032) based on the *VRI* for fiscal year 2008 (July 1, 2007 through June 30, 2008). The worksheets at *Section III, Item 56* reflect that the *Therapy Care* components of the rates were

⁷ Declaration of Edward Southon, Attachment D.

increased by 3.2 percent for *VRI*. *Section IV, Item 63* reflects that the *Support Services* component of each facility's rate was increased by 3.2 percent. And finally, *Section V, Item 71* of the rate computation worksheets reflect that the *Operations* components of the rates were also adjusted by the same amount (3.2 percent) for *VRI*.⁸

14. The *Description of July 2007 Nursing Facility Medicaid Payment Rate Setting* document generally addresses application of the *VRI* by informing the facilities:

Beginning with July 1, 2007 rates, the Direct Care, Therapy Care, Support Services, and Operations component rates are rebased to the 2005 cost report and subject to a vendor rate increase (*VRI*) of 3.2%.

The description letter specifically identifies application of the 3.2% *VRI*, effective July 2007, in discussing individually the *Direct Care, Therapy Care, Support Services, and Operations* components of the rate.⁹

15. Within 28 days of issuance of the July 1, 2007 Medicaid rates, the twenty-one Life Care Center nursing facilities (again none of which are appellants in this case) filed a continuing objection and request for an ARC to challenge the Department's methodology of applying the multiplier of 1.032 to the *Direct Care, Therapy Care, Support Services, and Operations* portions of the rate rather than applying a multiplier based on the cumulative *VRI*s for fiscal years 2006 through 2007. An additional 8 facilities also timely challenged the July 1, 2007 rate based on the same reasons. These 29 facilities and the Department entered into *Stipulation and Agreed Orders* on September 30, 2008, whereby the parties agreed to be bound by any final judgment entered in the previous year's challenge involving the *VRI* issue.¹⁰

16. The first 14 appellant facilities listed in the caption above, operating under the Evergreen Healthcare Management, LLC. (Evergreen), submitted a request for an ARC in 2007

⁸ See Declaration of Edward Southon, Attachment E, pp. 2 and 3.

⁹ See Declaration of Edward Southon, Attachment F, pp. 2 and 3.

¹⁰ See Declaration of Katy A. King, Attachment C.

to challenge, *inter alia*, the Department's use of 3.2 % *VRI* in determining the Evergreen facilities' July 1, 2007 rate. Evergreen's challenge regarding the *VRI* issue states:

The department has indexed 2005 costs for the purpose of setting rates applicable to the state fiscal year ended June 30, 2008 by the amount defined in the biennial appropriations act. The amount defined in the appropriations act is 3.2%. The purpose of indexing is to adjust historical costs to more closely reflect current costs based on changes in the cost of doing business. The cost reports ended December 31, 2005 are indexed through December 31, 2006. The start point of the index, therefore, is June 30, 2005 and covers a period of 30 months (2½ years). Using a factor of 3.2% to cover these 30 months amounts to an annual index rate of less than 1.3% per year . . . Use of the more industry specific SNF-Market-Basket index would provide similar results. Once again, the state has made representation to the federal government about adequacy of rates that are not supported by fact.¹¹

17. On October 26, 2007, the Department issued an ARC determination letter to Evergreen concluding, *inter alia*, that nursing homes could not challenge through the ARC process the Department's application of the economic trends and adjustment factor identified in the biennial appropriations act. Identifying Evergreen's challenge as a dispute with the amount of the *VRI* set forth in the biennial appropriations act, rather than the Department's methodology in applying only Fiscal Year 2008 *VRI* to the rate based on the 2005 cost reports, the Department concluded in the ARC determination letter:

Under WAC 388-96-901(3), the department has excluded from administrative review challenges based on the legal validity of a statute or regulation and/or failure to comply with federal law. Since Evergreen Healthcare wishes to raise a challenge to the department's application of the economic trends and adjustment factor identified in the biennial appropriations act (Chapter 522, Laws of 2007) to July 1, 2007 component rates for Evergreen Healthcare facilities, it must do so *de novo* in a court of proper jurisdiction as may be provided by law and not through administrative review as provided in WAC 388-96-904.¹²

18. It has not been argued nor is there any evidence that the Evergreen facilities requested an administrative hearing to contest the Department's denial set forth in the October 26, 2007 ARC determination letter as to the *VRI* issue. As with the July 1, 2006 rate, it is not argued and there is no evidence that the remaining 88 appellants in this case requested

¹¹ Declaration of Dale Patterson, Appendix A, p. 9.

¹² *Id.*

an ARC within 28 days of issuance of the July 1, 2007 rate to challenge the Department's methodology in applying the *VR* in determining each facility's Medicaid rate.

19. The Appellants submitted individual requests for hearing to challenge the Department's methodology in applying the *VR* for purposes of calculating the facilities' July 1, 2006, and July 1, 2007 Medicaid rates. The Department's Board of Appeals (BOA) received these requests from December 30, 2009, through March 10, 2010. Where the persons signing the requests for hearing have stated their professional positions, they have self-identified themselves as CEOs, CEOs of Financial Service, Senior Directors of Reimbursement Services, Chief Financial Officers (CFO), Director of Analytical and Regulatory Reporting, Administrators, Owners, Senior Vice President of Reimbursement, Executive Directors, and Campus Administrators.

20. The Appellants submitted a *Motion For Partial Summary Judgment (Collateral Estoppel)* and the Department submitted a response to the Appellants' motion. The Department submitted a *Motion to Dismiss and Memorandum in Support Thereof* and the Appellants submitted a response to the Department's motion.

II. CONCLUSIONS OF LAW

1. The Department's motion to dismiss is based on the issue of jurisdictional authority to proceed which may be raised at any time. *Wash. Beauty Coll., Inc. v. Huse*, 195 Wash. 160, 80 P.2d 403 (1938); see also *J.A. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 654, 657, 86 P.3d 202 (2004). There is jurisdiction to address the Department's motion to dismiss under WAC 388-96-904, WAC 388-02-0215(2)(c) and (m), WAC 388-02-0085(1), and RCW 34.05.413(2).

2. When deciding cases for the Washington State Department of Social and Health Services ("Department"), Administrative Law Judges, and Review Judges acting as presiding or reviewing officers, are to hear and decide the issue anew (*de novo*).¹³

3. It is helpful if all parties in the administrative hearing process understand the unique characteristics and specific limitations of this hearing process. An administrative hearing is held under the auspices of the *executive branch of government* and a presiding administrative or review officer does not enjoy the broad equitable authority held by a superior court judge within the *judicial branch of government*. It is well settled in law and practice that administrative agencies, such as the Office of Administrative Hearings and the Board of Appeals, are creatures of statute, and, as such, are limited in their powers to those expressly granted in enabling statutes, or necessarily implied therein. *Taylor v. Morris*, 88 Wn.2d 586, 588 P.2d 795 (1977). It is also well settled that an ALJ's or a review judge's jurisdictional authority to render a decision in an administrative hearing is limited to that which is specifically provided for in the authorizing statute or Department rule found in the Washington Administrative Code (WAC). An ALJ or review judge, acting as a presiding or reviewing officer, is required to apply the Department's rules adopted in the WAC as the first source of law to resolve an issue. If there is no Department rule governing the issue, the presiding officer or review judge is to resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington constitutions, statutes and regulations, and court decisions.¹⁴ The presiding officer may not declare any rule invalid and contractor challenges to the legal validity of a rule relating to the nursing facility Medicaid payment system must be brought *de novo* in a court of proper jurisdiction.¹⁵ The Department has incorporated RCW 74.46 into its nursing facility Medicaid payment system rules.¹⁶

¹³ WAC 388-02-215(1).

¹⁴ WAC 388-02-0220.

¹⁵ WAC 388-02-0225(1) and 388-96-901(3), respectively.

¹⁶ WAC 388-96-020.

4. Prior to rendering a decision in a case, a decision-maker must always first determine if he/she has jurisdictional authority to adjudicate the contested issue(s). Published appellate case law directs that the issue of subject matter jurisdiction cannot be waived and can be raised at any time. "Even in the absence of a contest, where there is a question as to jurisdiction, [the] court has a duty to, itself, raise the issue." *Riley v. Sturdevant*, 12 Wn. App. 808, 810, 532 P. 2d 640 (1975). "Jurisdiction relates to the power of the court, not to the rights of the parties as between each other. Jurisdiction cannot, therefore, be conferred by agreement or stipulation of the parties. Any judgment entered without jurisdiction is void. A party may waive personal jurisdiction, but not subject matter jurisdiction." *Sullivan v. Purvis*, 90 Wn. App. 456, 1998 Wash. App. LEXIS 196 (1998) (internal cites omitted). See also *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 1998 Wash. LEXIS 473 (1998). Nor can subject matter jurisdiction be conferred by estoppel. *Rust v. W. Wash. State College*, 11 Wn. App. 410, 1974 Wash. App. LEXIS 1247 (1974). Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal. *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 124, 989 P.2d 102 (1999). Furthermore, the undersigned has regulatory authority, as well as a duty, to determine subject matter jurisdiction before attempting to address the merits of a case.¹⁷ Even if the Department had not submitted its motion to dismiss, the undersigned would have had to determine if jurisdiction existed prior to issuing a merits decision. This would have been necessary even if a full hearing on the merits had been conducted.

5. Time frames for submitting a hearing request are mandatory and jurisdictional. *Rust*, 11 Wn. App. at 415, citing to *Lewis v. Department of Labor & Indus.*, 46 Wn.2d 391, 281 P.2d 837 (1955); *Smith v. Department of Labor & Indus.*, 4 Wn.2d 306, 96 P.2d 1031 (1939); *Nafus v. Department of Labor & Indus.*, 142 Wash. 48, 251 P. 877 (1927). A presiding officer in

¹⁷ WAC 388-02-0085(5) and 388-02-0215(2)(c) and (m).

the administrative hearing process only has authority to conduct a full hearing and render a decision on the merits of a case when a timely request for hearing has been made.¹⁸

6. The undersigned's jurisdictional authority to hear a case on the merits relating to the Nursing Facility Medicaid Payment System under RCW 74.46 is established under WAC 388-96-904. That regulation provides:

(1) Contractors seeking to appeal or take exception to an action or determination of the department, under authority of this chapter or chapter 74.46 RCW, relating to the contractor's payment rate, audit or settlement, or otherwise affecting the level of payment to the contractor, or seeking to appeal or take exception to any other adverse action taken under authority of this chapter or chapter 74.46 RCW eligible for administrative review under this section, **shall request an administrative review conference in writing within twenty-eight calendar days after receiving notice of the department's action or determination.**

The relevant regulation further provides:

(5) A contractor seeking further review of a determination issued pursuant to subsection (4) of this section **shall apply for an adjudicative proceeding, in writing, signed by one of the individuals authorized by subsection (1) of this section, within twenty-eight calendar days after receiving the department's administrative review conference determination letter.** A review judge or other presiding officer employed by the department's board of appeals shall conduct the adjudicative proceeding.

WAC 388-96-904 (Emphasis added).

7. Based on these regulatory provisions, a review judge only has jurisdictional authority to conduct an administrative hearing on the merits of a nursing rate claim when an appellant nursing facility has requested a Department Internal review known as an administrative review conference (ARC) within 28 days of receiving notice of the challenged action and then requests an administrative hearing within 28 days after receiving an adverse ARC determination letter.

8. The Department actions or determinations challenged by the Appellants in this case are the calculations of their respective July 1, 2006, and July 1, 2007-Medicaid rates.

The Appellants do not argue that they did not receive notification of the rates for these two

¹⁸ RCW 34.05.413(2).

years in late June of each year. Nor do any of the Appellants assert that they submitted requests for an ARC to challenge the July 1, 2006 rate within 28 days of receiving the rate notice. The fourteen Evergreen Healthcare facilities argue that they did challenge the application 3.2% VRI in calculating the July 1, 2007 rate. It cannot be determined based on the evidence in the hearing record if the Evergreen facilities were simply challenging the amount of the VRI as established in the biennial appropriations act for fiscal year 2008 (a challenge to a statute that cannot be brought in this administrative forum) or if they were challenging the methodology used by the Department in not applying the VRI cumulatively for the intervening years since the cost reports used in rebasing the rate (2005). The latter challenge arguably could be and has been heard in this administrative forum as it deals with interpretation and application of a statute in determining a rate rather than a direct challenge to the biennial appropriations act, itself. What the Evergreen facilities intended in their challenge to the July 1, 2007 rate does not need to be determined as those facilities did not follow-up with a request for an administrative hearing within 28 days of issuance of the October 26, 2007 ARC determination letter denying their claim. The regulations, at WAC 388-96-904(7), give a nursing facility the right to challenge a denial for relief issued after an ARC by requesting an administrative hearing. If the Evergreen facilities challenge was to the methodology of application of the VRI rather than the amount of the VRI established for fiscal year 2008 by the biennial appropriations act, the facilities had an obligation to request an administrative hearing within 28 days of the October 26, 2007 ARC determination letter, notwithstanding the reasons given for denial by the Department in the determination letter.

9. The Appellants argue that there exists a relief process for *errors or omissions* under statute and they should have a right to an administrative hearing to challenge the Department's refusal or denial to grant relief under that statute regardless of the timing of the challenge. The relevant statute provides:

(1) The department may adjust component rates for errors or omissions made in establishing component rates and determine amounts either overpaid to the contractor or underpaid by the department.

(2) A contractor may request the department to adjust its component rates because of:

- (a) An error or omission the contractor made in completing a cost report; or
- (b) An alleged error or omission made by the department in determining one or more of the contractor's component rates.

(3) A request for a rate adjustment made on incorrect cost reporting must be accompanied by the amended cost report pages prepared in accordance with the department's written instructions and by a written explanation of the error or omission and the necessity for the amended cost report pages and the rate adjustment.

(4) The department shall review a contractor's request for a rate adjustment because of an alleged error or omission, even if the time period has expired in which the contractor must appeal the rate when initially issued, pursuant to rules adopted by the department under RCW 74.46.780. If the request is received after this time period, the department has the authority to correct the rate if it agrees an error or omission was committed. **However, if the request is denied, the contractor shall not be entitled to any appeals or exception review procedure that the department may adopt under RCW 74.46.780.**

RCW 74.46.531 (Emphasis added).

10. The review procedure adopted by the Department under RCW 74.46.780 is the ARC and administrative hearing process established under WAC 388-96-904.¹⁹ The statute relied upon by the Appellants for relief specifically denies a nursing facility the right to an administrative hearing when a late request has been submitted and the Department has decided not to grant the relief sought by the facility under the *errors and omissions* provision of RCW 74.46.531. The undersigned has no authority to hear late challenges brought under RCW 74.46.531 for *errors and omissions*.

11. The Appellants, in their response, argue, or at least infer, that the Department's rate notifications in late June of 2006 and 2007 were deficient in apprising the facilities of how the Department was applying the VRI in determining their respective rates. The Appellants received three documents, one explaining how to make an appeal of a rate and

¹⁹ See RCW 74.46.770(1).

two of which explained application of the *VRI* to prior years' cost reports in rebasing the respective rates for July 2006 and July 2007. As set forth in the *Findings of Fact 7 and 13*, above and supported by the unchallenged evidence, the rate computation worksheets provided a step-by-step explanation how the rate was calculated including the application of the singular *VRI* percentages for fiscal years 2007 and 2008 where the rate component was being rebased on either the 2003 or 2005 cost reports. If the appellant facilities' rate analysts had concerns about the actual amounts of the 1.3 % and 3.2% *VRI*s used in setting the 2006 and 2007 rates, they had a responsibility to question these amounts and if not satisfied with the Department's answer, to timely seek an ARC to preserve their right to access to the administrative hearing process. The rate computation worksheet documents show the difference between the cumulative application of the *VRI* for those rate components that were not being rebased in July 2006 (*Therapy Care and Support Services*) and the non-cumulative application of the *VRI* for those rate components that were being rebased (*Direct Care and Operations* in July 2006 and *Direct Care, Therapy Care, Support Services, and Operations* for July 2007). The rate description documents also point out the application of the 1.3% and 3.2% *VRI*s used in calculating each facility's rate. And finally, the common rate notices sent to all the contracting nursing facilities in the state were adequate enough to apprise at least 21 nursing homes of the methodology used by the Department as evidenced by the timely Life Care appeals. For these reasons and recognizing the experienced status of the individuals signing the late requests for hearing, the Appellants' argument that the rate notices sent to them in late June of 2006 and 2007 were inadequate in apprising them of how the rates were determined is not convincing.

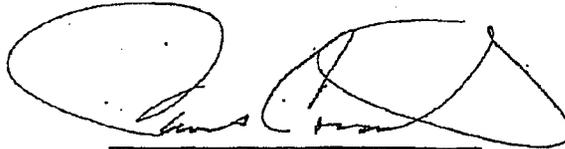
~~12. The undersigned's authority to conduct a hearing can only exist when there has been a timely request for an ARC pursuant to WAC 388-96-904(1) and a timely request for an administrative hearing if the nursing facility does not prevail at the ARC pursuant to WAC 388-96-904(5). Because the Appellants did not make a timely request for an ARC and a timely~~

request for an administrative hearing to challenge the Department's computation of their respective July 1, 2006 and July 1, 2007 Medicaid rates, the undersigned does not have jurisdictional authority to hear the challenges on the merits or to rule on the Appellants' motion for partial summary judgment and only has authority to dismiss the Appellants' appeal.

III. DECISION

Based on the conclusions entered above, the Department's motion to dismiss is granted. The prospective filing date deadlines, prehearing conference, and hearing set forth in the Scheduling Order issued on March 9, 2010, are hereby canceled.

DATED this ^{15th} day of July, 2010.

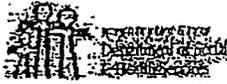


JAMES CONANT
Review Judge/Presiding Officer

Attached: Reconsideration/Judicial Review Information

Copies:

Thomas Grimm, Appellants' Representative
Katy King, AAG, Department's Representative, MS: 40124
Edward Southon, Program Administrator, MS: 45600



STATE OF WASHINGTON
 DEPARTMENT OF SOCIAL AND HEALTH SERVICES
 BOARD OF APPEALS
**PETITION FOR RECONSIDERATION OF
 REVIEW DECISION**

See Information on back.

Print or type detailed answers.

NAME(S) (PLEASE PRINT)		DOCKET NUMBER	CLIENT ID OR "D" NUMBER
MAILING ADDRESS		CITY	STATE ZIP CODE
TELEPHONE AREA CODE AND NUMBER			

Please explain why you want a reconsideration of the Review Decision. Try to be specific. For example, explain:

- Why you think that the decision is wrong (why you disagree with it).
- How the decision should be changed.
- The importance of certain facts which the Review Judge should consider.

I want the Review Judge to reconsider the Review Decision because...

PRINT YOUR NAME	SIGNATURE	DATE
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<u>MAILING ADDRESS</u> Board of Appeals PO Box 45803 Olympia WA 98504-5803	<u>PERSONAL SERVICE LOCATION</u> DSHS Board of Appeals Office Building 2 (OB-2), 1 st Floor Information Desk 1115 Washington Street SE Olympia WA
<u>FAX</u> (360) 664-6187	<u>TELEPHONE (for questions)</u> (360) 664-6100 or toll free 1-877-351-0002

RECONSIDERATION REQUEST

Page _____ of _____

OSHS 09-322 (REV. 04/2002) TRANSLATED

**If You Disagree with the Judge's Review Decision or Order and Want it Changed,
You Have the Right to:**

- (1) Ask the Review Judge to reconsider (rethink) the decision or order (10 day deadline);
- (2) File a Petition for Judicial Review (start a Superior Court case) and ask the Superior Court Judge to review the decision (30 day deadline).

DEADLINE for Reconsideration Request - 10 DAYS: The Board of Appeals must RECEIVE your request within ten (10) calendar days from the date stamped on the enclosed Review Decision or Order. The deadline is 5:00 p.m. If you do not meet this deadline, you will lose your right to request a reconsideration.

If you need more time: A Review Judge can extend (postpone, delay) the deadline, but you must ask within the same ten (10) day-time limit.

HOW to Request: Use the enclosed form or make your own. Add more paper if necessary. You must send or deliver your request for reconsideration or for more time to the Board of Appeals on or before the 10-day deadline (see addresses on enclosed form).

COPIES to Other Parties: You must send or deliver copies of your request and attachments to every other party in this matter. For example, a client must send a copy to the DSHS office that opposed him or her in the hearing.

Translations and Visual Challenges: If you do not read and write English, you may submit and receive papers in your own language. If you are visually challenged, you have the right to submit and receive papers in an alternate format such as Braille or large print. Let the Board of Appeals know your needs. Call 1-(360)-664-6100 or TTY 1-(360) 664-6178.

DEADLINE for Superior Court Cases - 30 DAYS: The Superior Court, the Board of Appeals, and the state Attorney General's Office must all RECEIVE copies of your Petition for Judicial Review within thirty (30) days from the date stamped on the enclosed Review Decision or Order. There are rules for filing and service that you must follow.

EXCEPTION: IF (and only if) you file a timely reconsideration request (see above), you will have thirty days from the date of the Reconsideration Decision.

Refer to the Revised Code of Washington (RCW), including chapter 34.05, the Washington Administrative Code (WAC), and to the Washington Rules of Court (civil) for guidance. These materials are available in all law libraries and in most community libraries.

If You Need Help: Ask friends or relatives for a reference to an attorney, or contact your county's bar association or referral services (usually listed at the end of the "attorney" section in the telephone book advertising section). Columbia Legal Services, Northwest Justice Project, the Northwest Women's Law Center, some law schools, and other non-profit legal organizations may be able to provide assistance. You are not guaranteed an attorney free of charge.

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EXPEDITE (if filing within 5 court days of hearing)
 No hearing is set
 Hearing is set:
Date: September 5, 2008
Time: 9:00 a.m.
Judge/Calendar: Hon. Chris Wickham

FILED
SEP 05 2008
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

LIFE CARE CENTERS OF AMERICA,
INC., et al.,

Petitioners,

vs.

DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, STATE OF
WASHINGTON,

Respondent.

NO. 07-2-02172-5
ORDER REVERSING ADMINISTRATIVE
DECISION

THIS MATTER came before the Court on judicial review of the Decision and Final Order issued by the Department of Social and Health Services on October 2, 2007, a copy of which is attached hereto as Appendix A ("Agency Decision"). This Court has reviewed: (i) the Agency Decision; (ii) the administrative record; (iii) the briefs submitted by the parties; and (iv) the oral arguments of counsel, and is otherwise fully advised concerning this case. Based upon the foregoing, the Court finds as follows:

1. The Court has jurisdiction to address this judicial review appeal of an administrative decision pursuant to RCW Chapter 34.05.510, et seq.
2. The Court previously entered on August 1, 2008, a Stipulation and Agreed Order of Dismissal re: Records Storage/Management Costs and Incidental Storage Costs Issue.

ORDER REVERSING ADMINISTRATIVE
DECISION - Page 1
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ATTORNEYS AT LAW
777 - 108th Avenue N.E.
Suite 1800
P.O. Box C-90016
Bellevue, Washington 98009-9016
(425) 455-1234

1 3. The sole remaining issue in this judicial review appeal is the "adjustment for
2 economic trends and conditions issue."

3 NOW, THEREFORE,

4 IT IS HERBY ORDERED as follows:

5 1. The Agency Decision is hereby REVERSED as to the adjustment for
6 economic trends and conditions issue.

7 2. This matter is hereby REMANDED to the Department of Social and Health
8 Services with the following instructions:

9 a. The Department shall adjust the Petitioners' July 1, 2006, direct care
10 and operations rate components for economic trends and conditions by the factors defined in
11 the biennial appropriations acts for all applicable periods, including fiscal years 2004, 2005,
12 and 2006. This requires an 8.2% vendor rate increase to the Petitioners' July 1, 2006,
13 direct care and operations rate components, as opposed to the 1.3% previously applied by
14 the Department.

15 b. Within ninety (90) days from the date of entry of this Order, the
16 Department shall: (i) recalculate the Petitioners' July 1, 2006, rates according to the terms
17 of this Order and other applicable provisions of chapter 74.46 RCW; (ii) issue revised
18 preliminary settlements; and (iii) pay the Petitioners' the difference between the rates so
19 recalculated and the rates previously paid.

20 3. Petitioners are awarded the following costs and statutory attorney's fees on
21 judicial review: filing fee (\$200.00); service of process (\$163.20); and statutory attorney's
22 fees (\$200.00), for a total of \$563.20.

ENTERED this 5th day of September, 2008.

CHRIS WICKHAM

Hon. Chris Wickham, Superior Court Judge

ORDER REVERSING ADMINISTRATIVE
DECISION - Page 2
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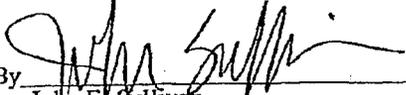
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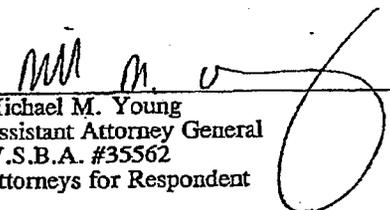
Presented by:

INSLEE, BEST, DOEZIE & RYDER, P.S.

By 
John F. Sullivan
W.S.B.A. #15426
Attorneys for Petitioners

Approved as to form and for entry; notice of presentation waived:

ROBERT M. MCKENNA
Attorney General

By 
Michael M. Young
Assistant Attorney General
W.S.B.A. #35562
Attorneys for Respondent

ORDER REVERSING ADMINISTRATIVE
DECISION - Page 3
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