IN THE SUPREME COURT OF MISSISSIPPI

BRENTWOOD HEALTH MANAGEMENT OF MISSISSIPPI, LLC D/B/A CHILDREN'S HOSPITAL OF VICKSBURG — **APPELLANT**

V. — **NO. 2008-SA-00169**

MISSISSIPPI STATE DEPARTMENT OF HEALTH — **APPELLEE**

APPEAL FROM THE DECISION OF THE HINDS CHANCERY COURT, FIRST JUDICIAL DIVISION

REPLY BRIEF FOR APPELLANT

ORAL ARGUMENT NOT REQUESTED

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REBUTTAL ARGUMENT

The parties (Brentwood Health Management ("Brentwood") and the Mississippi State Department of Health ("Department")) do not entirely agree on the primary issue before the Court. Nevertheless, based on the strict scope of review governing appeals from the Department, an administrative agency, the primary issue is whether the Department acted arbitrarily and capriciously by ruling in manifest disregard of the evidence presented and by ignoring the substantial evidence Brentwood presented regarding its actions concerning the utilization of the Certificate of Need Number R-0077 and Certificate of Need Number R-0134 (collectively the "CONs")

While this is the core issue before the Court, Brentwood presented additional issues which merit reversal of the State Health Officer's ("SHO") Final Order revoking the CONs regardless of the evidence presented at the Hearing. First, whether the Department even has authority to revoke CONs authorized by the Legislature, and second, whether the hearing officer through her Findings of Fact and Conclusions of Law (the "Recommendation"), relied upon and adopted by the SHO, committed reversible error by failing to conduct the Hearing and make her ruling in compliance with the Department's CON Manual (the "Manual"). The Department presents yet another issue which would uphold the decision of the Department regardless of whether the Department had substantial evidence to revoke the CONs - whether a CON can be automatically void and expire on its own terms without any action by the Department in light of two Attorney General Opinions.

The revocation of the CONs by the SHO was arbitrary and capricious as it was both against the manifest weight of the evidence admitted into evidence at the Hearing

and as the Final Order was not based on substantial evidence but based upon two Attorney General's opinions that were issued after the Hearing. These errors merit reversal.

I. The Certificates of Need Did Not "Expire by Their Own Terms," as the Department, Relying upon Inapplicable Attorney General Opinions, Contends.

Pursuant to the Department's request, the Attorney General opined as to the expiration of a CON in the general sense. In requesting these opinions, the Department did not provide any specific facts to the Attorney General. Both opinions reached the conclusion that CONs expired "by their own terms." The first opinion, which the hearing officer heavily relied upon, was not issued until after the Hearing of this matter had concluded. Then, after the hearing officer issued her Recommendation, which was relied upon by the SHO, yet another Attorney General's opinion was issued concerning the same subject matter. The Department relies heavily upon both opinions in presenting their argument.

Prior to demonstrating these CONs cannot simply "expire by their own terms," it is important to reiterate the Attorney General's Opinion, relied upon by the hearing officer, should not have even been considered as it was issued after the conclusion of the Hearing. Therefore, not only was it not part of the record, but Brentwood had no opportunity to rebut the findings of the Recommendation prior to the Final Order being issued.

The Manual clearly states the State Health Officer "shall consider only the record in making his decision; he shall not consider any evidence or material which is not included therein" (emphasis added). Manual, Ch. 5, Sec. 101.01, at 49. Therefore, the

SHO committed reversible error by simply adopting the hearing officer's Recommendation which was heavily reliant upon this Attorney General's Opinion which was not part of the record.

The analysis could technically stop at this point as this should clearly be grounds for reversal. Nonetheless, even if the hearing officer were justified in considering this opinion, which she was not, this opinion, along with the second Attorney General's opinion, would reach an inaccurate conclusion.

"There is no doubt that, under Mississippi law, a CON is a valuable property right entitled to protection." (emphasis added). *Baptist Mem'l Hosp.-DeSoto, Inc. v. Miss. Health Care Comm'n*, 617 F. Supp. 686, 689 (S.D. Miss. 1985). The Fourteenth Amendment and Article 3, Section 14 of the Mississippi Constitution ensure that only by due process of law can a person be deprived of property. *Miss. Tele. Corp. v. Miss. Pub'l Serv. Comm'n*, 427 So. 2d 963, 967 (Miss. 1983). The Supreme Court has consistently held "that some form of hearing is required before an individual is finally deprived of a property interest." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). An "administrative body must protect such rights before depriving a person of his property," and doing so requires that the person have the right to present evidence at a hearing. *Miss. Tele. Corp.*, 427 So. 2d at 967.

In taking the position that these CONs expired by their own terms, before the construction in question had even been commenced (much less completed), both the hearing officer and the Department relied heavily, not to say solely, upon the Attorney General's opinions. Appellee's Brief at 4-6. More specifically, the hearing officer stated in her Recommendation: "it is clearly established that the CON in question ceased to be

valid after September 5, 2002 ...." R.E. 12. Again, this argument was never even mentioned at the Hearing. Thus, it is clear the hearing officer could have only formed this belief after reading the Attorney General's Opinion. Also, the Department specifically cited the following portions of these Opinions in its brief which demonstrates its reliance:

- June 15, 2007 Opinion explains that, "subsection (4) provided that the Department "shall have the right to withdraw, revoke, or rescind the CON if it finds that the holder has not substantially undertaken construction or other preparation during the period of the CON ... [I]t is within the Department's discretion to determine whether the holder has 'substantially undertaken construction or other preparation.' "
- October 12, 2007 Opinion opines that "The Department may, by regulation, provide for criteria to determine whether 'commencement of construction or other preparation' has been 'substantially undertaken' and or the applicant has made a 'good faith effort to obligate such approved expenditure.' ") However, once the time period stated in the CON has lapsed, the CON is void and no extensions can be granted.

Appellee's Brief at 5-6.

It is again worth noting, while Attorney General Opinions are sometimes persuasive when on point, they are not binding and do not have the force of law. *See, e.g., State ex rel Holmes v. Griffin*, 667 So. 2d 1319, 1326 (Miss. 1995); *McGee v. Johnson*, 868 So. 2d 1051, 1053 (Miss. Ct. App. 2004); *Frazier v. Lowndes Co. Bd. Of*

Edu., 710 F.2d 1097, 1100 (5th Cir. 1979) (applying Mississippi law). Thus, this Court is in no way bound by the conclusions which were reached in either of these opinions.

In addition, reliance upon these opinions is flawed on several other grounds. First, these opinions blatantly ignore the due process safeguards which are to be in place to protect Brentwood's vested property right in these CONs. If we accept these opinions as correct, which they are not, there would be no hearing required prior to a revocation as, pursuant to the opinions, "the CON is void" once the time period has lapsed. However, based on the above-cited opinions in *Baptist Mem'l*, *Miss. Tele. Corp*, and *Matthews*, this cannot be. According to these cases, prior to the revocation of any CON, a hearing must be had prior to depriving Brentwood of its property interest.

The hearing that was had in this matter did not provide due process, because the hearing officer failed to afford Brentwood a genuine opportunity to be heard, due to her mistaken "deference" to an interlocutory decision by Department staff.

Other flaws exist in the opinions. The first opinion, relied upon by the hearing officer, concluded extremely inconsistent findings. This fact alone precludes one from obtaining a definitive conclusion from this opinion. Also, since the factual basis surrounding these CONs was not provided to the Attorney General, this should further serve to discount reliance upon either opinion as they cannot be construed to be "on point."

Finally, these opinions are not in line with the past practices of the Department. In fact, they are not even consistent with testimony provided by the Department at the Hearing. Sam Dawkins ("Dawkins"), Director of the Office of Health Policy and Planning, testified that as of the date of the Hearing, the CONs were still valid. T. 43-44.

In fact, Dawkins actually testified, that only the State Health Officer can revoke a CON. T. 43. Plus, the Department, in the past, has routinely allowed CONs to extend beyond the one-year limit, thereby further demonstrating it did not consider a CON to expire by its own terms — not before this hearing, in any event.[1]

Since September 5, 2002, the date which the Department now contends these CONs expired, the Department has sought progress reports, which were supplied, from Brentwood concerning the status of these CONs. T. 13-15. Which poses the question, why would the Department be concerned of the progress of a CON which had previously expired? Dawkins also testified had the Legislature authorized the amendment to the CON, it "would have started the clock anew on the proposed project" (emphasis added). T. 65. Which leads to the next question, how could the Legislature authorize an amendment to a project which had expired? The simple and correct answer to both of these questions, which Dawkins already answered, is the CONs were still valid.

Moreover, it was the Department who advised Appellant to go before the legislature to properly seek amendment to the CONs in 2006. T. 89. Had the Department viewed these CONs as expired, which Dawkins again testified it did not, it surely would not have (1) sought progress reports from Brentwood after September 5, 2002 or (2) persuaded Brentwood to spend additional monies in an effort to properly amend these CONs. T. 88-9. Thus, contrary to the position the Department now wishes

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[1]For the sake of clarity, we emphasize that the issue in this case concerns CONs for a project whose construction was not completed, so that a CON continued to be necessary for the capital expenditure necessitated by construction. Whether a CON expires after the completion of the project for which it was granted, is not a question raised by the present case.

to take, it never once considered either of these CONs to be expired prior to these Attorney General Opinions being issued.

Therefore, the Department acted at all relevant times as if these CONs were still perfectly valid and actions were taken by Brentwood in reliance upon this. Thus, to essentially "sleep on their right" and not assert the claim that the CONs had previously expired until after the Hearing had concluded not only precludes Brentwood from defending against this assertion, but is also inequitable and unjust in light of the Department's actions in this matter.

Regardless of this argument, the hearing officer was not justified in even considering this first Attorney General's Opinion as it was not part of the record, and the fact she did, warrants reversal of the Final Order. Also, the Department should be precluded from relying upon either opinion as each blatantly ignores the due process requirements which this Court has explicitly stated are required prior to the revocation of a CON. For these reasons, the Department's contention the CONs expired "by their own terms" must fail.

II. The Department's Final Decision Was Not Based on the Overwhelming Weight of the Evidence, as Improper Deference Was Afforded to a Decision Which Was Never Made.

The Department acknowledges in its brief at page 11 that the hearing officer did misstate "the proper standard" of review. However, the Department then makes an attempt to try and muddy the waters by stating despite this misstatement, the Department put on overwhelming evidence which met a "clear and convincing" standard. This argument by the Department ignores the fact that even if Brentwood were to accept the Department sufficiently met its burden, which it does not, this still does not defeat the

fact the hearing officer used the incorrect burden of proof and improper deference was given to a Department decision which in fact had not even been made.

"Generally an administrative agency is afforded deference, but when the agency has misapprehended a controlling legal principle, no deference is due." *Kemper Nat'l Ins. Co. v. Coleman*, 812 So. 2d 1119, 1124 (Miss. Ct. App. 2002). "Since the Commission stated the incorrect burden of proof, which is an error of law, this Court cannot give the normal deference and must review de novo." *Daniels v. Peco Foods of Miss., Inc.*, 980 So. 2d 360 364. (Miss. Ct. App. 2008).

It is again worth noting the precise language the hearing officer used in her Recommendation:

> Due to the Department [sic] issuance of its notice of intent and its finding [sic], the Applicant has the burden to show the Department's finding is "arbitrary and capricious" and without "substantial evidence" or in the alternative, demonstrate compliance with substantial progress on the project. Generally, the Department is afforded "great deference" and has a presumption in favor of its decision. Therefore, the evidence presented by the Applicant would have to show that evidence relied upon by the Department in this matter is not based on reason or judgment and contrary to the applicable criteria (emphasis added).

R.E.5 at 13. The hearing officer stated, relying on her mistaken belief that the Opinion justified a finding that the CONs ceased to be valid, that "the inquiry in this case has to be limited to whether under the facts and circumstances has the Department abused its discretion . . . ." R.E.5 at 12.

In regards to the extension of the CONs, the hearing officer stated that "the Department [has not] abused its discretion" in finding (again, the Department made no *findings*) that the CONs should be revoked. R.E.5 at 13.

Later the hearing officer stated that since the Department had issued a finding (which Dawkins testified the Department had not), "the Applicant has the burden to show the Department's finding is 'arbitrary and capricious' and without 'substantial evidence' ...." R.E.5 at 13.

Finally, in conclusion, the hearing officer stated, she did not find that the Department had "abuse[d] its discretion," in determining Brentwood had not made a good faith effort toward the project. R.E.5 at 16.

The hearing officer clearly misapplied an arbitrary and capricious standard *throughout her analysis,* which is therefore irremediably flawed — as is the Final Order issued by the SHO adopting the hearing officer's decision. Thus, no deference should be provided in this matter, and the Final Order should be set aside.

However even if we were to accept the Department's position that we should ignore the fact an incorrect standard of review was applied, there are still other major flaws with the Recommendation.

In presenting its argument, the Department cited this Court's specific language which correctly noted the importance of determining if a "fair-minded fact finder" would have reached this result prior to determining whether to disturb an agency's decision. *Molden v. Miss. State Dep't of Health*, 730 So. 2d 29, 37 (Miss. 1998). The Department has elected to ignore the plain language found in the Recommendation which correctly demonstrates a "fair-minded fact finder" did *not* render this decision. Plus, as will again be reiterated herein, had there been a "fair minded fact finder", the outcome of this Hearing would have clearly been different.

Again, Dawkins admitted the Department had not developed any formal recommendation or staff analysis prior to this Hearing concerning the revocation of these CONs. T. 69. The letter issued by the Department noting its intent to revoke these CONs was not a "determination". T. 69. In fact, if any decision was made by the Department in this matter it would be that Brentwood's efforts to bring these beds on-line were "reasonable". T. 66. Therefore, even if it was permitted to afford deference to a Department employee's decision, the hearing officer should have listened to the Director of the Office of Health Policy & Planning when he stated Brentwood's actions were "reasonable".

However, the hearing officer not only took the mistaken position she was vested with appellate authority, but in doing so, she gave deference to a decision which was in fact never even made. Despite the Department's contentions the decision was based on the overwhelming weight of the evidence, it is apparent the hearing officer's Recommendation was not the product of her own independent judgment and findings. Thus, no deference by this Court can be afforded to the SHO's Final Order, as it was merely an adoption of the flawed Recommendation. Thus, the Final Order should be set aside.

As it stands after analyzing these first two issues presented by the Department, it appears quite clear this case should at the very least be remanded for a fair and impartial hearing as Brentwood was not afforded due process. First, the hearing officer concluded prior to considering any evidence that these CONs had previously expired. Again, this conclusion was heavily reliant upon an Attorney General's Opinion, which (1) is barred from consideration under the State Health Plan and (2) based on case law, clearly reached

an incorrect result. Then, improper deference was afforded to a decision which was never even made. These two errors alone warrant a remand of this matter.

This Court should also be mindful of the severe implications which could arise if one were to accept these first two positions submitted by the Department. Essentially, the Department of Health would no longer be required to afford holders of CONs with a recognized property right, a formal hearing prior to revocation. A holding of such would ignore the due process requirements which this Court and the Constitution of this state require. Not only would this affect the process for revoking CONs, this argument could potentially be used to deny other owners of property rights, not just CONs, of the due process which they are entitled to receive.

Furthermore, if one were to accept the Department's position to just ignore the fact the hearing officer mistakenly applied the "arbitrary and capricious" standard, this could have an overreaching effect on all administrative hearings in this state. Hearing officers, in not just the Department but also Medicaid, Workers Compensation, and all other administrative hearings, would no longer be required to sit as the true fact finders. Hearing officers could simply defer to an employee's decision, and aggrieved parties would never be afforded a fair and impartial hearing. These results can simply not be had.

Had such critical mistakes not been made, it is Brentwood's position that the Hearing Officer would have correctly considered the relevant evidence and allowed these CONs to remain valid, as we shall now see.

III. The Department Lacks Authority to Withdraw, Revoke, or Rescind Brentwood's Certificate of Need.

It should be reiterated that the Mississippi Legislature, through Mississippi Code Sections 41-7-191(4)(a)(iii) and 41-7-191(3)(b), authorized the issuance of these CONs. Unlike most, these CONs were not issued pursuant to any Department finding of need. In fact, in directing these CONs to be issued, the Legislature waived compliance with any need methodology or any other requirements of the State Health Plan or the CON Manual. To allow them to now revoke this CON would be in direct conflict with the Legislative mandate.

The Department has made the argument the issuance of these CONs was purely discretionary, and therefore, it is at liberty to revoke them. If one were to accept this position, one would likewise be inclined to believe the Department was vested with complete authority to alter, amend, or address any issues associated with these CONs. After all, as the Department contends, it was solely left to its discretion whether these CONs would in fact be issued. However, this is not so. In fact, only the Legislature was at liberty to make such amendments to these CONs, and the Department actually advised Brentwood, upon gaining ownership of these CONs, it must seek approval from the Legislature prior to relocating these beds as the Department was not vested with such authority. T. 89. Thus, it seems illogical the Department, which is without authority to amend these CONs as the Legislature is the governing body that approved their issuance, would now be vested with authority to revoke them. Such a result would serve to undermine the Legislature's decision.

Plus, it should also be noted again that the Department acknowledged that, had the Legislature approved this amendment, the CONs would have remained perfectly

valid. T. 65. This, in essence, further demonstrates the Legislature, not the Department, is in ultimate control of these CONs. After all, if the Legislature had made this amendment, the letter issued by the Department alerting Brentwood of its intent to revoke would have been completely ignored.

This stance by the Department is clearly conflicting with the legislative mandate, and to allow the Department to revoke these CONs after the Department sent Brentwood to the legislature to seek guidance leads to a perverse outcome which quite simply cannot be had.

IV. Brentwood Successfully Demonstrated That a Good-Faith Effort Had Been Made, and Thus the Department Acted Arbitrarily and Capriciously in Revoking These CONs.

The Department correctly pointed out that its decisions are insulated from disturbance, "unless the court finds that the order is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional rights of any party involved in the appeal . . . ." Miss. Code Ann. § 41-7-201(2)(f). As has already been demonstrated herein, Brentwood's constitutional rights were clearly violated in two respects. First, the Hearing Officer considered an Attorney General's Opinion which was (1) clearly not part of the record and (2) ignored the due process requirements which are to be afforded prior to revoking a CON. Second, the hearing officer gave improper deference to a decision which the Department had not even made. Each of these alone serves to violate Brentwood's constitutional rights and require the Final Order to be set aside. However, as will be set forth below, Brentwood

also established a "good-faith effort" to relocate the beds which too calls for the Final Order to be reversed as the decision was arbitrary and capricious.

The Department has focused their analysis largely in part on the fact there has been no "commencement of construction" at the approved site. Brentwood fully acknowledges this fact and has not once contended otherwise. What the Department's analysis is void of, is the extensive and "good-faith" efforts which have been made by Brentwood to have these approved beds brought on-line. Several key facts warrant reiteration at this time to properly demonstrate the "good-faith" efforts put forth in this matter.

It should again be noted the ownership of this CON has changed hands several times, and while there has been a large passage of time since the CON was issued, the current owner, Brentwood, has been extremely diligent in seeking to have these beds brought on-line since obtaining ownership of these CONs. Therefore, any lack of diligence by previous owners should be disregarded as neither the Department nor the Legislature has taken issue with Brentwood obtaining ownership. In fact, if the Department had an issue with the lack of progress, it would have been prudent to alert Brentwood of this when Brentwood sought the Department's help in amending the CONs rather than act as if there were no issues with either. The Department made no such mentioning, as Dawkins testified, and Brentwood proceeded to diligently seek out the best option for bringing these beds on-line. T. 46-50.

Upon obtaining this CON, Brentwood determined it would be more economically feasible to see if these beds could potentially be relocated to one of Brentwood's existing locations. Had this opportunity been afforded Brentwood, this would have served to

As if this does not sufficiently demonstrate the Department's actions were arbitrary and capricious, Brentwood would again submit while construction may have not commenced, sufficient progress had been made. Substantial evidence has been put forth to demonstrate the great lengths Brentwood went to seek this amendment. Once it was apparent the CONs would not be amended, Brentwood intensified its efforts in Warren County. The fact the hearing officer, and now the Department, chose only to focus on actual construction in Warren County, and ignore the great efforts by Brentwood demonstrated herein, is clearly arbitrary and capricious.

Moreover, Brentwood would again reference the other arguments discussed both herein and in the initial brief which further demonstrate the unreasonableness of the hearing officer's decision. Each of these arguments alone should be sufficient to demonstrate the decision of the hearing officer was arbitrary and capricious. However, when viewed collectively, the arbitrary and capriciousness of this decision is overwhelmingly demonstrated.

CERTIFICATE OF SERVICE

The undersigned counsel for Appellant does hereby certify that he has on this day caused to be sent via United States mail, a true and complete copy of the above and foregoing document to:

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So certified, this the *17th* day of November, 2008.

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