

NO. 42567-0-II

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

MULTICARE HEALTH SYSTEM,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The issue in this case is whether MultiCare Health System (the Hospital) should be allowed to keep \$214,397.76, in excess money that has been determined to be the financial obligations of the patients it serves. From the time services were initially rendered to the Hospital's patients, it had every right to collect the \$214,397.76 it is owed from them. Instead of, or in addition to, collecting the money from its patients, the Hospital is now asking this Court to require the Department of Social and Health Services (the Department¹) to use Medicaid funds to pay the spenddown obligations of the Hospital's patients, which the Department is legally prohibited from doing.

Spenddown, the amount of medical expenses a client must incur to become eligible for medical assistance, is a client obligation that cannot be paid for with Medicaid funds. As such, the Department's billing instructions direct hospitals to include unmet spenddown obligations as amounts "due from patient" on claims submitted to the Department. Medicaid providers are instructed that not adding the spenddown amount on submitted claims may result in an overpayment to the Hospital, which

¹ In 2011, the Legislature enacted a bill under which the Health Care Authority replaced the Department as the "single state agency" for purposes of administering the Medicaid program. *See* Second Engrossed Second Substitute House Bill ("HB") 1738 (Laws of 2011, 1st Spec. Sess., ch. 15). To avoid confusion and for ease of reference, the HCA will be referred to as the Department in this brief.

must be reimbursed. Through the audit at issue here, the Department found that in almost every single instance, the Hospital failed to list spenddown in the “due from patient” field on its claim forms, and was erroneously paid by the Department for spenddown obligations.

II. RESTATEMENT OF THE ISSUES

1. Can the Department deduct a client’s spenddown obligation from its negotiated payment rate to the Hospital under federal and state regulations as they existed during the audit time period?
2. Given that Medicaid providers are required to follow billing instructions, and given that billing instructions required providers to notate spenddown on bills submitted to the Department, was the Department correct in assessing an overpayment on claims in which the Hospital failed to notate spenddown?

III. RESTATEMENT OF THE CASE

The Department conducted a claim by claim audit of the Medically Needy (“MN”) spenddown program for Medicaid services rendered and billed by the Hospital from February 1, 2000 to January 1, 2006. Administrative Record (“AR”) at 467. The purpose of the audit was to determine the Hospital’s compliance with federal and state regulations relative to claims paid by the Department for services provided under the Medicaid program. *Id.* The Department alleged in its Revised Final Audit

Report that the Hospital had failed to deduct the patients' spenddown liability from the bills that the Hospital had submitted to the Department. *Id.* at 468. Spenddown is the amount of medical expenses that a MN client must incur to become eligible for medical assistance for a three or six month period. *Id.* at pages ("pp") 2-3.

As a result of the Final Audit Report, the Department assessed an overpayment of \$233,612.57, plus interest. *Id.* at 566. The Hospital appealed and a four day hearing was conducted by the Office of Administrative Hearings (OAH). *Id.* at 1. At the conclusion of the hearing, the Department revised the Final Audit Report and the amount it had overpaid the Hospital down to \$214,397.76, plus interest. AR at 468. The OAH affirmed this overpayment amount, but disallowed the accrual of interest. Both parties appealed to the Department's Board of Appeals, which affirmed the overpayment arrived at by the OAH, but overturned the OAH on the issue of interest. The superior court affirmed the overpayment amount determined by the Board of Appeals, but overturned the Board of Appeals on the accrual of interest.

IV. ARGUMENT

A. The Department's Authority To Audit

The Department administers the Medicaid program in the state of Washington. Ch. 74.09 RCW; *Failor's Pharmacy v. Dep't of Soc. &*

Health Servs., 125 Wn.2d 488, 490, 886 P.2d 147 (1994). The Medicaid Purchasing Administration is the division within the Department that actually runs Medicaid and similar programs. See RCW 74.09.500; *Pinehurst Park Royal Convalescent Ctr., Inc. v. Thompson*, 97 Wn.2d 637, 640-41 n.3, 647 P.2d 1016 (1982). In order for the state to receive federal matching funds, it must provide a post payment review process to ensure the proper payment of Medicaid claims. See 42 U.S.C. § 1396a(a)(37)(B). Pursuant to this federal authority and to the authority granted under RCW 74.09, the Department conducts audits and investigations to ensure that its Medicaid payments to providers are proper.

Any legal entity that obtains Medicaid payments from the Department to which that entity is not otherwise entitled is liable for the excess payments received plus interest as calculated by RCW 43.20B.695. RCW 74.09.220. Enrolled providers must provide services “according to federal and state laws and rules, and billing instructions issued by the department.” WAC 388-502-0020(1)(i) (eff. 4/20/01). The Core Provider Agreement each enrolled provider signs also requires the provider to bill in accordance with the rules and billing instructions in effect at the time the service is rendered. AR at 1832. In this case, the Hospital is an enrolled Medicaid provider. AR at 2. The

Department assigned an overpayment to the Hospital because it failed to notate spenddown on claims it billed to the Department as required by Department-issued billing instructions. AR at 1777, 1817². The Hospital's failure to follow the billing instructions violated Department regulations, which in turn created the overpayment at issue in this case. WAC 388-502-0020(1)(i) (eff. 4/20/01); RCW 43.20B.010(5).

B. Standard Of Review

Under the Administrative Procedure Act, the Hospital must demonstrate the invalidity of the Final Order. RCW 34.05.570(1)(a); *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). When reviewing an administrative agency decision, the court reviews issues of law de novo. *Brown v. Dep't of Health Dental Disciplinary Bd.*, 94 Wn. App. 7, 12, 972 P.2d 101 (1999) (citing *Kellum v. Dep't of Retirement Sys.*, 61 Wn. App. 288, 291, 810 P.2d 5023 (1991)). The court can substitute its judgment for that of the administrative body. *Id.* However, the court accords substantial weight to the agency's interpretation of the law it administers, especially when the issue falls

² "When billing [the Medical Assistance Administration], hospitals must place the Spenddown and/or [Emergency Medical Expense Requirement] amount listed on the client's *Approval for MI/Spenddown Met letter*, . . .when appropriate in form locator 57 on the UB-92 claim form. Not adding the Spenddown and/or [Emergency Medical Expense Requirement] amount on the UB-92 claim form may result in an overpayment to the hospital. If, during an audit review, an overpayment is found, [the Medical Assistance Administration] will recoup the overpayment." AR at 1777, 1817.

within the agency's expertise. *Id.* (citing *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991)).

The reviewing court sustains an agency finding of fact if it is supported by substantial evidence “when viewed in light of the whole record before the court” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006 (1996). Substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrg’s Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (citation omitted). This Court applies the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court. *Burnham v. Dep’t of Soc. & Health Servs.*, 115 Wn. App. 435, 438, 63 P.3d 816 (2003).

C. Medically Needy Background

Each state has the option of extending Medicaid benefits to “optionally categorically needy” categories of individuals set forth in 42 U.S.C. § 1396a(a)(10)(A)(ii); 42 C.F.R. § 435, Subpart C; *Coye v. U.S. Dep’t of Health and Human Servs.*, 973 F.2d, 786, 789 (9th Cir, 1992). In addition, the state may choose to extend coverage to the “medically needy”, but is not required to do so. 42 U.S.C. § 1396a(a)(10)(C)(i); 42 U.S.C. § 1396d(a); 42 C.F.R. § 435, Subpart D; *Atkins v. Rivera*, 477

U.S. 154, 157, 106 S. Ct. 2456, 91 L. Ed. 2d 131 (1986); *Coye*, 973 F.2d at 790.

Washington has chosen to provide coverage to the Medically Needy. RCW 74.09.700. The statute establishes the “limited casualty program,” which provides coverage for medical services to persons “who are medically needy as defined in the social security Title XIX state plan” RCW 74.09.700(1). The statute directs the Department to establish eligibility requirements, including “minimum levels of incurred medical expenses” for the MN to incur before becoming eligible, and requires the MN to apply “[a]ll nonexempt income and resources” to “the cost of their medical care services.” RCW 74.09.700(1), (3).

The Department’s eligibility rules impose an income limit for the MN program, called the medically needy income level. WAC 388-478-0070 (eff. 5/31/02). A person’s countable income is compared to the medically needy income level, using a “base period” of three or six consecutive months. WAC 388-519-0110(1) (eff. 9/1/98). If the patient’s countable income is higher than the medically needy income level, the amount by which his or her income exceeds the medically needy income level is called “excess income”. WAC 388-519-0100(7) (eff. 9/1/98). The patient may reduce excess income by incurring medical expenses. WAC 388-519-0100(6) (eff. 9/1/98). Once the patient’s income is

reduced by the amount of excess income, the person qualifies for MN coverage. WAC 388-519-0100(8) (eff. 9/1/98). This process is called “meeting spenddown”. *Id.*

D. Federal Regulation Imposes Spenddown As A Patient Obligation, Not An Expense Paid By The Department

The federal regulation regarding spenddown could not be clearer: “Expenses used to meet spenddown liability are not reimbursable under Medicaid.” 42 C.F.R. § 435.831(i)(5). By requiring the *patient* to “incur” medical expenses to meet spenddown (42 C.F.R. § 435.831(d)), the regulation imposes liability for spenddown on the patient. *See United States ex rel. Humphrey v. Franklin-Williamson Human Servs., Inc.*, 189 F. Supp. 2d 862, 871 (S.D. Ill. 2002) (“[c]learly, the word ‘incur’ connotes taking on a liability”); *see also Cohen v. Quern*, 608 F. Supp. 1324, 1327 (N.D. Ill. 1984) (“‘incurred’ [is] generally defined as ‘becom[ing] liable or subject to’”). Accordingly, courts liken spenddown to a “deductible” which must be met prior to qualifying for MN coverage:

Medically needy people may qualify for Medicaid assistance after satisfying a deductible calculated on the basis of their income and resources above the threshold for participation in [Aid to Families with Dependent Children] or [Supplemental Security Income]. *Atkins*, 477 U.S. at 157-58, 106 S.Ct. 2456.

Franklin-Williamson Human Servs., Inc., 189 F. Supp. 2d at 868; *see also e.g. Addis v. Whitburn*, 153 F.3d 836, 838 (7th Cir. 1998) (“[I]f an

applicant's income exceeds the state's need standards [for Categorically Needy coverage], he still may qualify for medical assistance after satisfying a deductible calculated on the basis of his excess income. *See* 42 C.F.R. § 435.831(e)"); *see also Markva v. Haveman*, 317 F.3d 547, 550 (6th Cir. 2003) (referring to spenddown as a "deductible"). "After the patient incurs the spenddown obligation, he is eligible for Medicaid assistance for additional medical costs." *Franklin-Williamson Human Servs. Inc.*, 189 F. Supp. 2d at 865 (emphasis added).

1. Spenddown is analogous to a patient's private insurance deductible.

As discussed in case law, the spenddown obligation imposed by federal regulation is analogous to a "deductible" often paid by persons enrolled in private insurance. At the hearing, Donna Dorris, a Senior Health Policy Analyst with the Office of the Insurance Commissioner, explained the cost-sharing requirements of private insurance. Testimony of Donna Dorris, Tr. Vol. I, pp. 86-88. A deductible is the amount of money that the patient would have to pay before the insurance company would pay anything. *Id.* at p. 88:5-9. However, when a patient purchases an insurance contract, they get the benefit of receiving the negotiated contracted rate between the insurer and provider, even if their deductible has not yet been met. *Id.* at pp. 89, 90. Others who do not have insurance

would be billed the provider's usual, customary and reasonable charge.

Id.

2. Negotiated payment rates apply once the patient is enrolled in the MN program.

A provider's usual, customary and reasonable charges, or total charges, are the amount the provider would bill the client in general, if no insurance was applicable. Testimony of Roger Gantz³, Tr. Vol. I, p. 50:16-24. Within the MN spenddown program, a Medicaid beneficiary becomes enrolled once that beneficiary has incurred their spenddown liability. Testimony of Catherine Fisher⁴ ("Test. of Fisher"), Tr. Vol. I, p. 118:6-11; 42 C.F.R. § 435.831(i)(4); WAC 388-416-0020 (eff. 9/1/98). To determine when a beneficiary has incurred their spenddown liability, a base period is assigned to the beneficiary, where income is analyzed to determine what the beneficiary's spenddown liability is. Test. of Fisher, Vol. I, p. 111; WAC 388-519-0110(1) (eff. 9/1/98). The date of enrollment in the Medicaid program depends on the type of expense used to meet spenddown. Test. of Fisher, Vol. I, pp. 119-22. For example, if a hospital expense was used to meet spenddown, coverage would open at the beginning of the month. *Id.*; WAC 388-416-0020(1)(a) (eff. 9/1/98). Once the beneficiary has incurred enough expenses to meet their

³ Roger Gantz is the Department Director of Legislation and Policy Analysis.

⁴ Cathy Fisher is the Department Regional Eligibility Representative.

spenddown liability, the beneficiary is enrolled and is entitled to all the protections afforded other Medicaid beneficiaries, including having the negotiated contract rate between the Department and the provider apply to the services rendered to them. Test. of Fisher, Vol. I, p. 126.

To illustrate this point, Ms. Fisher was asked about how spenddown would be applied and when enrollment would begin given examples involving a provider's usual and customary charges and the negotiated contract rate. One example involved a spenddown liability of \$500, total hospital charges of \$4,000 and a negotiated contract rate of \$2,000. In this instance, the expense would be used to meet spenddown, the provider would be allowed to collect \$500 from the patient, and the negotiated rate of \$2,000 would apply because the patient was enrolled in the Medicaid program with this medical expense. *Id.* at pp. 125-26. This is known as a split bill scenario. *Id.*

Federal regulation contemplates adjudication of the "split bill" in such a fashion to ensure that Medicaid does not pay for spenddown obligations of the Medically Needy:

Expenses used to meet spenddown liability are not reimbursable under Medicaid. [Therefore,] to the extent necessary to prevent the transfer of an individual's spenddown liability to the Medicaid program, States must reduce the amount of provider charges that would otherwise be reimbursable under Medicaid.

42 C.F.R. § 435.831(i)(5). To use an example from this case, patient Haley A. was assigned a spenddown liability of \$2,005.44. AR at 618. The Hospital's total usual and customary charges for the January 29, 2005 to January 31, 2005 hospital stay was \$11,647.75. *Id.* at 620. Because this was a Diagnosis Related Group claim, it would be impossible to split up the charges for this hospital stay⁵. *See* Test. of Fisher, Tr. Vol. I, pp. 128-29. Since hospital expenses from the hospital stay met the spenddown amount, the patient became eligible for Medicaid beginning on January 1, 2005. *See* WAC 388-416-0020(1)(a) (eff. 9/1/98). Therefore, the Department is required to apply the Medicaid payment rate to the entire hospital stay. Test. of Fisher, Tr. Vol. I, pp. 125-26. In this case, the allowed Diagnosis Related Group payment was \$2,666.42. *Id.* at 625. The Department assigned as an overpayment \$2,005.44, because spenddown was not identified by the Hospital when billing the Department. AR at 595. However, the Hospital is still allowed to collect the \$2,005.44 from the client. *See* Test. of Fisher, Tr. Vol. I, p. 125. In fact, a provider may bill a client if the bill counts toward a spenddown liability. WAC 388-502-0160(3)(f) (eff. 7/1/02). Thus, although the Hospital states that, in many cases, the result of the overpayment will

⁵ A Diagnosis Related Group rate is not based on the number of days spent at the hospital. Test. of Fisher, Tr. Vol. I, p. 128:13. The Diagnosis Related Group rate is based upon a calculation that looks at the specific hospital, the diagnosis, why the client was there, and what services were received. *Id.* at p. 128:14-17.

result in no payment to it; this fact has no effect on the Hospital's authority to independently collect the spenddown amount from the patient.

3. The Hospital's hypothetical example applied to the WAC.

The Hospital argues that deducting spenddown from MN payments leads to an absurd result in that bills for patient care provided prior to the start date of MN enrollment are offset against payments due to the Hospital for covered MN services after enrollment. Hospital's Opening Brief, p. 10. The Hospital then poses the following hypothetical: a patient with a \$500 spenddown is hospitalized for three days and incurs \$250 a day in hospital bills. *Id.* In this scenario, the patient would become eligible after incurring \$500 in medical bills. WAC 388-519-0100(8) (eff. 9/1/98)⁶. The eligibility start date would be on the first day of the month in which hospital expenses equal the spenddown amount. WAC 388-416-0020(1)(a) (eff. 9/1/98)⁷. The Hospital would then be required to notate the \$500 spenddown amount on its bill to the Department, which would notify the Department to reduce its payment to the Hospital by \$500. The Hospital takes issue with this, arguing later in its brief that in fourteen

⁶ "When a person has or will have 'excess income' they are not eligible for MN coverage until they have medical expenses which are equal in amount to that excess income. This is the process of meeting 'spenddown.'" WAC 388-519-0100(8) (eff. 9/1/98).

⁷ "The certification period for the noninstitutionalized medically needy (MN) program begins: (a) On the first day of the month in which hospital expenses equal the spenddown amount." WAC 388-416-0020(1)(a) (eff. 9/1/98).

cases, it is receiving a net payment of zero dollars after spenddown is deducted from the Diagnosis Related Group rate. Hospital's Opening Brief, pp. 14-15. Although the Hospital is not receiving payment from the Department, nothing is stopping the Hospital from seeking to collect the spenddown amount from the patient. WAC 388-502-0160(3)(f) (eff. 7/1/02)⁸.

E. Substantial Evidence Supports Each Of The Claimed Overpayments In This Case

1. The burden of proof does not rest with the department.

The Hospital argues that the Department has the burden of proof and must satisfy three different criteria, generated by the Hospital and not supported by any authority, to support an overpayment. Hospital's Opening Brief, pp. 15-16. However, at the time this hearing was conducted, the Hospital had the burden of proof. WAC 388-502A-1200(3) (eff. 6/1/07). (The burden of proving compliance with applicable federal and state statutes and regulations, provider billing instructions, published memoranda, and fee schedules rests with the provider at the audit appeal hearing.) Prior to June 1, 2007, the burden of proof was not placed on either party. Department regulations described what standard of

⁸ "A provider may bill a client only if one of the following situations apply: (f) The bill counts towards a spenddown liability, emergency medical expense requirement, deductible, or copayment required by [the Medical Assistance Administration]."

proof applied, but did not establish which party had the burden of proof. WAC 388-02-0485 (eff. 10/2/00).

Moreover, the self-generated criteria claimed by the Hospital to apply in this case, does not. If the Department determines that an overpayment has occurred, the Medicaid provider may request an administrative hearing. RCW 43.20B.675(3). If an administrative hearing is requested, the presiding or reviewing officer will determine the amount, if any, of the overpayment received. RCW 43.20B.675(4). Overpayment is defined as “any payment or benefit to a recipient or to a vendor in excess of that to which is entitled by law, rule, or contract, including amounts in dispute.” RCW 43.20B.010. This was not an eligibility hearing where the parties were disputing the spenddown amount assigned to a patient; the administrative law judge was to determine if the Hospital was paid in excess of what it was entitled by law, rule or contract. In other words, the administrative law judge was to determine if the Hospital notated spenddown on its claims to the Department, as it was required to do by the Department’s billing instructions.

2. Compelling evidence was presented to prove that the Hospital had been overpaid.

Even if this Court determines that the Department had the burden of proof, the Department has met its burden. The Department auditor

reviewed information contained in ACES, HWT (the Department's data repository), Barcode (a system housing scanned images of medical bills brought in from clients), Remittance and Status Reports, and Accounts Receivable (A/R) notes supplied by the Hospital. *See* Testimony of Amparo Panelo (Test. of Panelo), Tr. Vol. II, pp. 83-86.

Much of what makes the evidence compelling in this case is Barcode. Barcode is a system independent of ACES that records a scanned image of documentation, such as a medical bill, brought in from the client. Test. of Fisher, Tr. Vol. I, p. 210:2-5. Although Barcode was not available to Ms. Panelo when she first did the audit, she pulled available bills from Barcode once this system became available to her in 2007. Test. of Panelo, Tr. Vol. II, p. 97:13-19. The auditor confirmed the expense amount listed in ACES with the scanned image of the bill in Barcode in 42 of 48 instances.⁹

However, even with the six records that do not contain a scanned image of the bill used to meet spenddown, substantial evidence exists to support the overpayment finding. For example, record 3 does not contain a scanned image of a bill, but the award letter identifies a \$12,290.45 expense that was used to meet spenddown. AR at 637. This expense

⁹ Records where the exhibit included a scanned image of the bill used to meet spenddown: 1, 2, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 50, and 52.

amount matches up to the expense amount listed in ACES, in HWT, and in the Hospital's A/R notes. AR at 595, 641, 646. For record 27, an ACES award letter lists the patient's spenddown at \$26,647.86 and a Hospital bill of \$26,063.10 as applying to that spenddown amount. *Id.* at 1145-52. Hospital A/R notes verify that it received this letter and was aware of the patient's spenddown liability. *Id.* at 1160. For record 35, there was no scanned image of the bill, but the award letter states that a \$37,323.00 Hospital bill was used to meet spenddown. *Id.* at 1320. The Hospital's A/R notes confirm that it received the award letter and knew that a spenddown of \$4,445 applied. *Id.* at 1329. In short, "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order" is present in this case. *City of Redmond*, 136 Wn.2d at 46.

3. Bills used to meet spenddown were proper under WAC 388-519-0110(10).

The Hospital argues that the Department used bills to meet spenddown that were neither paid by the patient nor existing at the time the base period began, which allegedly violates WAC 388-519-0110(10) (eff. 9/1/98). Hospital's Opening Brief, p. 14. However, WAC 388-519-0110(10) provides in relevant part as follows:

To be counted toward spenddown, medical expenses must:
(a) Not have been used to meet a previous spenddown; and
(b) Not be the confirmed responsibility of a third party...
(c) Meet one of the following conditions: (i) Be an unpaid liability at the beginning of the base period and be for services for: (A) the applying person; or (B) A family member legally or blood-related and living in the same household as the applying person. (ii) Be for services received and paid for during the base period; or (iii) Be for medical services paid and incurred during a previous base period if that client payment was made necessary due to delays in the certification for that base period.

WAC 388-519-0110(10) (eff. 9/1/98) (emphasis added). Accordingly, spenddown expenses can include paid or unpaid expenses.

4. The order of medical expenses used to meet spenddown benefitted the Hospital.

The Hospital argues that the Department did not apply bills towards spenddown in the order required by regulations. Hospital's Opening Brief, p. 14. Ms. Fisher testified that the Department prioritizes medical expenses used to meet spenddown as follows: (1) Medicare premiums (PR), health insurance deductibles (DE), and co-insurance charges (CO); (2) medical expenses that will not be covered by the Medicaid program (MU); (3) prior unpaid bills (PB); (4) hospital expenses (HO); (5) bills that are potentially payable by Medicaid (MC); and (6) prescription claims¹⁰. Test. of Fisher, Tr. Vol I, p. 171-174. Prior unpaid

¹⁰ Prescription claims were only prioritized after the audit of the Hospital. Testimony of Fisher, Tr. Vol I, p. 174:1-2.

bills were prioritized third, but were not listed in WAC 388-519-0110(7) (eff. 9/1/98). Although prior unpaid bills were not listed in regulation, this accrues to the Hospital's favor because it would decrease the Hospital's spenddown liability. Further, the Hospital has not cited to any evidence at the hearing suggesting that the priority of expenses affected the amount of spenddown assigned to it.

5. The bills used to meet spenddown are not at issue.

The Hospital argues that the Department did not create a record of how patients met their spenddown nor did the Department attempt to retain bills that the Department reviewed at the time they enrolled patients in the MN program. Hospital's Opening Brief, p. 15. As mentioned previously, this was not a hearing concerning a patient's eligibility determination; it was a hearing over whether the Hospital correctly notated spenddown in its claims to the Department. Whether a patient was correctly enrolled or whether the Department considered the correct medical expenses when determining eligibility are issues that are between the Department and the client, not the Hospital. *See* WAC 388-472-0005(1)(j)¹¹ (eff. 7/1/02). The Hospital's right to an administrative

¹¹ "If you apply for or get cash, food, or medical assistance benefits you have the right to: (j) Ask for a fair hearing if you disagree with a decision we make. You can also ask a supervisor or administrator to review our decision or action without affecting your right to a fair hearing."

hearing stems from the Department assessment of an overpayment, not from eligibility determinations. *See* RCW 43.20B.675.

6. No evidence has been submitted to establish that Indian Health Services is at issue.

The Hospital argues that patients involved in records 1, 3, 14, 22, 30, 33, 35, and 44 had Indian Health Services coverage. AR at 400-02. Based on this, the Hospital argues that the Department could not use these expenses to meet spenddown because this approach shifts part of the cost of a Medicaid-covered service to the patient when the patient would be entitled to use Indian Health Services as an alternative resource to pay the spenddown amount. Hospital's Opening Brief, p.18. The Hospital's arguments with regard to Indian Health Services clients are misplaced. During the audit time period, an expense submitted by an Indian Health Services client could be used to meet spenddown so long as Indian Health Services had not made payment on the expense and the client was still ultimately liable for the expense. Test. of Fisher, Tr. Vol. I, p. 207. Further, expenses cannot be counted towards spenddown if they are the confirmed responsibility of a third party. WAC 388-519-0110(10)(b) (eff. 9/1/98)¹².

¹² "To be counted toward spenddown, medical expenses must: (b) Not be the confirmed responsibility of a third party. The entire expense will be counted unless the third party confirms its coverage within: (i) Forty-five days of the date of the service; or (ii) Thirty days after the base period ends;"

The Hospital has not presented any evidence that patients were not ultimately liable for the expenses listed for records 1, 3, 14, 22, 23, 30, 33, 35, and 44. In fact, the Hospital's A/R notes indicate that, although Indian Health Services was billed by the Hospital, they did not pay and asked the Hospital to bill the Department directly. AR at 605, 646. In addition, records 35 and 44 involve patients identified by the Hospital as having Indian Health Services coverage, but nonetheless have a personal pay designation, indicating that the Hospital has identified them as having financial responsibility for the bill.¹³ AR at 1326, 1565. For records 14, 22, 30, and 33, Indian Health Services is identified as the secondary insurance, but the Hospital A/R notes state that only the Department was billed and that Indian Health Services was not billed and never paid on the expense at issue. *Id.* at 883, 1058, 1063, 1216, 1288.

None of the records identified by the Hospital indicate that Indian Health Services was ever responsible for payment on the expenses used to meet spenddown. In addition, other than A/R notes, there is nothing confirming that Indian Health Services was even the secondary insurer. All evidence presented at hearing shows that Indian Health Services was not an alternative resource available to clients. If it were a resource that

¹³ "When the patients come into our facilities, if they do not have any insurance coverage, then the patient is registered as classification of personal pay because they're responsible for the bill." Testimony of Mary Thomas (Test. of Thomas), Tr. Vol. IV, p. 44:5-8.

was available to pay for these spenddown expenses, the expenses would not be allowed to be used for spenddown. WAC 388-519-0110(10)(b) (eff. 9/1/98).

F. Spenddown Is Deducted From The Negotiated Rate, Not Total Billed Charges

The Hospital makes two arguments concerning the Department's deduction of spenddown from the negotiated rate. Hospital's Opening Brief, pp. 20-22. The first argument misstates the Department's practice. The second argument ignores the plain language of the federal regulation at issue.

1. The Department pays for qualified services only when the patient is eligible for such services.

The Hospital states that the Department develops a rate for the entire hospital stay "even if only the final days of the hospital inpatient stay were covered by the MN program." Hospital's Opening Brief, p. 21. A Diagnosis Related Group rate is not based on the number of days spent at the hospital. Test. of Fisher, Tr. Vol. I, p. 128: 13. The Diagnosis Related Group rate is based upon a calculation that looks at the specific hospital, the diagnosis, why the client was there, and what services were received. *Id.* at p. 128:14-17. If a hospital expense is incurred that makes the client eligible for the MN program, eligibility begins on the first day of the month in which hospital expenses meet the spenddown amount.

WAC 388-416-0020(1)(a) (eff. 9/1/98) (see discussion *supra* at section D(2)). If the client were not eligible for the MN program, the Hospital would not be billing the Department in the first place.

2. Spenddown must be deducted from the negotiated rate, not the total charges billed by the Hospital.

The Hospital argues that federal regulations require spenddown from the total charges a provider bills, not the provider's negotiated payment rate. Hospital's Opening Brief, p. 21. However, the Hospital's argument avoids the plain language of the relevant federal regulation at issue. 42 C.F.R. § 435.831(i)(5) states as follows:

Expenses used to meet spenddown liability are not reimbursable under Medicaid. [Therefore,] to the extent necessary to prevent the transfer of an individual's spenddown liability to the Medicaid program, **States must reduce the amount of provider charges that would otherwise be reimbursable under Medicaid.**

42 C.F.R. § 435.831(i)(5) (emphasis added). Taking one word from this regulation, the Hospital argues that a provider's "charges" must mean a provider's usual and customary charges. This regulation concerns "charges that would otherwise be reimbursable under Medicaid." In all claims but one, the total charges billed by the Hospital have been reduced to the allowed amount that the Department paid. AR at 472. These total charges billed by the Hospital are charges that are already not

reimbursable under Medicaid. The plain language of this regulation concerns the contracted rate that the Hospital has with the Department.

G. The Hospital's Arguments In Appendices A And B Should Be Disregarded

The Hospital requests this Court reject specific findings of the Review Judge. Hospital's Opening Brief, p. 22. In support of this request, it attaches arguments it made at the administrative level to its brief as appendices A and B. *Id.* This Court should disregard these arguments incorporated by reference. An appellant's opening brief "should contain . . . [t]he argument in support of the issues presented for review, together with citations to legal authority . . ." RAP 10.3(a)(6). Washington courts "have consistently rejected attempts by litigants to incorporate by reference arguments contained in trial court briefs, holding that such arguments are waived." *Kwiatkowski v. Drews*, 142 Wn. App. 463, 499-500, 176 P.3d 510 (2008); see *U.S. West Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 111-12, 949 P.2d 1337 (1997); *State v. Kalakosky*, 121 Wn.2d 525, 540 n. 18, 852 P.2d 1064 (1993).

H. Department's Response To Individual Claims:

If this Court decides to consider the Hospital's arguments in its appendices, the Department has responded to the individual claim arguments below.

1. Finding of Fact No. 19, Record 1 (AR 597 – 611)

For Jeremy A., the Medicaid beneficiary was assigned a spenddown of \$1,917.14. AR at 602. The Hospital expense of \$4,423.85 was assigned to spenddown. *Id.* at 601. The auditor confirmed the expense amount with a scanned copy of the bill. Test. of Panelo, Tr. Vol. II, pp. 89:22-90:5; AR at 604. Although the ACES letter in the AR does not identify the expense used to meet spenddown, the Community Services Office (CSO) case worker notes on December 23, 2003, indicate that a detailed explanation was provided in the ACES letter. *Id.* at 599. Finally, although Indian Health Services was noted on the bill, AR at 604, the March 18, 2004 A/R notes indicate that Indian Health Services would not be responsible for this bill, and that the Department should be billed directly. *Id.* at 605.

2. Finding of Fact No. 20, Record 2 (AR 612 – 631)

For Haley A., the Medicaid beneficiary was assigned a spenddown of \$2,005.44. AR at 618. The medical expense from the Hospital was used to meet spenddown. *Id.* at 617. The auditor confirmed the expense

amount with a scanned image of the bill. Test. of Panelo, Tr. Vol. II, p. 139:10-14; AR at 619. Finally, the award letter identifies the \$11,647.75 expense amount incurred at the Hospital as the bill used to meet the spenddown amount of \$2,005.44. *Id.* at 612. This letter was sent to R&B Solutions, who was hired by the Hospital to handle processing of eligibility with the Department¹⁴. *Id.*

3. Finding of Fact No. 21, Record 3 (AR 632 – 652)

For Susan A., the Medicaid beneficiary was assigned a spenddown of \$14,757.60. AR at 643. The ACES award letter identified a \$12,940.45 expense as being applied to spenddown. *Id.* at 637. This expense amount matches up to the facility charge of \$12,966.45, after subtracting the \$26 adjustment made on April 8, 2002. *Id.* at p. 645. Further, the A/R notes indicate the Hospital knew that the patient had coverage for the spenddown period at issue. *Id.* at 646. Finally, although Indian Health Services might have been involved at one point, the December 14, 2001, A/R notes indicate that Indian Health Services had denied coverage and that the Department was to be billed. *Id.*

4. Finding of Fact No. 22, Record 4 (AR 653 – 687)

For Mason A., the Department assigned \$8,084.40 to spenddown for the period of September 2003 to February 2004. AR at 665. An

¹⁴ See Testimony of Thomas, Tr. Vol. III, p. 175:4-12 and AR at 1716.

expense amount of \$11,457.50 from the Hospital was split, and \$7,057.15 was assigned to spenddown. *Id.* at 664. The auditor confirmed the expense amount with a scanned image of the bill. Test. of Panelo, Tr. Vol. II, p. 154:10-16; AR at 667. On March 10, 2004, the Hospital's A/R notes indicate that it had received the ACES award letter. *Id.* at 669. The award letter identifies an \$8,084.40 expense from the Hospital as being applied to spenddown. *Id.* at 655. This amount equals the \$1,027.25 expense amount from Auburn Regional Medical Center, and the \$7,057.15 client liability for the split bill amount from the Hospital. *Id.* at 663-64. Thus, the Hospital knew of the spenddown amount and knew that the \$11,457.50 expense would be applied towards spenddown.

5. Finding of Fact No. 23, Record 5 (AR 688 – 701)

For Mason A., the Department assigned \$6,955.20 to spenddown for the period of April 2004 to September 2004. AR at 693. An expense amount of \$44,525.80 from the Hospital was used to meet spenddown. *Id.* at 692. The expense amount was split, causing \$6,955.20 to be applied towards spenddown. *Id.* The auditor verified through a scanned image that the CSO had relied on an interim statement of charges. Test. of Panelo, Tr. Vol. II, p. 158:5-10; AR at 695. Although a letter with the spenddown amount is not in AR 688-697, the May 10, 2004 A/R notes indicate that the Hospital received a letter with spenddown information:

“PT’S DSHS ENDED 2-29-04: PT IS ON A SD: I HAVE COPY OF SD LETTER: \$6955.20.” *Id.* at 698. Still, knowing that spenddown applied to this particular bill, the Hospital failed to notate spenddown on the bill submitted to the Department.

6. Finding of Fact No. 24, Record 6 (AR 702 – 725)

For Nicholas B., the Department identified \$3,065.80 as applying to spenddown for the period of June 2004 to August 2004. AR at 709. Nicholas B. was the Medicaid beneficiary at issue with this record. AR at 595. A Hospital expense of \$5,935.45 was used to meet spenddown, with \$3,065.80 assigned as the client liability for the split bill. AR at 708. The auditor verified the expense amount through a scanned image of the bill. Test. of Panelo, Tr. Vol. II p. 167:12-16; *Id.* at 711. The total amount billed to the Department was \$5,740.45 because a \$195 professional fee was billed separately to the Department. AR at p. 714; *see* Testimony of Mary Thomas, Tr. Vol. III, p. 178:17–p. 179:7. The award letter indicated that the \$5,935.45 of the Hospital expense was used to meet spenddown. AR at 705.

7. Finding of Fact No. 26, Record 8 (AR 749 – 769)

For Jeremie B., the Department identified \$3,414.84 as applying towards spenddown for March 2005 to August 2005. AR at 754. A Hospital expense of \$21,916.15 was used to meet spenddown, with

\$3,414.84 assigned as the client liability amount for the split bill. *Id.* at 753. The auditor verified the expense amount with a scanned image of the bill. Test. of Panelo, Tr. Vol. II, p. 193:12-14; AR at 756. The award letter indicates that this same bill was identified as being used to meet spenddown. *Id.* at 751.

8. Finding of Fact No. 27, Record 9 (AR 770 – 789)

For Miya B., the Department assigned a spenddown of \$639.98. AR at 775. The Hospital expense of \$27,765.75 was used to meet spenddown, with \$639.98 assigned as the client liability amount for the split bill. *Id.* at 774. The auditor confirmed the expense amount with a scanned image of the bill. Test. of Panelo, Tr. Vol. II, p. 197:11-12; AR at 777.

9. Finding of Fact No. 28, Record 10 (AR 790 – 803)

For Tyler B., the Department assigned a spenddown amount of \$3,592.74. AR at 793. The Hospital expense of \$22,674.50 was used to meet spenddown, with \$3,592.74 assigned as the client liability amount for the split bill. *Id.* at 792. The auditor confirmed the expense amount with a scanned image of the bill. Test. of Panelo, Tr. Vol. II, p. 201:22-p. 202:2; AR at 795-96. The award letter indicates that a retro certification applied in this case and listed the same Hospital expense as applying towards spenddown. *Id.* at 791.

10. Finding of Fact No. 29, Record 11 (AR 804 – 828)

For Daniel B., the Department assigned a spenddown amount of \$2,593.14, with an assigned base period of June 2004 to November 2004. AR at 810. The Medicaid beneficiary is Daniel B. *Id.* at 804. The Hospital expense of \$3,257.50 was used to meet spenddown, with \$2,593.14 assigned as the client liability amount for the split bill. *Id.* at 809. The auditor confirmed the expense amount with a scanned image of the bill. Test. of Panelo, Tr. Vol. II, p. 208:5-7; AR at 812. The charges applicable to Daniel B. were actually \$3,059.50. *Id.* After a \$34 professional fee is subtracted, the amount of the bill is \$3,025.50. *Id.* at 813. After a \$15 adjustment was made on February 10, 2005, the billed amount of \$3,010.50 equals the billed amount as shown in HWT. *Id.* at 815, 595.

11. Finding of Fact No. 30, Record 12 (AR 829 – 852)

For Ethan C.¹⁵, the Department assigned a spenddown amount of \$8,948.10, with an assigned base period of August 2004 to January 2005. AR at 833. The Hospital expense of \$36,072.60 was used to meet spenddown, with \$8,948.10 assigned as the client liability amount for the split bill. *Id.* at 832. The auditor confirmed the expense amount with a scanned image of the bill. Test. of Panelo, Tr. Vol. II, p. 215:19-21; AR at

¹⁵ Finding of Fact No. 30 incorrectly identifies this patient as Ethan D. The patient should be Ethan C. AR at 829.

835. From the scanned image, it appears the CSO used an interim statement of charges. *Id.* This expense amount was identified on the award letter. *Id.* at 829. According to the February 14, 2005 A/R notes, the Hospital received a copy of this award letter. *Id.* at 838.

12. Record 13 (AR 853 – 872)

For Caelan C., the Department assigned a spenddown amount of \$8,291.04, with an assigned base period of January 2005 to June 2005. AR at 861. The Hospital expense of \$22,668.00 was used to meet spenddown, with \$8,291.04 assigned as the client liability amount for the split bill. *Id.* at 860. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 863. On April 1, 2005, R&B Solutions faxed a letter to the CSO, asking for the award letter to identify how much of the bill would be applied towards spenddown. *Id.* at 867. One week later, the award letter identified the same Hospital expense as being used to apply towards spenddown. *Id.* at 855. The letter indicated that \$8,291.04 would be applied towards spenddown. *Id.*

13. Finding of Fact No. 31, Record 14 (AR 873 – 891)

For Julian D., the Department assigned a spenddown amount of \$7,794.00, with an assigned base period of December 2003 to May 2004. AR at 880. The Hospital expense of \$12,924.95 was used to meet

spenddown, with \$7,794.00 assigned as the client liability amount for the split bill. *Id.* The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 882.

14. Finding of Fact No. 32, Record 15 (AR 892 – 913)

For Karl D., the Department assigned a spenddown of \$10,638.00, with a base period of August 2005 to January 2006. AR at 897. The Hospital expense amount of \$18,172.45 was used to meet spenddown, with \$10,638.00 assigned as the client liability amount for the split bill. *Id.* The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 900. Pursuant to the October 18, 2005 A/R note, the Hospital received the award letter and knew that the patient had a \$10,638.00 spenddown. *Id.* at 904, 908.

15. Finding of Fact No. 33, Record 16 (AR 914 – 945)

For Nathaniel E., the Department assigned a spenddown amount of \$6,185.19, with an assigned base period of July 2004 to September 2004. AR at 921. The Hospital expense amount of \$27,878.50 was used to meet spenddown, with \$6,185.19 assigned as the client liability amount for the split bill. *Id.* at 920. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 923. The A/R notes on January 14, 2005 state: “RECD DSHS

S/DOWN LETTER STNG S/DOWN 6185.19. OUR BILL USED TO MEET S/DOWN. PT WL OWE 6185.19 TO MHC.” *Id.* at 924, 936.

16. Record 17 (AR 946 – 961)

For Jillian E., the Department assigned a spenddown amount of \$6,504.66, with an assigned base period of November 2003 to January 2004. AR at 947. The Hospital expense amount of \$7,446.65 was used to meet spenddown, with \$6,504.66 assigned as the client liability amount for the split bill. *Id.* at 946. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 951.

17. Record 18 (AR 962 – 977)

For Trenton F., the Department assigned a spenddown amount of \$3,511.80, with an assigned base period of August 2003 to January 2004. AR at 967. The Hospital expense amount of \$17,145.60 was used to meet spenddown, with \$3,511.80 assigned as the client liability amount for the split bill. *Id.* at 966. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 969. Pursuant to the January 9, 2004 A/R notes, the Hospital knew the patient was on \$3,500.00 spenddown from August to January of 2004. *Id.* at 971, 975.

18. Record 19 (AR 978 – 993)

For Carson F., the Department assigned a spenddown amount of \$5,820.82, with an assigned base period of November 2005 to January 2006. AR at 979. The Hospital expense amount of \$22,809.20 was used to meet spenddown, with \$5,820.82 assigned as the client liability amount for the split bill. *Id.* at 978. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 982. As of January 24, 2006 and February 10, 2006, the A/R notes indicate that the Hospital knew spenddown applied. *Id.* at 987-88.

19. Record 20 (AR 994 – 1021)

For Mercedes G., the Department assigned a spenddown amount of \$2,203.26, with a base period of September 2004 to November 2004. AR at 1001. The Hospital expense amount of \$5,056.75 was used to meet spenddown, with \$2,203.26 assigned as the client liability amount for the split bill. *Id.* at 1000. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1003. The award letter identified the \$5,056.75 expense from the Hospital as applying to spenddown. *Id.* at 997-98.

20. Finding of Fact No. 37, Record 21 (AR 1022 – 1049)

For Elizabeth H.¹⁶, the Department assigned a spenddown amount of \$4,691.10, with an assigned base period of May 2004 to October 2004. AR at 1030. The Hospital expense amount of \$12,090.30 was used to meet spenddown, with \$4,691.10 assigned as the client liability amount for the split bill. *Id.* at 1029. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1032. The award letter identifies the \$12,090.30 from the Hospital as being applied towards spenddown. *Id.* at 1024. The A/R notes show that the Hospital was aware on April 14, 2005, that the beneficiary had medically needy coverage with spenddown. *Id.* at 1033.

21. Record 22 (AR 1050 – 1073)

For Samantha H., the Department assigned a spenddown amount of \$5,971.20, with an assigned base period of January 2005 to June 2005. AR at 1055. The Hospital expense amount of \$6,941.05 was used to meet spenddown, with \$5,971.20 assigned as the client liability amount for the split bill. *Id.* at 1054. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1057. R&B Solutions knew, as of March 15, 2005, that spenddown would be involved with this patient. *Id.* at 1063. Further, on May 3, 2005,

¹⁶ For Finding of Fact No. 37, the Review decision refers to patient Elizabeth H. and record 26. Elizabeth H. is actually under record 21.

this same expense from the Hospital was identified as being used to meet spenddown in the award letter. *Id.* at 1052.

22. Finding of Fact No. 34, Record 23 (AR 1074 – 1092)

For Samantha H., the Department assigned a spenddown amount of \$5,949.20, with an assigned base period of September 2005 to February 2006. AR at 1100. The Hospital expense amount of \$3,391.75 was used, with the entire expense used to meet spenddown. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1102. There is a letter indicating that \$5,971.20 in medical bills were needed to obtain medical benefits. *Id.* at 1093. The November 17, 2005 Hospital A/R notes indicate that the patient had good Department coverage beginning on September 1, 2005, which matches up to the base period at issue for this record. *Id.* at 1104. Finally, although Indian Health Services appears in the A/R notes and on the scanned copy of the bill, this is irrelevant as there is no indication that Indian Health Services paid any portion of this bill.

23. Finding of Fact No. 36, Record 25 (AR 1109 – 1130)

For Grace J., the Department assigned a spenddown amount of \$6,183.00, with an assigned base period of January 2005 to March 2005. AR at 1114. The Hospital expense amount of \$10,037.38 was used to meet spenddown, with \$5,878.00 assigned as the client liability for the

split bill. *Id.* at 1128. The expense amount can be confirmed with a scanned image of the bill. *Id.* at 1116. On May 3, 2005, R&B Solutions was aware that this patient had a spenddown liability¹⁷. *Id.* at 1111. On May 9, 2005, the Hospital knew that R&B Solutions had submitted Hospital bills to be used towards spenddown. *Id.* at 1119.

24. Record 26 (AR 1131 – 1144)

For Kieren J., the Department assigned a spenddown amount of \$109.38, with an assigned base period of May 2004 to July 2004. AR at 1132. The Hospital expense amount of \$447.00 was used to meet spenddown, with \$109.38 assigned as the client liability amount for the split bill. *Id.* at 1131. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1136.

25. Finding of Fact No. 38, Record 27 (AR 1145 – 1164)

For Brittany K.¹⁸, the Department assigned a spenddown amount of \$26,647.86, with an assigned base period of March 2001 to August 2001. AR at 1155. The Hospital expense amount of \$26,063.10 was used to meet spenddown, along with a \$311 Medicare premium and a \$273.76

¹⁷ Two prior bills of \$40 and \$265 were utilized in this beneficiary's spenddown total. AR at 1128. $\$40 + \$265 + \$5,878 = \$6,183$, which is the spenddown amount noted on AR at 1114.

¹⁸ Finding of Fact No. 38 incorrectly identifies the patient as Brittany L. instead of Brittany K. AR at 1145.

Tacoma General bill. *Id.* at 1153-54. On June 4, 2001, the A/R notes state: "DSHS NOTICE OF SPENDDOWN REC: RESOURCES ARE TOO HIGH – LIABIULITY(sic) \$26,647.86 = NO COVERAGE." *Id.* at 1160. The award letter identified the same Hospital expense amount of \$26,063.10. *Id.* at 1145-52. Although the date the expense incurred is listed in ACES as March 1, 2001, *Id.* at 1153, the admit date is listed in the A/R notes as February 17, 2001. *Id.* at 1157. However, it appears the February 17, 2001 date was later changed to March 3, 2001, and there were no charges incurred by the patient in February 2001. *Id.* at 1161.

26. Record 28 (AR 1165 – 1184)

For Kyle K., the Department assigned a spenddown amount of \$5,784.75, with an assigned base period of April 2005 to June 2005. AR at 1172. The Hospital expense amount of \$23,239.45 was used to meet spenddown, with \$3,086.75 assigned as the client liability amount for the split bill. *Id.* at 1170. Another Hospital expense from Good Samaritan was used towards spenddown in the amount of \$2,698.00. *Id.* The auditor confirmed the Hospital expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1174. The Hospital was aware that spenddown would apply to this patient because pursuant to the A/R notes entered on August 8, 2005, the Hospital sent an

itemized statement to the patient to help the beneficiary meet his spenddown. *Id.* at 1176, 1181.

27. Record 29 (AR 1185 – 1204)

For Travis K., the Department assigned a spenddown amount of \$2,255.25, with an assigned base period of June 2004 to August 2004. AR at 1191. The Hospital expense amount of \$7,383.00 was used to meet spenddown, with \$2,255.25 assigned as the client liability amount for the split bill. *Id.* at 1190. Although this expense may have been incorrectly coded as a health insurance deductible rather than a Hospital expense, this would have had no impact on the spenddown assigned to the Hospital because there were no other expenses identified, making it impossible for an incorrect priority to be assigned. *See* Test. of Fisher Tr. Vol. I, p. 170. The auditor confirmed the expense with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1192¹⁹.

28. Record 30 (AR 1205 – 1227)

For Dennis L., the Department assigned a spenddown amount of \$2,701.63, with an assigned base period of March 2005 to May 2005. AR at 1212. The Hospital expense amount of \$23,002.86 was used to meet spenddown, with \$2,701.63 assigned as the client liability amount for the split bill. *Id.* at 1211. The auditor confirmed the expense amount

¹⁹ The scanned image of the bill appears to show an expense amount of \$7,363.00, while the ACES screen appears to show an expense amount of \$7,383.00.

with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1214. The award letter, which was sent to the Hospital, identifies the Hospital expense identified above as applying to spenddown, and states that the client is still responsible for \$2,701.63. *Id.* at 1208-09.

29. Record 31 (AR 1228 – 1261)

For Dontis L., the Department assigned a spenddown amount of \$1,773.49, with an assigned base period of October 2004 to December 2004. AR at 1247. The Hospital expense amount of \$3,073.00 was used to meet spenddown, with \$1,773.49 assigned as the client liability amount for the split bill. *Id.* at 1234. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1236²⁰. Although there was an initial issue between the Department and the Hospital regarding the correct date of service to use, that issue was corrected. *Id.* at 1232 (4/26/05 Entry).

30. Record 32 (AR 1262 – 1281)

For Laura L., the Department assigned a spenddown amount of \$4,075.23, with an assigned base period of December 2004 to February 2005. AR at 1267. The Hospital expense amount of \$11,667.10 was used to meet spenddown, with \$4,075.23 assigned as the client

²⁰ In this case, the line item for “ICU/PEDS” appears to have been used by the CSO to establish the \$3,073 expense amount. AR at 1236 (second line item from the top).

liability amount for the split bill. *Id.* at 1266. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1269. The award letter identifies the Hospital bill of \$11,667.10 as being used to meet spenddown. *Id.* at 1264.

31. Record 33 (AR 1282 – 1298)

For Cassandra M., the Department assigned a spenddown amount of \$6,700.40, with an assigned base period of October 2005 to December 2005. AR at 1285. The Hospital expense amount of \$12,372.05 was used to meet spenddown, with \$6,700.40 assigned as the client liability amount for the split bill. *Id.* at 1284. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1287. The award letter identifies this same Hospital bill as being used to meet spenddown. *Id.* at 1282.

32. Record 34 (AR 1299 – 1317)

For Cody M., the Department assigned a spenddown amount of \$6,249.12, with an assigned base period of April 2005 to June 2005. AR at 1305. The Hospital expense amount of \$15,100.05 was used to meet spenddown, with \$6,249.12 assigned as the client liability amount for the split bill. *Id.* at 1303. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1307. The award letter, which was sent to R&B Solutions,

identifies the same Hospital bill as being used towards spenddown. *Id.* at 1299-1303.

33. Finding of Fact 39, Record 35 (AR 1318 – 1337)

For Marcus M., the Department determined that an underpayment occurred. AR at 1337. The Hospital applied spenddown in this case of \$4,445.00. AR at 595. However, the auditor determined that only \$2,620.00 should have been applied. AR at 1337. Thus, the auditor assigned the difference ($\$4,445 - \$2,620 = \$1,825$) as an underpayment for this record. *Id.*

34. Record 36 (AR 1338 – 1354)

For Daniel M., the Department assigned a spenddown amount of \$7,998.00, with an assigned base period of October 2003 to March 2004. AR at 1340. The Hospital expense amount of \$9,480.10 was used to meet spenddown, with \$7,998.00 assigned as the client liability amount for the split bill. *Id.* at 1339. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1342.

35. Record 37 (AR 1355 – 1387)

For Ana M., the Department assigned a spenddown amount of \$3,197.07, with an assigned base period of September 2004 to November 2004. AR at 1364. The Hospital expense amount of \$5,056.30

was used to meet spenddown, with \$3,197.07 assigned as the client liability amount for the split bill. *Id.* at 1362. The auditor confirmed the expense amount with a scanned image of the bill²¹. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1366. The award letter, which was sent to R&B Solutions, identifies the same Hospital bill as being applied to spenddown. *Id.* at 1357-58.

36. Record 38 (AR 1388 – 1406)

For Mariah N., the Department assigned a spenddown amount of \$7,579.21, with an assigned base period of November 2001 to January 2002. AR at 1394. The Hospital expense amount of \$29,263.65 was used to meet spenddown, with \$3,924.55 assigned as the client liability amount for the split bill. *Id.* at 1392.

37. Record 39 (AR 1407 – 1430)

For Aiden P., the Department assigned a spenddown amount of \$9,198.00, with an assigned base period of July 2003 to December 2003. AR at 1412. The Hospital expense amount of \$23,748.45 was used to meet spenddown, with \$9,198.00 assigned as the client liability amount for the split bill. *Id.* at 1411. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1414.

²¹ After looking at charges on 9/19/04, there was a \$2.00 difference between the scanned image and the ACES total. AR at 1366.

38. Record 40 (AR 1431 – 1466)

For Jorge P., the Department assigned a spenddown amount of \$6,857.34, with an assigned base period of October 2004 to March 2005. AR at 1437. The Hospital expense amount of \$7,680.00 was used to meet spenddown, with \$6,647.34 assigned as the client liability amount for the split bill²². *Id.* at 1433-34. The auditor confirmed the expense amount with a scanned image of the bill²³. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1439. The December 6, 2004 A/R notes indicate that the Hospital received the Department's award letter. *Id.* at 1448.

39. Record 41 (AR 1467 – 1492)

For Brianna R., the Department assigned a spenddown amount of \$8,318.00, with an assigned base period of March 2005 to August 2005. AR at 1473. The Hospital expense amount of \$210,991.00 was used to meet spenddown, with \$8,318.00 assigned as the client liability amount for the split bill. *Id.* at 1472. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1475. The March 3, 2005, A/R notes indicate that the Hospital believed the beneficiary would qualify for spenddown. *Id.* at 1482, 1485.

²² This record involves four separate bills of \$1,536 each, with a fifth bill of \$1,536 that was split, with \$503.34 assigned as the patient liability for split bill. AR at 1434.

²³ Charges of \$1,536 were billed on 10/10/04, 10/11/04, 10/12/04, 10/13/04, and 10/15/04. AR at 1439.

As of June 11, 2005, R&B Solutions was on notice that the beneficiary had a spenddown of \$8,318.00. *Id.* at 1469.

40. Record 42 (AR 1518 – 1535)

For Mikael R., the Department assigned a spenddown amount of \$1,598.04, with an assigned base period of June 1, 2005 to June 30, 2005. AR at 1523. The Hospital expense amount of \$13,389.00 was used to meet spenddown, with \$1,598.04 assigned as the client liability amount for the split bill. *Id.* at 1522. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1525. The award letter sent to R&B Solutions identifies the Hospital bill in the amount of \$13,389.00 as being used to meet spenddown. *Id.* at 1520-21.

41. Record 43 (AR 1535 – 1554)

For Todd S., the Department assigned a spenddown amount of \$16,678.32, with an assigned base period of August 2004 to January 2005. AR at 1538. The Hospital expense amount of \$49,545.70 was used to meet spenddown, with \$16,678.32 assigned as the client liability amount for the split bill. *Id.* at 1537. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1540. The award letter was sent to the Hospital. *Id.* at 1535.

42. Record 44 (AR 1555 – 1581)

For Seth S., the Department assigned a spenddown amount of \$6,928.80, with an assigned base period of March 2005 to May 2005. AR at 1563. The Hospital expense amount of \$5,610.00 was used to meet spenddown²⁴. *Id.* at 1561. The auditor confirmed the expense amount with a scanned image of the bill²⁵. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1565. On April 28, 2005, the beneficiary's father informed the Hospital that they were on a spenddown of \$6,928.80. Further, the award letter identifies the \$5,610.00 Hospital bill as being applied to spenddown. *Id.* at 1557-58.

43. Record 45 (AR 1582 – 1602)

For Mateusz S., the Department assigned a spenddown amount of \$18,064.68, with an assigned base period of November 2002 to April 2003. AR at 1586. The Hospital expense amount of \$247,220.15 was used to meet spenddown, with \$18,064.68 assigned as the client liability amount for the split bill. *Id.* at 1584. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1588. The award letter, dated January 7, 2003 indicates that the \$18,064.68 Hospital bill would be used to meet

²⁴ Of the four expenses identified to Mary Bridge, only the \$5,610.00 bill on March 10, 2005 was identified as an overpayment. AR at 596.

²⁵ The third line item contains a charge for \$5,610.00. AR at 1565.

spenddown. *Id.* at 1582. That same day, the Hospital was in contact with the Department concerning the client's eligibility. *Id.* at 1591.

44. Record 46 (AR 1603 – 1622)

For Michael T., the Department assigned a spenddown amount of \$8,834.13, with an assigned base period of April 2005 to June 2005. AR at 1608. The Hospital expense amount of \$14,728.70 was used to meet spenddown, with \$8,834.13 assigned as the client liability amount for the split bill. *Id.* at 1607. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1610. The award letter, which was sent to R&B Solutions, identifies the Hospital bill incurred while admitted on April 16, 2005 as applying to spenddown. *Id.* at 1605.

45. Finding of Fact No. 40, Record 47 (AR 1623 – 1647)

For Khi U., the Department assigned a spenddown amount of \$12,299.10, with an assigned base period of January 2005 to March 2005. AR at 1630. The Hospital expense amount of \$27,820.50 was used to meet spenddown, with \$9,695.56 assigned as the client liability amount for the split bill. *Id.* at 1628. The auditor confirmed the expense amount with a scanned image of the bill²⁶. Test. of Panelo, Tr. Vol. III, pp. 23:24-

²⁶ In this case, the CSO worker entered the client liability amount for split bill in the expense amount field, and assigned the entire expense to apply to spenddown. AR at 1628. The same result would have been achieved had the CSO worker identified the

24:5-9; AR at 1632. The appeal letter identified the Hospital bill as one of two bills that would apply to spenddown. *Id.* at 1626.

46. Record 50 (AR 1696 – 1716)

For Jovan W., the Department assigned a spenddown amount of \$7,118.00, with an assigned base period of May 2005 to October 2005. AR at 1701. The Hospital expense amount of \$22,217.00 was used to meet spenddown, with \$9,501.00 assigned as the client liability amount for the split bill. *Id.* at 1700. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1703. The award letter, which was sent to R&B Solutions, identified this Hospital bill as applying to spenddown. *Id.* at 1698.

47. Record 51 (AR 1717 – 1733)

For Peter Y., the Department assigned a spenddown amount of \$18,528.00, with an assigned base period of November 2001 to April 2002. AR at 1722. The Hospital expense amount of \$55,240.54 was used to meet spenddown, with \$18,528.00 assigned as the client liability amount for the split bill. *Id.* at 1721. This expense amount equals the \$55,211.54, plus the \$29 professional fee as noted in the January 3, 2002, A/R notes. *Id.* at 1726.

expense amount as \$27,820.50, and then assigned \$9,695.56 as the client liability amount for split bill.

48. Record 52 (AR 1734 – 1756)

For Joseph Y., the Department assigned a spenddown amount of \$5,155.73, with an assigned base period of March 2005 to May 2005. AR at 1741. The Hospital expense amount of \$16,741.00 was used to meet spenddown, with \$5,155.73 assigned as the client liability amount for the split bill. *Id.* at 1740. The auditor confirmed the expense amount with a scanned image of the bill. *See* Test. of Panelo, Tr. Vol. II, p. 97:17-19; AR at 1743. The award letter, which was sent to R&B Solutions, identifies the Hospital bill of \$16,741.00 as being applied towards spenddown. *Id.* at 1737-38.

49. Finding of Fact No. 42, Record 53 (AR 1493 – 1517)

For Brianna R., the Department assigned a spenddown amount of \$338.00, with an assigned base period of September 1, 2005 to September 31, 2005. AR at 1505. The Hospital expense amount of \$7,481.00 was used to meet spenddown, with \$338.00 assigned as the client liability amount for the split bill. *Id.* In this case, the provider had already applied \$2,028.00 to spenddown. AR at 596. Thus, the auditor took the \$2,028.00 that the provider already applied, subtracted the spenddown that should have been applied (\$338), and came up with a final underpayment of \$1,690.00 for this particular claim.

V. CONCLUSION

The Hospital has failed to demonstrate why the Board of Appeals' Review Decision is invalid. Therefore, the Department respectfully requests that that the Board of Appeals decision be affirmed.

RESPECTFULLY SUBMITTED this 19th day of December, 2011.

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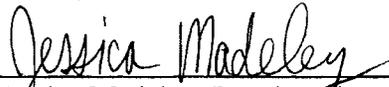
I certify that I served a copy of the Brief of Respondent on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of December, 2011, at Tumwater, WA.



Jessica Madeley, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

December 19, 2011 - 3:09 PM

Transmittal Letter

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Court of Appeals Case Number: 42567-0

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