STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

MICHIGAN HOME HEALTH CARE, INC.,

Petitioner,

-v-

File No. 92-10664-AA
HON. PHILIP E. RODGERS, JR.

MICHIGAN DEPARTMENT OF
SOCIAL SERVICES,

Respondent.

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Deborah Randall
Counsel for Petitioner

Patrick E. Heintz (P31443)
Co-counsel for Petitioner

Richard T. O'Neill (P25877)
Assistant Attorney General

DECISION AND ORDER

Petitioner appeals a decision of the Respondent's Director to recover alleged overpayments made to Petitioner, under the provisions of Title XIX of the Social Security Act (Medicaid) and Section 105 of the Social Welfare Act, MCL 400.105; MSA 16.490(15). The underlying dispute represents the Department of Social Services' (hereinafter DSS) efforts to recoup a portion of the monies paid to the Petitioner, a provider of home health care services. Following an audit for Medicaid payments for the years, 1985 and 1986, Gerald Miller, Director of DSS, rendered a Decision requiring repayment in an amount that exceeded the recommendations of Administrative Law Judge Donald T. Kane.

At issue is whether DSS must return monies, in the amount of $121,521.74, collected and held pursuant to the subject audit

projections.[1] Respondent's Brief, p 4. The parties have disparate views of the extrapolation process used in the audit. Michigan case law sets forth the standards for review of this matter. The Supreme Court describes MERC v Detroit Symphony Orchestra (DSO), 393 Mich 116; 223 NW2d 283 (1974) as the leading case setting forth the scope of judicial review of administrative decisions.[2] The DSO Court sets the standard, as follows:

> Const 1963, art 6, § 28...sets forth the minimum constitutional scope of judicial review of administrative decisions.
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> > All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the court as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, ruling and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.
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> * * *
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> Although such a review does not attain the status of de novo review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. Cognizant of these concerns,

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[1] Originally, alleged overpayments in the amount of $152,880.45 were in dispute. In negotiations between DSS and the provider prior to the administrative hearings, that figure was reduced to $140,816.68. Following the ALJ's recommended decision, Director Miller allowed exceptions on several of the disputed billings and thus reduced the amount in controversy by roughly $30,000.00.

[2] See Oakland Co v Michigan, 432 Mich 49, 60; 438 NW2d 61 (1989), n 4.

> the courts must walk the tightrope of duty which requires judges to provide the prescribed meaningful review.

DSO, supra at pp 121 and 124. See also In re Payne, 444 Mich 679, 693; 514 NW2d 121 (1994). The evidentiary requirements are as follows:

> Administrative decisions must be supported by competent, material and substantial evidence on the whole record, as required by MCL 24.306(1)(d). Great deference should be given to the findings of an administrative hearing officer, Campbell v Marquette Prison Warden, 119 Mich App 377, 385; 326 NW2d 516 (1982), particularly where administrative expertise influences a choice between two reasonably differing views, Sutherby v Gobles Bd of Ed (After Remand), 132 Mich App 579, 588-589; 348 NW2d 277 (1984), lv den 422 Mich 910 (1985).

Traverse Oil Co v NRC Chairman, 153 Mich App 679, 691; 396 NW2d 498 (1986). See also Amalgamated Transit v SEMTA, 437 Mich 441, 450; 473 NW2d 249 (1991).

The specific standard applicable to appellate referee decisions involving DSS is set forth in Hardges v DSS, 177 Mich App 698, 701-702; 442 NW2d 752 (1989):

> Our review of department decisions is limited. We reverse only if the decision (1) violates the constitution or a statute, (2) exceeds the agency's authority or jurisdiction, (3) is made upon unlawful procedure, (4) is not supported by competent, material, or substantial evidence, (5) is arbitrary or capricious, or an abuse of discretion, or (6) is affected by a substantial or material error of law. MCL § 24.306; MSA § 3.506(206); Spratt v Dep't of Social Services, 169 Mich App 693, 700[;] 426 NW2d 780 (1988), Soto v Director of the Michigan Dep't of Social Services, 73 Mich App 263[;] 251 NW2d 292 (1977).

In Great Lakes Sales v Tax Comm, 194 Mich App 271, 280; 486 NW2d 367 (1992), the Court of Appeals stated as follows:

> "Substantial evidence" has been defined as that which a reasonable mind would accept as adequate to support a conclusion. Consumers Power Co v Public Service Comm, 189 Mich App 151, 187; 472 NW2d 77 (1991). Substantial evidence consists of more than a scintilla of evidence, but less than a preponderance of the evidence. Id.

See also In re Payne, supra, at p 692.

> Expert opinion testimony is "substantial" if offered by a qualified expert who has a rational basis for his

> views, whether or not other experts disagree. To hold otherwise would thus neutralize all expert testimony in cases of conflict and the party with the burden of proof would automatically lose.

Great Lakes Steel v PSC, 130 Mich App 470, 481; 344 NW2d 321 (1983), lv den 418 Mich 970; 344 NW2d 283 (1984).

> An administrative decision involving the exercise of discretion is subject to reversal by the courts only where the evidence establishes that the agency has abused its discretion by arbitrary action. Evans v United States Rubber Co, 379 Mich 457; 152 NW2d 641 91967); Crider v Michigan, 110 Mich App 702, 716; 313 NW2d 367 (1981).

Bannan v City of Saginaw, 120 Mich App 307, 324; 328 NW2d 35, aff'd 420 Mich 376; 362 NW2d 668 (1982). The burden is on the provider to show that it is entitled to payment of the welfare monies. Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990); Rutherford v Dep't of Social Services, 193 Mich App 326; 483 NW2d 410 (1992).

This Court now turns to the facts of this matter. Administrative Law Judge Donald T. Kane (hereafter ALJ) issued his Recommended Decision on September 3, 1992. The ALJ's decision began with a summary of the audit review process and the documentation supplied by the parties for administrative review. Next, the ALJ's decision described the parties' respective arguments relating to each of the ten categories which DSS used as a basis for disallowing payment for services. Then, the ALJ summarized the legal arguments presented in the parties' briefs.

Judge Kane presented 16 pages of Findings of Fact and Conclusions of Law. The ALJ's Recommendation, in pertinent part, reads as follows:

> The Administrative Law Judge, based on the above findings of fact and conclusions of law, recommends that the decision of the Director, Medical Services Administration, be upheld, except for the payments allowed in the above findings of fact and the payments conceded by the department on page 8 of Attachment B.
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> It is further recommended that the department recompute payments disallowed or recoded based on the above findings of fact and department concessions and as

set out in Attachment A, determine the error rate in the sample and recalculate total mispayments by extrapolation to total claims. In computing mispayments in the sample the payments conceded by the Appellant, page 7 of Attachment B, should be included in the total sample mispayments.

ALJ's Recommended Decision, pp 37-38.

On November 13, 1992, Gerald H. Miller, Director of DSS, issued his Decision in which he approved and adopted the ALJ's Recommended Decision with adjustments. The adjustments made by the Director were based on exceptions filed by the parties. The Director's one and one-half page Decision included the following abbreviated remarks regarding his analysis of the exceptions,

> I find no merit to the exceptions filed on behalf of Michigan Home Health Care, Inc.[.] However, I do find merit to several of the exceptions filed on behalf of the Medical Services Administration (MSA).

Director's Decision, p 1.

The parties disagree with regard to the weight to be given to the ALJ's findings. MHHC relies on Meadows v Marquette Prison Warden, 117 Mich App 794; 324 NW2d 507 (1982). Attorney Deborah Randall made the following remarks at this Court's hearing on April 15, 1994:

> ...I would endorse the citation to Meadows versus Marquette Prison, since it speaks to the importance of the administrative law judge's assessment of the record, because fundamentally in this case there is a very strong, extremely comprehensively-written, extremely eloquently-written administrative law judge opinion in this case which has been totally thrown out, with very small exceptions, by the Department and we feel that the Department does not have substantial evidence in throwing out that administrative law judge's opinion.

Transcript, April 15, 1994, p 6.[3] In contrast, DSS relies on

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[3] In this Court's view, Petitioner misinterpreted wording found within Soto v Dep't of Social Services, 73 Mich App 263; 251 NW2d 292 (1977). In its Brief, Petitioner stated as follows:

> As was noted by the court in Soto v Dep't of Social Services, it is the administrative law judge who is "aware of the importance of evidence of the medical treatment which [is] the key factor" in certain cases and

Viculin v Dep't of Social Services, 386 Mich 375, 406; 192 NW2d 449 (1971) and provides the following quotation from the Court of Appeals opinion in that case:

> Courts are indulgent toward administrative action to the extent of affirming an order where the agency's path can be "discerned" even if the opinion "leaves much to be desired".

This Court finds this quotation more helpful when viewed in context of the Viculin Court's analysis. There, in footnote 27, the Viculin Court wrote as follows:

> See also Greater Boston Television corporation v Federal Communication Commission (1971), 143 App DC 383, 393, (444 F2d 841, 851) in which the supervisory function of the judiciary was well summarized by Judge Leventhal:
>
>> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the

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> it is that tribunal which is ideally suited to pass on the credibility of the witnesses.

In context, the few words within the quotation marks above read as follows:

> It is not disputed that plaintiff did at some point establish permanent residence in Michigan. The dispute arises over when this occurred. The administrative law judge was apparently aware of this and aware of the importance of evidence of the medical treatment which became the key factor in plaintiff's decision to remain in Michigan.

Having reviewed Soto, this Court concludes that Petitioner's counsel was mistaken when she stated at this Court's hearing that Soto, supra is "a case specifically pointing to the administrative law judge's awareness of the importance of medical issues and his role in judging credibility." Transcript, April 15, 1994, p 7.

> court would on its own account have made different findings or adopted different standards. Nor will the court upset a decision because of errors that are not material, there being room for the doctrine of harmless error. If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency's path may reasonably be discerned, though of course the court must not be left to guess as to the agency's findings or reasons. (Footnotes omitted.)

As the preceding cases all demonstrate, judicial review of administrative decisions "entails a degree of qualitative and quantitative evaluation of evidence considered by [the] agency." This Court must "accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views". DSO, supra at pp 121 and 124, see also In re Payne, supra at p 693.

It is the opinion of this Court that the ALJ's analysis was thorough and his conclusions well-grounded in fact and law. There is no evidence of any factual or legal analysis by the Director. In cursory remarks, he found merit in DSS's post-hearing exceptions and did not find merit in the provider's exception. This Court cannot discern those agency reasons or standards which require that the provider reimburse the agency for substantially more than the ALJ recommended. Viculin, supra, p 406, n 27. The Director's scanty remarks do not provide a "discernable path" or reflect a "hard look at salient problems". The Director's lack of analysis requires that this Court speculate as to his findings and reasons for the disallowance of MHHC's exceptions or affirm arbitrary decision making.

For the following reasons, it is this Court's opinion that the ALJ's decision be adopted in totality and without exceptions as to those issues raised on appeal:

1) MHHC presented qualified experts, in nursing practice in Michigan and policy administration and development, Joan Guy, R.N.

and Alvan Rimson, M.S.N. and Dr. Hoelzel-Seipp, President of MHHC.

2) DSS presented witnesses who were not as well-qualified regarding the delivery of home health care and the practice of nursing in Michigan. Indeed, one of DSS's nursing witnesses was not licensed to practice nursing in Michigan during the period covered by the audit. The ALJ had the opportunity to assess the credibility, demeanor and veracity of the witnesses. Meadows, supra.

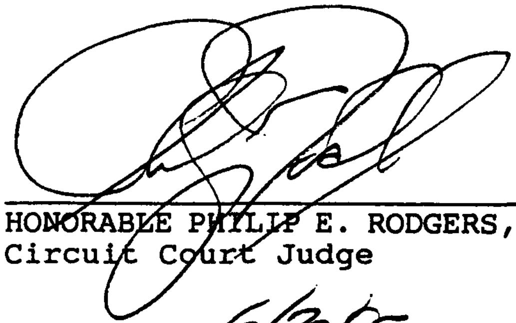
3) The Director's granting of post-hearing DSS exceptions, unsupported by precise findings of fact or conclusions of law, is arbitrary and an abuse of discretion. Evans, supra, Crider, supra and Bannan, supra. In light of the thorough analysis and rationale provided by the ALJ's Recommended Decision, Director's cursory, unexplained decision in his agency's favor is arbitrary. Hardges, supra.

4) At least to the extent that the ALJ ruled in MHHC's favor, Petitioner MHHC met the burden of proving entitlement to at least a substantial portion of the funds paid to the provider. Prechel, supra and Rutherford, supra. The ALJ carefully analyzed the medical basis for each of the disputed payments and reported his conclusions in the Findings of Facts portion of his Recommended Decision. Absent an articulation of the Director's reasons for overruling the ALJ's determinations, the Director's decision was arbitrary and capricious.

In conclusion, it is evident that administrative findings based upon a record of substantial, competent and material evidence are due significant deference. Judge Kane's findings are due this deference. The unsubstantiated, cursory revision to such findings without reference to the record is prima facie evidence of arbitrary and capricious decision making. No deference is due to an opinion which shows no evidence of a thoughtful review of the record. Accordingly, the Petitioner's appeal is hereby granted and the Director's decision reversed, and the ALJ findings reinstated

as the final agency decision.[4]

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/30/95

[4] Implicit in this Court's reversal of the Director's decision and reinstatement of the ALJ opinion is its finding that the ALJ decision is due substantial deference on all issues, including those exceptions raised by Plaintiff and denied by the Director.