COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2012-SC-000090-D

COMPREHENSIVE HOME HEALTH SERVICES, INC.
d/b/a FAMILY HOME HEALTH CARE S.E. APPELLANT

vs. ON REVIEW FROM COURT OF APPEALS OF KENTUCKY
CASE NO. 2009-CA-001846
ON APPEAL FROM FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 07-CI-00016

PROFESSIONAL HOME HEALTH CARE AGENCY, INC.;
WHITLEY COUNTY HEALTH DEPARTMENT d/b/a
WHITLEY COUNTY HOME HEALTH; AND
COMMONWEALTH OF KENTUCKY, CABINET FOR
HEALTH AND FAMILY SERVICES APPELLEES

REPLY BRIEF OF APPELLANT

Respectfully submitted,

Marian J. Hayden
Holly Turner Curry
Cull & Hayden, P.S.C.
210 Washington Street, P.O. Box 1515
Frankfort, Kentucky 40602-1515
Phone: (502) 226-4157
Fax: (502) 226-4158

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Brief was served upon the following: Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Thomas D. Wingate, Judge, Franklin Circuit Court, 669 Chamberlin Avenue, Frankfort, KY 40601; Carole D. Christian, Wyatt, Tarrant & Combs, LLP, 500 West Jefferson Street, Suite 2800, Louisville, KY 40202; and Ann T. Hunsaker, Assistant Counsel, Cabinet for Health and Family Services, Office of Legal Services, 275 East Main Street, 5W-B, Frankfort, KY 40621, by mailing same with the United States Post Office, postage pre-paid, on this the 28th day of January, 2013.

INTRODUCTION

In its initial Brief, Family set forth multiple reasons why the Court of Appeals' Opinion must be reversed, with the most obvious one being that it directly contradicts existing, long-standing Kentucky precedent on remand by improperly improving Appellees' position while simultaneously placing Family at a significant disadvantage. In this Reply, Family addresses the fact that Appellees now attempt to cloud this simple issue in numerous ways. Family also responds to the mistaken assertions that it has no vested right to application of the October 2006 *State Health Plan* figures and that its arguments rely on a misinterpretation of 900 KAR 6:050.

ARGUMENT

I. The Court of Appeals' Opinion ignores long-standing law governing remand.

The Franklin Circuit Court's directive for the remand hearing is sound. In remanding the action, the Franklin Circuit Court properly defined the scope of the hearing as the need calculations in the 2006 *State Health Plan*, a binding regulation, on which Family's application was heard and approved. These are critical distinctions simply overlooked by the Court of Appeals that must now be rectified by this Court.

Further, contrary to Appellees' mistaken assertions, the extreme disadvantage that Family will suffer if the Court of Appeals' Opinion is allowed to stand is clear. The Court of Appeals' Opinion denies Family a meaningful appeals process since it will be improperly precluded from even proceeding to a hearing.[1] Such a result violates

[1] In this case, on remand, the current *State Health Plan* need figures applicable to Family's CON application show a **negative net need** of 364 patients in Whitley County. Clearly, application of the current figures will improve Appellees' position to Family's detriment – its application cannot proceed so a rehearing is meaningless. This directly contradicts the purpose of remand proceedings and does not effectuate justice. This rule of administrative appellate practice created by the Court of Appeals' Opinion broadly affects not only Family in this case, but all participants in administrative proceedings that are controlled by laws that regularly change or are updated.

Family's due process rights, and the due process rights of all other similarly situated parties who, through no fault of their own, will have meaningless appeal rights if subjected to a different set of rules upon remand. Conversely, the Franklin Circuit Court's September 2, 2009 Opinion and Order properly enforced Kentucky law by allowing Appellees to develop and present a case related to the *State Health Plan* figures under which Family's application was approved.

Because Appellees will be allowed to develop an evidentiary record on the *State Health Plan* need methodology during the remand hearing, the Franklin Circuit Court's September 2, 2009 Opinion and Order is consistent with its May 15, 2009 Opinion and Order as well as Kentucky law. As such, it should be affirmed and the Court of Appeals' Opinion reversed. This decision in no way denies Appellees due process or limits their ability to present the evidence that they would have used if the Cabinet had continued the hearing or conducted a reconsideration hearing, the two alleged errors underlying the remand order. Moreover, the September 2, 2009 Opinion and Order does not restrict the Hearing Officer's discretion on remand to decide what arguments and evidence will be accepted, rejected, or afforded any weight. However, the Court of Appeals' Opinion eradicates Family's due process rights and should be reversed.

As a matter of law, the purpose and scope of a remand hearing in administrative proceedings is to allow a party to introduce only that evidence that it was unable to produce during the original administrative proceedings. See Searcy v. Three Point Coal Co., 280 Ky. 683, 134 S.W.2d 228, 232 (1939). By definition, remand permits a party to present further proof on a subject in which the facts were not fully developed, which places the party in the position it would have been in had the administrative agency acted

properly. See Broadway & Fourth Avenue Realty Co. v. Metcalfe, 230 Ky. 800, 20 S.W.2d 988 (1929) and Getty v. Federal Savings & Loan Corp., 805 F.2d 1050, 1061 (D.C. Circuit 1986). Importantly, this Court recognized the purpose and scope of a remand hearing in administrative proceedings over 35 years ago in Browning Manufacturing Division, et al. v. Paulus, 539 S.W.2d 296, 297 (Ky. 1976). In their Brief, Appellees cite no persuasive authority to distinguish or explain away this controlling Kentucky case law.

Instead, in support of their position, Appellees incorrectly argue that the Court of Appeals' Opinion is based on "long-standing Kentucky law that squarely supports an unrestricted remand hearing." (Appellees' Brief, p. 17.) However, consideration of these cases reveals that they actually support Family's argument for a remand hearing that only allows the introduction of evidence that was not fully presented and developed at the original administrative proceedings. Specifically, in Whitaker et al. v. Southeastern Greyhound Lines, 314 Ky. 131, 234 S.W.2d 174 (1950), the Court remanded a case approving a certificate of convenience and necessity for the sole purpose of determining whether the newly-approved service was needed. While the Court permitted the consideration of several factors at the remand hearing to determine need, *i.e.*, reasonable needs for additional services on the route; pending applications; proposed new schedules; and offers to furnish additional services by existing providers, it did not authorize an unlimited exploration of all issues previously decided at the administrative level, such as the inadequacy of existing services. In fact, the Court accepted the administrative agency's findings that the services being rendered were inadequate, despite subsequent evidence to the contrary.

Likewise, in Williams v. Cumberland Valley National Bank, 569 S.W.2d 711, 714 (Ky. App. 1978), the Court of Appeals concluded that legislative direction to administrative agencies did not include repeated hearings. Rather, "[a]n exception will only be allowed upon a showing of significant change of conditions or circumstances." Id. In this context, there has been no finding that a significant change of condition or circumstance exists to warrant an unlimited remand hearing. Rather, through the Franklin Circuit Court's September 2, 2009 Opinion and Order, Appellees received the very relief they sought by having the unfettered ability to challenge the regulation containing the calculations on which Family's application was based, at least in part. The Court of Appeals' erroneous interpretation of these cases fails to take into account the long-standing purpose and scope of remand hearings in administrative proceedings and cannot serve as a valid basis to uphold the Opinion.

The law is clear. A remand order cannot serve to improve a party's position while simultaneously placing the other party at a significant disadvantage, which is exactly the result the Court of Appeals' Opinion will achieve in any administrative proceeding involving a time-sensitive issue should this Court allow the Opinion to stand. See Getty, supra. "If the rule were otherwise, litigation would be **interminable** and **reversals** might be had without number, first upon one ground and then upon another, so that it would be **advantageous** to parties to hold back for **future service** matters which might well have been tried originally." Phillips v. Charles, 267 S.W.2d 748, 750 (Ky. 1954).[2] Based on

[2] While Appellees criticize Family for availing itself of all steps in the appellate process, the exercise of Family's due process rights during the course of one case does not rise to the level of interminable litigation. If anything, the relief Family seeks through this appeal will reduce interminable litigation and reversals by assuring that all parties are treated fairly and uniformly during remand hearings.

these sound legal directives, the Franklin Circuit Court correctly made the following determination:

> This appeal was about the fact that [Appellees] were not given adequate notice of the significant change in the SHP numbers in time for the October 16, 2006 filing deadline. The remedy to which they are entitled upon remand is what the Cabinet should have granted in the first place – the opportunity to develop and present a case based on those changes....The relevant decision here is the 2006 decision; the relevant issue is whether Family Home Health Care was entitled to the certificate of need under the State Health Plan and figures effective on the date of the original hearing. The hearing on remand should be limited to the scope of the October 25, 2006 hearing. (Appendix 5 to Brief of Appellant.)

Because the Franklin Circuit Court correctly applied Kentucky law, thus affording all parties the ability to exercise their due process rights at the remand proceedings, it should be affirmed and the Court of Appeals' Opinion reversed.

II. Family's fundamental right to due process warrants application of the October 2006 *State Health Plan* at the remand hearing.

Appellees mistakenly contend that Family has no vested right to apply the October 2006 *State Health Plan* figures and that current utilization data should be considered on remand. (Brief of Appellees, pp. 22-24.) To support this inaccurate proposition, Appellees cite several cases. Specifically, Appellees assert that the United States Supreme Court's ruling in Western Union Telegraph Co. v. Louisville & Nashville Railroad Co., 258 U.S. 13, 42 S. Ct. 258 (1922), supports this position by finding that a litigant's rights are determined by the law in effect at the time of a remand hearing. (Brief of Appellees, p. 22.) However, the Western Union case is clearly distinguishable from this appeal and Appellees' reliance on it is misplaced. In Western Union, the entire statutory framework that conferred upon the parties the right to institute a cause of action and afforded the District Court jurisdiction had been repealed. Because all existing rights

were essentially "cut off" by the repeal of the statute, the District Court was left powerless to decide any pending cases on appeal under the repealed legislation and therefore had to apply the law in effect at the time of remand.

Moreover, in an attempt to further bolster this flawed argument, Appellees are forced to rely on case law from other States to assert that it is appropriate to apply new rules and statistics to remand proceedings on CON matters. However, none of these cases involve regulatory language that specifically and clearly sets forth what information is to be considered in remand proceedings. The Court of Appeals' Opinion incorrectly concluded that the scope of the remand hearing should be unlimited. As such, it must be reversed to protect Family's due process rights.

III. The Court of Appeals' Opinion erroneously interprets CON law governing the *State Health Plan* issue.

Appellees assert that Family misinterprets the governing CON law to avoid its "clear import." (Brief of Appellees, p. 24.) Appellees argue that no statute, regulation, or case exists to support the use of the plain meaning of a "decision" and instead relies on a dictionary definition. Appellees' flawed argument fails to recognize that the plain and unambiguous meaning of the CON regulation in effect at the time of the decision on Family's CON application clearly dictated what data governed the process:

> In determining whether an application is consistent with the State Health Plan, the cabinet shall apply the latest criteria, inventories, and need analysis figures maintained by the cabinet and the version of the State Health Plan in effect **at the time of the cabinet's decision.**

900 KAR 6:050 Section 7(1)(b) (emphasis added). As recognized by the Court of Appeals, Technical Note 6 of the *State Health Plan* requires that, "[a]ll certificate of need decisions shall be made using the version of the Plan in effect on the date of the decision,

regardless of when the letter of intent or application was filed, or public hearing held." (See Appendix 1 to Brief of Appellant, p. 9.) The plain meaning of the CON regulation and Technical Note 6 to the *State Health Plan* clearly calls for the 2006 figures that were in effect at the time of the Cabinet's decision, *i.e.*, the November 15, 2006 decision underlying this appeal, to govern the remand proceedings. The use of a dictionary definition or any other guidance is simply inapplicable in this case.

Moreover, the Court of Appeals failed to recognize that the Cabinet shares Appellant's legal position as it directly complies with the Cabinet's long-standing interpretation of the governing CON statutes and regulations. (See Brief for Appellee Commonwealth of Kentucky, Cabinet for Health and Family Services.) The statutes and regulations at issue herein were enacted to afford CON applicants a full and fair opportunity to develop and present a case under the *State Health Plan* calculation applicable to the original administrative hearing and decision. The Cabinet's long-standing interpretation of such statutes and regulations is reasonable and entitled to considerable deference. See Hagan v. Farris, 807 S.W.2d 488, 490 (Ky. 1991).

Despite these clear legal mandates and the Cabinet's long-standing interpretation thereof, the Court of Appeals incorrectly concluded that the CON law "requires use of the latest numbers available at the time of the decision." (Appendix 1 to Brief of Appellant, pp.12-13.) Inexplicably, the Court of Appeals reached this erroneous conclusion without even referencing Technical Note 6 of the *State Health Plan*, the regulatory provision promulgated by the Cabinet to provide CON applicants with finality and certainty. In its Opinion, the Court of Appeals simply overlooked the need for the Cabinet to promulgate a detailed regulation addressing the ever-changing *State Health Plan* calculations that

control each CON application. Therefore, its ruling is inconsistent with the plain meaning of the governing CON regulation and Technical Note 6 to the *State Health Plan.*

Had the Court of Appeals taken into account the Cabinet's interpretation of its detailed regulation governing the correct application of *State Health Plan* calculations, it could only have concluded that utilization of the *State Health Plan* calculations in effect in October 2006 affords the Appellees the opportunity to develop and present a case on those figures. The Court of Appeals' Opinion ignored the plain meaning and long-standing agency interpretation in this instance and must be overruled.

IV. To satisfy all parties' due process rights, the 2006 *State Health Plan* and projected need calculations must govern the remand proceedings.

To further support their flawed argument, Appellees identify several "examples" of evidence that should be "treated as hypothetical" that may be presented during the remand hearing, including population data published **after** the October 25, 2006 hearing, changes in the *State Health Plan* formula **since** 2006, actual utilization figures, and changes in the applicant. (Brief of Appellees, pp. 28-32.) By presenting these "hypothetical examples," Appellees completely ignore the fact that their own appeal to the Franklin Circuit Court and Court of Appeals centered on their alleged inability "to amend their prehearing filings or introduce evidence other than that presented in those filings" to address the updated *State Health Plan* figures **in October 2006**. However, the information contained in the "hypothetical examples" that Appellees incorrectly argue could be the subject of the remand proceedings simply did not exist at the time of the October 25, 2006 hearing and, therefore, could not have been utilized to challenge the October 16, 2006 figures. Had Appellees been granted a hearing continuance or a reconsideration hearing, they would not have been able to present the "hypothetical

examples" because such information was not available or in existence at that time. The Court of Appeals' Opinion failed to recognize this fact and improperly remanded the hearing with an unlimited scope.

Appellees over-exaggerate the effect of the Franklin Circuit Court's ruling, claiming that it "is a practical impossibility, in effect asking the parties to travel backward in time and ignore any intervening developments that would show the 2006 proof to be true, untrue, or irrelevant." (Brief of Appellees, p. 28.) However, the Franklin Circuit Court's ruling does not, and cannot, require that the remand proceedings involve an entirely new administrative hearing over all issues as the Court of Appeals' Opinion improperly allows. Rather, it simply requires utilization of the calculations in effect in October 2006 and affords Appellees the opportunity to develop and present a case on those figures. In an attempt to skew the true issue before this Court, Appellees mistakenly contend that the Court of Appeals was correct in vacating the Franklin Circuit Court's September 2, 2009 Opinion and Order because it will deny the parties due process and achieve arbitrary results. In actuality, it is the Court of Appeals' Opinion that is arbitrary, for it fails to afford all parties due process by improving Appellees' position to the detriment of Family.

V. Contrary to Appellees' contentions, the Court of Appeals' reliance on the separate and distinct Laurel County case warrants reversal of the Opinion.

Appellees argue that the Court of Appeals' mistaken reliance on Family Home Health Care, Inc. v. Saint Joseph Health System, Inc. d/b/a Seton Home Health, et al., Case No. 2008-CA-001790-MR (Ky. App. Aug. 7, 2009) (*unpublished decision*)

("FHHC Decision") does not impact the ultimate decision reached in the Opinion.[3] Despite Appellees' assertions that the Court of Appeals expressly considered differences between the two cases, the reality is that there are distinguishing factors between them that the Court of Appeals simply overlooked. Unlike the FHHC Decision, the *State Health Plan* need figures for Whitley County continued to show a need for the approval of an additional home health agency long after the approval of Family's application. Conversely, in the FHHC Decision, the *State Health Plan* figures showed an insufficient need on the date the Hearing Officer issued the Final Order on the application. Thus, in the FHHC decision case, the *State Health Plan* in effect at the time of the final decision did not permit approval; a remand under that *State Health Plan* or the current 2011 *State Health Plan* does not change the parties' positions. Because the Court of Appeals overlooked this critical distinction, it erred as a matter of law by basing its Opinion on alleged "parallels" between this case and the FHHC Decision that do not exist.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in its initial Brief, Family respectfully requests that this Court reverse the Opinion of the Court of Appeals.

Respectfully submitted,

Marian J. Hayden
Holly Turner Curry
Cull & Hayden, P.S.C.
210 Washington Street, P.O. Box 1515
Frankfort, Kentucky 40602-1515
Phone: (502) 226-4157
Fax: (502) 226-4158

[3] While Family is mindful that the FHHC Decision is an unpublished case, it is not citing or using it as authority in this appeal as prohibited by CR 76.28(4)(c). Rather, Family only references the FHHC Decision in this Brief in direct response to the Court of Appeals' Opinion, which states that the factual and legal bases behind it are similar to the case at bar.