STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Consolidated Case Nos. 2016AP2082 & 2017AP634
Waukesha County Case No. 15CV2403

KATHLEEN PAPA and
PROFESSIONAL HOMECARE PROVIDERS INC.,
Plaintiffs-Respondents,

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT DATED SEPTEMBER 29, 2016 AND AN ORDER DATED MARCH 24, 2017 ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE KATHRYN W. FOSTER, PRESIDING

AMICUS CURIAE BRIEF OF DANE COUNTY, IN SUPPORT OF PLAINTIFFS-RESPONDENTS

Dyann Hafner
Assistant Corporation Counsel
Dane County
State Bar No. 1009541

1202 Northport Drive
Madison, WI 53704
(608) 242-6483
Hafner@countyofdane.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. Wisconsin Stat. §§ 227.10 and 227.11, Enacted as a Result of 2011 Wisconsin Act 21, Dramatically Reduce State Agencies' Regulatory Authority 1

II. Wisconsin Stat. §49.45 Sets Clear Limits of the Audit Authority of the Wisconsin Department of Health 2

A. The Legislature's Grant of Authority to the Wisconsin Department of Health is Unambiguous and Limited 4

B. The Wisconsin Department of Health Fails to Recognize It's Measured Statutory Audit Authority 6

III. There is No Requirement Supporting the Wisconsin Department of Health's Exercise of Excessive Audit Practices 7

CONCLUSION 9

CERTIFICATION REGARDING COMPLIANCE WITH RULE § 809.19(8)(b) and (c) 10

CERTIFICATION REGARDING COMPLIANCE WITH RULE § 809.19(12) 11

TABLE OF AUTHORITIES

CASES CITED

Operton v. Labor and Industry Review Comm'n
2017 WI 46, 375 Wis. 2d 1, 894 N.W.2d 426 4

Tannler v. Wis. Dep't of Health and Soc. Servs.
211 Wis. 2d 179, 564 N.W.2d 735 (1997) 7

STATUTES CITED

Wis. Stat. § 49.45 2,3,5,6,7,8,9
Wis. Stat. § 49.471 3,5
Wis. Stat. § 227.10 1,5,6,7,8,9
Wis. Stat. § 227.11 1,2,5,6,7,8,9

OTHER AUTHORITIES CITED

42 C.F.R. § 430.0 8
42 C.F.R. Part 455 8
42 U.S.C. § 1396a 7
42 U.S.C. § 1396p 8
Wis. Op. Att'y Gen. OAG-01-16 1

I. Wisconsin Stat. §§ 227.10 and 227.11, Enacted as a Result of 2011 Wisconsin Act 21, Dramatically Reduce State Agencies' Regulatory Authority.

2011 Wisconsin Act 21, creating Wis. Stat. §§ 227.10(2m) and 227.11(2)(a) (2011-12), took effect June 7, 2011, and dramatically changed the authority of state agencies to promulgate rules interpreting the provisions of statutes enforced or administered by the agency. This change in state agency authority was described by Attorney General Brad D. Shimel in a 2016 attorney general opinion, reading in part as follows:

> Administrative agencies are creatures of the Legislature, with "only those powers as are expressly conferred or necessarily implied from the statutory provisions under which [they] operate." *Lake Beulah,* 335 Wis. 2d 47, ¶ 23 (quoting *Brown Cty. v. DHSS*, 103 Wis. 2d,43, 307 N.W.2d (1981)). Those statutes will be strictly construed to preclude the exercise of power not expressly granted. *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶14, 270 Wis. 2d 318, 677 N.W.2d 612. Any reasonable doubt regarding an agency's implied power should be resolved against the agency.

Wis. Op. Att'y Gen. OAG-01-16, ¶ 20.

Wisconsin Stat. § 227.10(2m) applies to state agency enabling authority:

> No agency may implement or enforce **any standard, requirement, or threshold**, including as a term or condition of any license issued by the agency, **unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute** or by rule that has been promulgated in accordance with this subchapter…. [Emphasis added.]

2011 Wisconsin Act 21 also created Wis. Stat. § 227.11(2)(a), which reads:

> 1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy **does not confer rule-making authority** on the agency or augment the agency's rule-making authority **beyond the rule-making authority that is explicitly conferred on the agency by the legislature**.
>
> 2. A statutory provision describing the agency's general powers or duties **does not confer rule-making authority** on the agency or augment the agency's rule-making authority **beyond the rule-making authority that is explicitly conferred on the agency by the legislature**.
>
> 3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement or threshold **that is more restrictive** than the standard, requirement, or threshold contained in the statutory provision. [Emphasis added.]

Therefore, even where the Department of Health has authority to audit Medical Assistance claims, its audit authority cannot exceed that expressly authorized by statute.

II. Wisconsin Stat. § 49.45 Sets Clear Limits of the Audit Authority of the Wisconsin Department of Health.

The authority of the Department of Health to conduct audits is found in Wis. Stat. § 49.45(2)(b)3 and 4:

> (b) The department may:

3. Audit all claims filed by any contractor making the payment of benefits paid under ss. 49.46 to 49.471 and make proper fiscal adjustments.

4. Audit claims filed by any provider of medical assistance, and as part of the audit, request of any such provider, and review, medical records of individuals who have received benefits under the medical assistance program.

The ability to audit is also clearly narrowed in focus by Wis. Stat. § 49.45(3)(f) as follows:

1. Providers of services under this section shall maintain records as required by the department for verification of provider claims for reimbursement. **The department may audit such records to verify actual provision of services and the appropriateness and accuracy of claims**.

2. **The department may deny any provider claim for reimbursement which cannot be verified** under subd. 1. **or may recover the value of any payment made to a provider which cannot be so verified**. The measure of the recovery will be the full value of any claim if it is determined upon audit that actual provision of the service cannot be verified from the provider's records or that service provided was not included in s. 49.46(2) or 49.471(11). In cases of mathematical inaccuracies in computations or statements of claims, the measure of recovery will be limited to the amount of the error. [Emphasis added.]

A. The Legislature's Grant of Authority to the Wisconsin Department of Health is Unambiguous and Limited.

The Wisconsin Supreme Court summarized the rules of statutory interpretation in *Operton v. Labor and Industry Review Commission*, 2017 WI 46, ¶¶ 27, 28 and 29, 375 Wis. 2d 1, 894 N.W.2d 426, as follows:

> ¶27 It is axiomatic that "the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. "We assume that the legislature's intent is expressed in the statutory language." *Id.* For this reason, "statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *Id.*, ¶45 (quoting *Seider v. O'Connell*, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*, ¶45.
>
> ¶28 "Context is important to meaning." *Id.*, ¶46. Accordingly, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* (citations omitted).
>
> ¶29 Moreover, we need not consult extrinsic sources of interpretation if there is no ambiguity in the statute. *Id.* And, "a statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.*, ¶47 (citing *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶19, 260 Wis. 2d 633, 660 N.W.2d 656).

> After all, "the court is not at liberty to disregard the plain, clear words of the statute." *Id.* (quoting *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)).

The purpose of statutory interpretation is to determine what the statutes mean in order to give them full, proper and intended effect. Therefore, Wis. Stat. §§ 227.10 and 227.11 must guide the interpretation of § 49.45. The specific terms of the Department of Health's audit authority, expressly found in § 49.45(3)(f), are as follows:

1. The department may audit records to verify actual provision of services.

2. The department may audit records to verify the appropriateness and accuracy of claims.

3. The department may deny any provider's claim for reimbursement which cannot be verified.

4. The department may recover the value of any payment made to a provider that cannot be verified.

5. The measure of the recovery of a claim by the State will be the full value of the claim if it is determined that actual provision of the service cannot be verified from the provider's records.

6. The measure of the recovery of a claim by the State will be the full value of the claim if it is determined that the service provided was not included in the lists of approved benefits under Wis. Stat. §§ 49.45(2) and 49.471(11).

7. In cases of mathematical inaccuracies in computations or statements of claims, the measure of recovery will be limited to the amount of the error.

This directive could not be more clear. If the meaning of the statute is plain, the inquiry into statutory intent generally stops. However, one also considers the context of

statutory language, reading closely related statutes, in this situation Wis. Stat. §§ 49.45, 227.10 and 227.11 as a whole. The clear intent of these statutes is not for the Department of Health to develop its own audit mission, but for the department to limit itself to the authority given to it by the legislature.

If the explicit directives of these statutory sections do not provide sufficient context, then one must also consider the purpose of the state Medicaid program found in Wis. Stat. § 49.45(1).

> To provide appropriate health care for eligible persons and obtain the most benefits available under Title XIX of the federal social security act, the department shall administer medical assistance, rehabilitative and other services to help eligible individuals and families attain or retain capability for independence or self-care as hereinafter provided.

Administration of the state Medicaid program must further the cause of helping eligible clients attain and retain their capacities for independence and self-care. To the extent that the Wisconsin Department of Health fails to restrain its own audit activities beyond that which is reasonable, it betrays this fundamental purpose by making it unnecessarily difficult for Medicaid services providers to serve these individuals and their families.

B. The Wisconsin Department of Health Fails to Recognize It's Measured Statutory Audit Authority.

What is not included in this legislative directive, and therefore excluded from the Department of Health's recoupment authority by the direction of Wis. Stat. § 227.11(2)(a), are:

1. Disqualification of claims where services are verified as appropriate and provided based on paperwork imperfections, such as lack of correlation between the various documents.

2. Disqualification of entire shifts of care where there is a paperwork defect regarding one of the services provided.

3. Disqualification of services provided for failure to follow the myriad of procedural rules for claims submissions, otherwise referred to as "the perfection rule."

Medicaid providers have a due process right to expect, when providing services under the program, that the department will not create for itself reasons beyond that authorized by statute to recoup payments for verified appropriate services provided. By expanding its audit authority beyond that authorized by enabling statues, the Wisconsin Department of Health contravenes the express mandate of the state legislature by discouraging provider services through use of an unfair audit process.

III. There is No Requirement Supporting the Wisconsin Department of Health's Exercise of Excessive Audit Practices.

While 42 U.S.C. § 1396a(a)(42), requires the states to have an audit program to ensure that the states recover and refund to the federal government improper payments, the legislative mandates found in Wis. Stat. §§ 49.45, 227.10 and 227.11 are consistent with the federal authority. The Department of Health is required and authorized to set conditions of participation and to establish documentation requirements to verify provider claims for reimbursement under § 49.45(3)(f). The legislative purpose of an audit is to verify the actual appropriate provision of services, rather than to disqualify the actual appropriate provision of services for lack of strict procedural adherence.

The case *Tannler v. Wisconsin Department of Health and Social Services*, 211 Wis. 2d 179, 564 N.W.2d 735 (1997), is incorrectly cited by the State for the proposition that the Department of Health may promulgate and enforce policies and guidelines without having to call them "rules," thus circumventing Wis. Stat. §§ 227.10 and 227.11. *Tannler*

is, in fact, a case of statutory interpretation, specifically determining whether the meaning of the word "action" under Wis. Stat. § 49.45(3), as defined by 42 U.S.C § 1396p(e)(1), includes the inaction of failing to make a spousal election under the state divestment statutes. The Wisconsin Supreme Court found the term "action" ambiguous and used the context of the federal statutes and the state Medical Assistance Handbook to determine the legislative purpose of the use of the term. *Id.,* ¶ 14. In *Tannler*, the Department of Health and Social Services did not adopt any action which contravened state or federal authority.

The issue in this case is whether the Department of Health oversteps its enabling authority. Federal law is intended to provide states administrative flexibility in administering the Medicaid program. "Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures." 42 C.F.R. § 430.0. The purpose of the Medicaid Integrity Program, 42 C.F.R. Part 455, is to identify, investigate and recoup Medicaid payments resulting from fraud and abuse. 42 C.F.R. §455.1. The express legislative boundaries of Wis. Stat. §§ 49.45, 227.10 and 227.11 are consistent with this purpose.

CONCLUSION

When enacting 2011 Wisconsin Act 21, the legislature made a conscious effort to restrain overly burdensome regulatory efforts of state agencies. The Department of Health has clear authority to audit Medicaid claims, but must do so within the authority set forth in Wis. Stat. § 49.45(3)(f), recovering claim payments in those situations where the actual provision of services, the appropriateness of the claim or the accuracy of claim cannot be verified. The trial court's ruling in this case is consistent with federal Medicaid rules, with Wis. Stat. §§ 49.45, 227.10 and 227.11, and with the purpose of the state Medicaid program to help individuals and families attain and retain capability for independence.

Dated this 28th day of November, 2017.

Respectfully submitted,

DYANN HAFNER
Assistant Corporation Counsel
State Bar No. 1009541

1202 Northport Dr.
Madison, WI 53704
(608) 242-6483
Hafner@countyofdane.com

Attorney for Dane County

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,123 words.

Dated this 28th day of November, 2017.

DYANN HAFNER
Assistant Corporation Counsel
State Bar No. 1009541

1202 Northport Dr.
Madison, WI 53704
(608) 242-6483
Hafner@countyofdane.com

Attorney for Dane County

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of November, 2017.

DYANN HAFNER
Assistant Corporation Counsel
State Bar No. 1009541

1202 Northport Dr.
Madison, WI 53704
(608) 242-6483
Hafner@countyofdane.com

Attorney for Dane County