IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WESLEY MEDICAL CENTER **APPELLANT**

VS. **CIVIL ACTION NO. G2008-466 W/4**

MISSISSIPPI STATE DEPARTMENT OF HEALTH and FORREST GENERAL HOSPITAL **APPELLEES**

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

BRIEF OF APPELLANT WESLEY MEDICAL CENTER

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the justice of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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(10) Mississippi State Department of Health, Appellee

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(12) Southern Bone and Joint Specialists, P.A.

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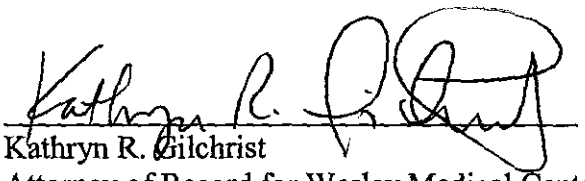
(14) David Burckel, Administrator, Southern Bone and Joint Specialists, P.A.

(15) Cassandra B. Walter, Esquire, Hearing Officer

(16) Honorable Patricia D. Wise, Chancellor

Respectfully submitted,



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I. STATEMENT OF ISSUES

Issue One: Whether a finding that Forrest General's CON Application is economically viable is contrary to the manifest weight of the evidence.

Issue Two: Whether the Department's determination that Forrest General may relocate **a portion** of its orthopedic service, but not the entirety of that service, to a location remote from the main hospital campus, is contrary to the Department's own rules and regulations, and thus exceeds its statutory authority.

Issue Three: Whether the Department's finding that there is a need for this project is contrary to the manifest weight of the evidence.

Issue Four: Whether, in the face of its undisputed financial statistics, Forrest General's Application to relocate a portion of its orthopedic service can reasonably be found to be consistent with the General Goal of the State Health Plan that it accomplish "some cost containment."

II. STATEMENT OF THE CASE

This is an appeal from a decision of the Mississippi State Department of Health ("the Department") on a Certificate of Need (CON) Application. The Appellee, Forrest General Hospital ("Forrest General"), is a Mississippi, not-for-profit, tax-exempt general acute care hospital, owned by Forrest County. Forrest General operates five-hundred, twelve (512) beds and is governed by a seven-member board of trustees. Forrest General proposes to relocate thrity (30) of its existing thirty-seven (37) orthopedic beds to a new hospital facility to be constructed on behalf of Forrest General by one of two orthopedic groups practicing in the Hattiesburg area – Southern Bone and Joint Specialists ("SBJ"). The proposal is that SBJ will build the new facility adjacent to SBJ's clinic offices and single specialty ambulatory surgery center, but in a location remote from Forrest General's hospital campus, and lease space to the hospital for operation of the relocated portion of its orthopedic service.[1] Staff Analysis at 1 (Hrg Ex. 3).

On December 1, 2005, Forrest General filed a CON Application seeking approval from Department of its plan to construct a new "hospital facility" and to relocate thirty (30) orthopedic beds to that facility where they would continue to be operated as orthopedic acute care beds. As the basis for its Application, Forrest General stated that the wing of its current facility where orthopedic services are primarily provided is outdated and too small to easily accommodate wheelchairs and other equipment commonly encountered in the treatment of orthopedic patients. CON App. at II-2, 3; III (Hrg. Ex. 2). Forrest General contended that its plan to relocate thirty (30) of its orthopedic beds to the proposed new location adjacent to Hattiesburg's largest orthopedic group (SBJ) would benefit the hospital by forging a closer bond between it and the orthopods. Forrest General took the position that this relocation would not cause any adverse

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[1] Exhibits from the Hearing on this matter (which are in the Record) are referred to herein as "Hrg. Ex. ___." Referenced portions of the Hearing transcript are referred to by the name of the witness and the transcript page number. Where referenced portions of the record are being provided along with this brief, that is noted by either R.E. (record excerpt) or App. (Appendix).

impact to existing service providers in the service area because it will not add any bed capacity to the service area, and therefore (according to Forrest General) will not be in a position to take patients from the existing providers. CON App. at III-7 (Hrg. Ex. 2).

Forrest General argues that the project will be financially feasible and estimates it will experience a loss of $2,323,000 in the first year, a loss of $831,000 in the second year, and an income in year three of $155,000. Ex. I to CON App. (Hrg. Ex. 2).

After considering the Application, the Department's Staff issued its Staff Analysis recommending approval of the Application. Wesley Medical Center ("Wesley") filed a timely Request for a Hearing During the Course of Review.

CON applications for the construction of a healthcare facility and those for the relocation of acute care beds are subject to review in accordance with *Miss. Code Ann.* §41-7-191(1)(d)(xii) (1972, as amended), as well as duly adopted rules, procedures, plans, criteria and standards of the Department. The Department reviews all such applications for compliance with the *State Health Plan* in effect when the application is filed – in this case the 2006 *State Health Plan* ("*SHP*") – and Section I of the Mississippi Certificate of Need Review Manual.

The Hearing requested by Wesley took place on August 14 – 15, 2007. Wesley participated in the Hearing as an affected party as permitted in the CON Review Manual. At the hearing, legal representatives for Forrest General, Wesley, and the Department were present. Thirteen (13) witnesses testified, and twenty (20) exhibits were either identified or introduced into evidence. Approximately sixty (60) days following the Hearing, the parties submitted their post-hearing briefs (proposed findings of fact and conclusions of law), and the Hearing Officer issued her opinion on January 25, 2008. In her opinion, the Hearing Officer found that Forrest General's project satisfies the requirement of economic viability, that it constitutes a permissible relocation of beds and services, and that there exists a need for that relocation. She

recommended that the Application be approved, and at the monthly CON meeting, the State Health Officer concurred in that recommendation, approving the Application. Hrg. Officer's Final Opinion (R.E. 3).

Wesley timely appealed the Department's decision to the Chancery Court of the First Judicial District of Hinds County. Wesley contended before Judge Patricia Wise that the Hearing Officer's opinion was inconsistent with the law, exceeded the statutory authority granted to the Department, and contained multiple conclusions and findings that were contrary to the manifest weight of the evidence. Judge Wise considered the briefs of the parties and heard oral argument on the matter. She issued her opinion, dated June 20, 2008, affirming the Department's decision. Chancellor's Opinion (R.E. 2).

Contrary to the conclusions of both the Hearing Officer and the Chancellor,[2] Forrest General did not satisfy the requirements imposed on its Application by either the SHP or the CON Review Manual. As is demonstrated herein, the Department exceeded its power by giving approval to an Application for a project that will not be economically viable, that proposes an illegal relocation of a portion of a service, and for which there is no real need. Its findings were in some respects contrary to the manifest weight of the evidence. The Chancellor, likewise, erred. Both the Department and the Chancellor should be reversed, and Forrest General's Application remanded for disapproval.

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[2] The Court should note that in this case the Hearing Officer's opinion was, in its entirety, nothing more than a near-verbatim copy of Forrest General's post-hearing brief. This is important because the parties submit post-hearing briefs simultaneously following a CON hearing. Forrest General's brief (and thus the Hearing Officer's final opinion) includes no consideration of the issues raised by Wesley following the Hearing. While it is axiomatic that parties submit post-hearing briefs in order to assist the Hearing Officer in making a final recommendation to the Department, it is not appropriate for the Hearing Officer merely to adopt into one party's brief (including misstatements contained therein), and fail even to acknowledge the other party's arguments. The Hearing Officer's action in this regard calls into serious question whether adequate consideration was actually given to both sides of the issues in this matter.

III. SUMMARY OF THE ARGUMENT

The summary of Wesley's argument on this appeal is very simple: in its decision to approve Forrest General's Application, the Department completely ignored its own rules and requirements, as well as the evidence presented in the Hearing on this matter. Specifically, the Hearing Officer recommended approval of an Application which the evidence clearly demonstrated:

1. failed to satisfy the economic viability requirement;
2. was an attempt to relocate a portion of a service (orthopedics), which the Department's own representative testified is not permitted;
3. seeks a project that is unneeded; and
4. will unquestionably NOT promote cost containment.

Economic Viability

The evidence in this matter, largely supplied by Forrest General's own Chief Financial Officer, demonstrated without any question that Forrest General's orthopedic program has lost money in the past, is losing money now, and will continue to lose money after this proposal is in place. The evidence demonstrated further that in preparing the CON Application, Forrest General's financial personnel gave little or no real thought to the compilation of expense items and revenue calculations. Instead, they guessed. They speculated. And in so doing, they omitted numerous expenses and understated others. The result of the inquiry was a clear answer – that this project will NOT make money by the end of its third year of operation. That instead, a service area which, at Forrest General, has been losing millions of dollars annually, will be, in part, relocated to a more expensive setting where the very factors that have been the cause of the annual losses to date will actually get worse. There is no way the Department can reasonably have come to the conclusion that this project meets the economic viability requirement. And it is

just that – a requirement. For this reason alone, as is set forth in detail herein, the Application must be disapproved. The Department and the Chancellor simply made the wrong decision in refusing to recognize this issue as a "deal-breaker."

Relocating a Portion of a Service

At the Hearing, the Department's own representative testified that a portion of a service area, such as orthopedics, cannot be relocated under the State Health Plan and the Certificate of Need Review Manual. Underlying this testimony was his stated belief that Forrest General's Application was, nonetheless, approvable, because Forrest General did not propose to relocate a portion of its orthopedic service, but the whole service.[3] When the evidence adduced from Forrest General thereafter demonstrated the contrary – that Forrest General absolutely plans to relocate only a portion of its orthopedic service (30 of 37 beds) – the Hearing Officer simply ignored that evidence and recommended approval anyway. The Department's approval of that recommendation is reversible error.

No Need Exists

As is fully discussed herein, Forrest General's entire argument regarding the alleged need for this facility is based on what it contends is the outdated state of its current physical plant, specifically the size of some of its patient rooms and the width of the doorways between the rooms and the bathrooms. Forrest General's entire argument breaks down, however, due to the simple fact that it is relocating only part of its orthopedic service. If Forrest General's need argument is to be believed, then one would have to conclude (1) that renovation of Forrest General's facilities is not a possibility (which the evidence at the Hearing showed is not the case); and (2) that only SBJ's patients need larger rooms and wider doorways, while the patients

[3] The Department's assumption was not ill-founded, as Forrest General's Application never indicated that anything less than the entirety of its orthopedic service was proposed for relocation. *See*, e.g., CON App. Section III, Item 7, under No. 10 (will "relocate existing orthopedic services and staff" – no indication of less than 100%).

of the Hattiesburg Clinic physicians are just fine in the current facility. Because of the discrepancy in treatment of these two separate groups of physicians, both of whom do the majority of their orthopedic practice at Forrest General, Forrest General's need argument fails.

Otherwise, Forrest General identifies nothing in support of its need argument other than the fact that doing this project will significantly enhance the hospital's relationship with the SBJ physicians. That simply is not a legitimate basis for a finding of need. As is detailed in the following pages, there is no need for this facility.

There is No Evidence of Cost Containment

Forrest General's orthopedic service is losing $2 to 3 million annually. Here, they propose to provide orthopedic services in not one, but two locations – increasing operational expenses, increasing capital costs, and requiring duplicative personnel, equipment, and services. There is NO evidence of cost containment. This project will cost more and result in greater losses on orthopedics than Forrest General is experiencing now.

IV. ARGUMENT

A. STANDARD OF REVIEW

The scope of review of an appeal of a final order of the Department is controlled by *Miss. Code Ann.* §41-7-201(2)(f), which provides in part that:

> [t]he order shall not be vacated or set aside, either in whole or in part, except for errors of law, **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 [Department], **or** violates any vested constitutional rights of any party involved in the appeal. . . .

(Emphasis added).

Appellees likely will contend that this standard is set so high as to be virtually unreachable. It is not, nor was it intended to be. For while courts have uniformly recognized the existence of a presumption in favor of the Department (or any state agency), the statute expressly

recognizes that the Department **can** "get it wrong." Furthermore, when the Department does get it wrong, the statute mandates that the right decision must be imposed by an appellate body. Indeed, as this Court has held on many occasions in the specific context of certificates of need, any decision by the Department that is not supported by substantial evidence **OR** that is contrary to the manifest weight of the evidence not only may be reversed – it must be reversed. *See Mississippi State Department of Health, et al. v. Natchez Community Hospital*, 743 So.2d 973, 977 (Miss. 1999) (attached as App. A), *citing Mississippi Real Estate Comm'n v. Anding*, 732 So.2d 192, 196 (Miss.1999). And, while "substantial evidence" has been defined by this Court as "more than a scintilla," *Mississippi Code Annotated* §41-7-201 recognizes that even in cases in which "more than a scintilla" of evidence exists to support the Department's decision, if that decision is, nonetheless, contrary to the manifest weight of the evidence, it must still be reversed. In other words, where the Department's decision may have a minute body of evidence supporting it, but the majority of the evidence presented is to the contrary, that decision cannot stand.

Here, the Department's decision is unquestionably contrary to the manifest weight of the evidence on at least two points – either of which, alone, requires reversal. Specifically, the vast majority of evidence presented at the Hearing on the issue of economic viability established that Forrest General failed entirely to prove that this new orthopedic facility will be profitable by the end of its third year of operation. In addition, Forrest General was unable to demonstrate any true need for this project. Instead, the evidence showed that if this project goes forward, it will compromise the very existence of Forrest General's already struggling orthopedic service line.

In addition, the Department clearly exceeded its statutory authority in allowing Forrest General to relocate only a portion of its orthopedic service.

In ignoring these critical factors, the Chancellor committed similar error to that committed by the Department. The Department's decision in this matter simply does not pass muster under the statutory standard of review. That decision must be reversed.

B. THE DETERMINATION THAT THIS APPLICATION IS ECONOMICALLY VIABLE IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE

The most glaring failure by Forrest General to meet the requirements for approval of its CON Application was the absence of evidence sufficient to establish that the project is economically viable. Indeed, the testimony from its own CFO, Ed Tucker, was most damaging of all. On direct, Tucker recited all of Forrest General's "talking points" – stating that he had taken a "conservative approach" and that this plan offers an "opportunity for economic improvement." When questioned about the details of his financial analysis, however, Tucker crumbled, recognizing that, at best, this project is "more feasible" than the current operation, which he acknowledged is regularly losing $2 to $3 million a year. The Hearing Officer and the Chancellor gave credence to the first part of Tucker's testimony and apparently disregarded the rest. Their action in so doing was inappropriate and resulted in wrong decisions. This issue alone requires reversal of the Department's decision.

In order to demonstrate economic viability, every application must satisfy General Review Criterion 4, which provides as follows:

> **Economic Viability: The immediate and long-term financial feasibility of the proposal, as well as the probable effect of the proposal on the costs and charges for providing health services by the institution or service. Projections should be reasonable and based upon generally accepted accounting procedures.**
>
> **a. The proposed charges should be comparable to those charges established by other facilities for similar services within the service area or state. The applicant should document how the proposed charges were calculated.**
>
> **b. The projected levels of utilization should be reasonably consistent with those experienced by similar facilities in the service area and/or state. In addition, projected levels of utilization should be consistent with the need level of the service area.**

c. **If the capital expenditure of the proposed project is $2,000,000 or more, the applicant must submit a financial feasibility study prepared by an accountant, CPA, or the facility's financial officer. The study must include the financial analyst's opinion of the ability of the facility to undertake the obligation and the probable effect of the expenditure on present and future operating costs. In addition, the report must be signed by the preparer.**

CON Review Manual at 57 (Hrg. Ex. 6). To satisfy this requirement, the Department has consistently required that every applicant must show that its project will be profitable by the end of its third year of operation. Every applicant knows (or should know) when it prepares an application that its financials must satisfy this standard. Forrest General, being no stranger to the CON application process, certainly was aware of this requirement before it ever filed its Application. The Department's Chief of the Division of Planning, Sam Dawkins, testified on the first day of the Hearing in this matter. He left no doubt that if Forrest General's project could not be shown to be profitable by year three, then its Application would have to be disapproved.[4] Dawkins at 53-54 (R.E. 4).

Before reviewing the evidence that was presented at the Hearing, (which must be done on appeal in order to determine where the "manifest weight of the evidence" lay at the close of the

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[4] In its proposed findings of fact and conclusions of law, submitted to the Hearing Officer for consideration, Forrest General suggested that an application might be deemed to satisfy this criterion simply by showing that its **rate of loss** each year will decrease, and that it merely holds the promise of becoming profitable in some year after the third. The Chancellor even noted in her Opinion that Tucker stated that the "key question for him" regarding the proposal's economics was "whether the proposed orthopedic facility would be **more feasible** than the current operation [which is losing millions a year]." Chancellor's Opinion at 15 (R.E. 2). By adopting Forrest General's brief as her opinion, the Hearing Officer also picked up on this suggestion – as did the Chancellor after her. *See* Hrg. Off. Op. at 27-28 (R.E. 3); Chancellor's Opinion at 14 (R.E. 2). There is NO AUTHORITY in any Department rule, regulation or manual for such a proposition. Instead, as Mr. Dawkins confirmed, the Department's rules are directly to the contrary.

In suggesting that Forrest General's Application might be approvable if it merely loses less each successive year after this proposed facility is up and running, the Hearing Officer and the Chancellor both essentially applied a different definition and a lower standard for economic viability than that mandated by the Department's own rules and regulations. That action constitutes reversible error. Forrest General may not be held to a lower standard than that imposed by the Department on all other applicants. *See St. Dominic-Jackson Memorial Hospital v. Mississippi State Department of Health*, 728 So.2d 81, 85 (Miss. 1998) (Department reversed for applying a lessened standard of need, contrary to its own definitions).

As is demonstrated herein, the manifest weight of the evidence soundly established that Forrest General's project is not economically viable. The Application was therefore not approvable.

Hearing), a brief discussion of the role of the Department's Staff is in order. As this Court is aware, every CON Application that is received by the Department is first reviewed and assessed by the Staff. The Staff's assessment, called the Staff Analysis, is the first indication given to an Applicant regarding the Department's view of the application's content. In its initial review of Forrest General's project, the Staff found that the Application was economically viable and satisfied GR-4. There are several reasons, however, why even the Department recognizes that the Staff's Analysis regarding the economic viability of any application may be wrong. As Dawkins testified in the Hearing, the review the Staff performs of the financial portion of an application is merely cursory and does not involve any determination of the accuracy of numbers provided. Instead, the Staff assumes the foundational numbers are reliable and merely performs a double-check of the actual addition and subtraction. Dawkins at 38-41 (R.E. 4). In other words, according to the Department itself, as to Forrest General's Application the Staff was (as it always is) entirely unaware of the accuracy or reliability of the numbers in the Application, and its policy is not to do any review of background information. *Id.*

In view of these facts, Dawkins accurately recognized that any number of issues might cause an Application which the Staff has deemed, and which appears on its face to be economically viable by the third year (i.e., all the numbers provided add up and they are high enough to equal profit in year three) to fail to satisfy GR-4 when more closely examined. Specifically, understated expenses, omitted expenses, and overstated utilization in the financial portion of the application are some of the issues Dawkins agreed would warrant a change in the Staff's initial conclusion. Dawkins at 54-55 (R.E. 4). Here, all of those issues are present, along with several instances in which Forrest General relied on erroneous calculations which the Staff simply did not catch in its review. These issues combined should have made it clear to the Hearing Officer, the Department, and the Chancellor that the proposed project will not make

money in year three. In finding to the contrary, the Department and the Chancellor ignored the manifest weight of the evidence and the approval of the Application must be reversed.

1. Forrest General's Financials Are Largely the Product of Speculation.[5]

Testifying on Forrest General's behalf regarding the economic viability of this project was Ed Tucker, Forrest General's CFO. On cross-examination, Tucker could not identify the basis for many of the numbers contained in the financial section of the Application. He also testified that he is not certain whether this project is in the financial best interest of Forrest General. Because Tucker is also the individual who performed the financial feasibility study and declared this project feasible, the uncertainty he expressed in his testimony during the Hearing necessarily calls into question the reliability of the study he previously provided.

The following items are matters which have significant bearing on the project's financial feasibility, and as to which Tucker either was uncertain, or about which Tucker and Oliver (Forrest General's CEO) flatly disagreed with one another:

a. The number of FTE's to be added as the result of this project (which greatly impacts operational expenses). Tucker at 316-317 (R.E. 4);

b. What staff will be relocated as the result of this project; (Oliver testified that all RN's and paramedical technical people will move, while Tucker stated he was uncertain who will move or where replacement staff will be needed as a result). Tucker at 322-323 (R.E. 4);

c. What level of assistance will be required at the proposed new facility from radiologists, pathologists, anesthesiologists, and hospitalists. (Tucker was unable to state

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[5] One of the most speculative items is the fact that no lease document was presented with the Application. The Application should not have been deemed complete without a draft lease setting forth terms and a negotiated lease rate. CON App. at I-6 (Hrg. Ex. 2) (in response to requirement to provide lease document, Forrest General responded "not applicable.") Here, there was no agreed upon lease rate because Forrest General and SBJ had not been able to agree. Tucker 343-344 (R.E. 4). Moreover, no evidence was presented at the Hearing to ensure that such an agreement would or could be reached. *Id.* The Hearing Officer could not possibly have made a reliable decision on this project without knowing for certain that there IS an agreed-upon lease and being able to factor in an actual lease rate in her assessment of the Application's economic viability.

whether these people would be present twenty-four hours a day, seven days a week, or less time than that. Tucker at 325 (R.E. 4). He and Oliver also disagreed about how many of each would be needed and the cost associated with them. Tucker at 327 (R.E. 4)).

d. Non-Medical Supply Costs: Tucker was unable to testify to the basis for the figure included in the Application. He did not know what Forrest General's per day non-medical cost was historically, and he did not know whether that number formed the basis for the projection in the Application. Tucker at 333 (R.E. 4).

e. Property taxes: In the Application, Tucker calculated property taxes based on patient days. He admitted during the Hearing, however, that because taxes have no relation to patient days, this was not a good or reliable method. Tucker at 341 (R.E. 4). He stated that he has no idea what the tax on the property would be or whether the figure included in the Application is reliable. Tucker at 341 (R.E. 4).

In addition these five items, in the context of whether this proposal will be successful financially, Tucker testified without reservation that the entire Application is "a stretch." Tucker at 278, 296, 379-380 (R.E. 4). "This is a difficult one," he stated. "It's not a slam dunk by any means." Tucker at 296 (R.E. 4). Ultimately, Tucker stated that the best possibility this project provides Forrest General is an opportunity to "break even" and a chance at a "better financial outcome" that it has now. Tucker at 278, 380 (R.E. 4). Tucker may be right, but the "financial outcome" Forrest General has had the last several years has been a $2 to 3 million loss on orthopedics. Tucker at 305 (R.E. 4). "Better" than that on an annual basis **does not satisfy the standard required by the Department.**[6]

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[6] As already mentioned, Tucker's testimony on this point, which both the Hearing Officer and the Chancellor noted, was that the key question for him was whether the proposed orthopedic facility will be "more feasible than the current operation." *See* Hrg. Off. Op. at 28 (R.E. 3); Tucker at 264 (R.E. 4). Whether a new project is "more feasible" than the existing situation is simply the wrong standard to apply under GR-4 and is one reason why the Department must be reversed.

As the additional facts set forth in the following sections further establish, this project will not make a profit in year three and is, thus, not financially feasible. Instead, although it may decrease Forrest General's recent rate of loss on orthopedics, it will continue to lose money, and it will do that well beyond the first three years of operation. It is the Applicant's burden to demonstrate that the proposed project will satisfy the economic viability criterion. That burden was not satisfied in this case.

2. Numerous Expenses in Forrest General's Proforma Are Admittedly Understated.

In addition to his uncertainty concerning much of the financial aspect of this project, Tucker also admitted that numerous expense items in Forrest General's financials are understated. As Dawkins recognized, understated expenses (which were unknown to the Staff when it prepared the Staff Analysis) must be reviewed and considered in order to determine whether, once the proper expenses are accounted for, the project is economically viable. Based on Forrest General's own CFO's testimony, it is undisputed that at least the following items in the financial proforma for this project are understated:

a. Supplies: Forrest General projected supply costs at 80% of its actual historical experience. The basis for the 20% reduction in was a savings Forrest General hopes to attain through collaboration with the SBJ doctors. Tucker at 294 (R.E. 4). However, Tucker conceded that the anticipated "collaboration" has, in great part already taken place – and with results that were inferior to those hoped for. Tucker testified that Forrest General has already negotiated with its primary and secondary suppliers of orthopedic implants. The primary supplier, which supplies 80% of Forrest General's needed implants, allowed a discount of only 10%, and the secondary suppliers would permit no discount at all. Moreover, Tucker stated that even if a discount might be obtained in the future from those secondary suppliers, he would expect it to be a smaller discount than 10%. Tucker at 308-310 (R.E. 4). Therefore, according to

Tucker's testimony, the supply costs in the Application were understated by at least 10%, or in excess of $640,000.

b. Employee salaries: Tucker acknowledged that salary numbers in the Application should have had inflation built in at a rate of 3% per year for the three year intervening period from Application to project completion date. That was not done. Tucker at 319-320 (R.E. 4).

c. Benefits for employees: Forrest General projected benefits for its employees at 20% of salaries. Tucker at 315 (R.E. 4). Tucker testified, however, that Forrest General pays benefits to its employees at 20-23%, plus the "Forrest General health plan costs." Tucker at 316 (R.E. 4). The benefits projection is, as a result, low. It is impossible to project how much higher this figure should be because Forrest General was unable to state the cost of the Forrest General health plan. Even Tucker agreed, however, that the projected cost must be increased due simply to the large increase in the number of employees projected to accompany this project (anywhere from 51.6 to 73.5 additional FTE's NOT accounted for in the Application). Tucker at 317 (R.E. 4).

d. Compensation of radiologists, pathologists, hospitalists, and anesthesiologists: In the Application, the projected compensation of these professional persons was calculated based on a "per admit" basis. Tucker acknowledged that that is not the method of compensation used at Forrest General. Forrest General instead compensates these positions on a "per shift" basis. While Tucker stated that he believed the figure in the Application is appropriate for a person working seven days in every fourteen-day period, he was unable to confirm whether Forrest General would need one or two or three people in each of these positions. Oliver testified previously that the new project would require service from two or three hospitalists. "I heard him say that," Tucker stated. "I thought he was wrong." Tucker at

327 (R.E. 4). Ultimately, Tucker testified that the calculation performed for the pro forma was "just a quick way of doing the financial model." Tucker at 329 (R.E. 4).

Based on the testimony of Forrest General's own two top witnesses, the only thing that was clear at the end of the Hearing about the projected number of persons in these positions who will be necessary to be on-site at the new project or the compensation to be paid to them individually or as a group was that it was unclear. There was no consensus between Tucker and Oliver, and there was no way for the Hearing Officer to conclude that substantial evidence supported any particular answer. Oliver's testimony confirmed that the compensation projection should increase dramatically to cover two or three hospitalists instead of just one, but it remained uncertain what adjustment would be needed to the number of pathologists, radiologists and anesthesiologists, or to their compensation. Tucker stated that although all of those specialists are paid on a per shift basis, he did not know how much they are paid per shift. Tucker at 329 (R.E. 4).

e. Non-Medical Supplies: As with employee salaries, Tucker acknowledged that the non-medical supply cost numbers in the Application should have had inflation built in at a rate of 3% per year for the three year intervening period from Application to project completion date. That was not done. Tucker at 333 (R.E. 4).

f. Utilities: In the Application, the utilities costs were projected on a per square foot basis, based on Forrest General's actual experience in its main hospital facility. Wesley does not dispute the manner of the calculation. However, in order for the calculation to be reliable, the correct number of square feet must be used. Although the proposed new facility will total 67,296 square feet of space, Forrest General only calculated utility expense based on 61,930 square feet. Tucker at 334 (R.E. 4). Tucker at first stated that that figure represented heated and cooled space, but subsequently acknowledged that that was not the case. Tucker at

334-336 (R.E. 4). Ultimately, Tucker conceded that Forrest General should have applied the entire square footage of the facility, or 67,296 square feet in its calculation. The utilities projection is, as a result, understated.

g. Pharmacy Expense: Tucker confirmed that there should be a pharmacy expense for this proposed project, and that it was not included. Tucker at 343 (R.E. 4). There was no testimony as to what amount of expense should be projected for pharmacy. This item was (admittedly by Forrest General) understated.

h. Fixed Equipment costs: Tucker confirmed that due to an apparent mathematical error (undetected by the Staff), this amount was understated by $244,200. (Application says $2,974,830, while correct figure should be $3,219,030). Tucker at 655 (R.E. 4).

i. Non-Fixed Equipment costs: Tucker confirmed that due to an apparent mathematical error (undetected by the Staff), this amount is understated by $701,748. (Application says $1,368,082, while correct figure is $2,069,830). Tucker at 356, 655 (R.E. 4).

j. Capitalized Interest: Tucker confirmed this figure was understated due to the understatement of the fixed and non-fixed equipment costs. He was uncertain of the amount of additional interest that should have been projected. Tucker at 655-656 (R.E. 4).

k. Average Length of Stay: Forrest General was repeatedly inconsistent in its use of ALOS figures throughout the Application. In both the Application and the Hearing, Forrest General argued that the ALOS for patients in the proposed new facility will be lower, bringing about cost containment. The historical ALOS for these patients is 4.6 days. In the financial section of the Application, however, Forrest General used a higher number (5.8 days). The impact of the higher ALOS number is to inflate revenues. It also calls into serious question how Forrest General expects to attain any cost containment through this very expensive project.

3. This Project Will Not Make Money in Year Three, and Therefore Fails to Comply with GR-4.

Wesley followed the testimony of Tucker at the Hearing with testimony from its own expert witness, Charles Overstreet, who was qualified by the Hearing Officer as an expert in the fields of strategic planning, performance improvement and financial analysis in the healthcare industry. Tr. at 578, 586 (R.E. 4). Overstreet presented Exhibit 19, which was admitted into evidence. *See* R.E. 5. Exhibit 19 contained a revised financial analysis of the proposed project, taking into consideration many (though not all)[7] of the understated and omitted expenses, in accordance with Tucker's testimony. Overstreet at 596, et seq. (R.E. 4).

Specifically, Exhibit 19 accounts for the inflation that Tucker testified should have been applied during the intervening three years from the date of the Application to the date of the beginning operation of the Orthopedic Institute. Overstreet at 601-602 (R.E. 4). In making this adjustment, Overstreet used a per year inflation rate of 3% or 4%, **as Tucker had indicated was appropriate.**

Significantly, although he recognized that the actual savings accomplished by Forrest General in its efforts to reduce supply costs is only 10% savings on part of the necessary orthopedic supplies, in an effort to be conservative, Overstreet did not adjust Forrest General's supplies expense to reduce the savings from the 20% that was credited in the Application. Importantly, the amount included in the Application for 80% of Forrest General's supply costs was $5.179 million. That adjustment, once made in accordance with Tucker's testimony, would increase supply costs to $5.826 million, an increased cost of approximately $645,000. This amount alone establishes the Application's failure to satisfy GR-4. Overstreet at 603 (R.E. 4).

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[7] Overstreet was unable to account for all understated and omitted expenses simply because Forrest General did not know what the accurate numbers should be. The burden of proof to show the economic viability of this Application was on Forrest General. Forrest General failed miserably to carry that burden. In the end, the deficit Overstreet identified after year three of the operation of the proposed project would be far greater due to amounts Forrest General simply did not know or never considered.

Overstreet did not include any additional expense for pharmacy in his financial analysis because he had no information upon which to base a figure. He agreed with Tucker that pharmacy would be a significant additional expense. Overstreet at 606 (R.E. 4).

Overstreet made corrections to the utilities calculation and the property tax calculation. He did not decrease Forrest General's projected utilization or revenues.[8] Overstreet at 615 (R.E. 4). He did not change the number of admits or the average length of stay. After applying all of Tucker's concessions as to the financials, the result was that, even after three years, Forrest General will lose nearly $1 million. *See* Hrg. Ex. 19 (R.E. 5).

The additional expense items to which Tucker testified but which Overstreet did not or was not able to add to his analysis would render even a worse result for Forrest General.[9] Those items include:

- an admitted increase of Forrest General's "other medical supplies and drugs" category to account for the increase by year in number of admits or patient days;
- the undisputed absence of an appropriate pharmacy expense;
- the undetermined additional expense of needed hospitalists, radiologists, pathologists and anesthesiologists;

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[8] Tucker testified that the lease expense to Forrest General might decrease from the projected amount due to the probable residual value of the facility that would remain at the end of the lease term. Overstreet testified, however, that his financial analysis accounted for this possibility by eliminating completely any land expense to Forrest General. Overstreet at 621 (R.E. 4).

[9] Forrest General attempted to rebut Overstreet's assessment of its financials by suggesting that he had failed to inflate revenues by the three-year intervening period like he did expenses. The Hearing Officer included that portion of Forrest General's brief in her opinion, but did not address Overstreet's testimony on that point. Forrest General's attempt to defuse Overstreet's position failed because, as Overstreet explained, Medicare not only does not increase its reimbursements annually to keep up with inflation, testimony at the Hearing was to the effect that it was likely that Medicare's reimbursement would decrease in the near future, and that changes in reimbursement over the last several years has resulted in, at best, a break-even change to reimbursement at Forrest General (per its CFO). Overstreet did not inflate revenues because no inflation of the revenue figure was appropriate. In addition, even if he had, that one change would not have been sufficient to offset the significant loss this Application will suffer in any one of the first three years of operation.

- the additional $640,000 plus expense for supplies (due to Tucker's admission that Forrest General has already negotiated for and failed to obtain the savings that were assumed in the Application);
- the undisputed 10-15% increase in construction and other costs following Hurricane Katrina, which Tucker admittedly did not factor into this project; and
- capitalized interest or annual depreciation expense on the additional $945,000 to be spent on fixed and non-fixed equipment;
- ALOS inconsistencies. Overstreet could have changed the ALOS in the financials to the lower number which Forrest General represented repeatedly in the body of its Application would be the result of this project. That factor would have decreased the hospital's revenues significantly. Overstreet left this factor out of his recalculation.

Finally, on this point, it is important to note that Forrest General's witnesses testified that the primary reason for the orthopedic service's recent annual losses has been the high Medicare patient population and the low reimbursement provided by Medicare for the procedures done most often on those patients. Tucker at 264-265 (R.E. 4); Hrg. Off. Op. at 28 n. 2 (R.E. 3). One would have expected Forrest General to provide evidence at the Hearing that it will have a lower Medicare patient census and that other more lucrative payor sources will become more prominent in this new facility, thus increasing reimbursement. Not the case. Instead, Tucker testified that at the new facility the percentage of Medicare patients will INCREASE. Tucker at 305 (R.E. 4). In view of this position by Forrest General, coupled with the enormous additional expenses imposed by the project, there is no way logically to conclude that this project, as proposed, is economically viable.

When one views all of the evidence presented, it is questionable whether even a scintilla of evidence can be found to support the conclusions of the Department and the Chancellor regarding economic viability of this project. There is, however, absolutely no question that the manifest weight of the evidence demands a contrary conclusion. This project is not economically viable. It does not substantially comply with GR-4, and the Department's decision to approve it as such was arbitrary and capricious and must be reversed.

C. RELOCATING A **PORTION OF A SERVICE** IS NOT PERMITTED UNDER THE DEPARTMENT'S OWN RULES

Even if Forrest General had met its burden to demonstrate economic viability, this Application cannot legally be approved for the simple reason that it proposes the relocation of only part of Forrest General's orthopedic service line, and the CON law does not provide for that sort of a relocation. The Staff admittedly believed (because the Application said so) that Forrest General intended to relocate its entire orthopedic practice. At the Hearing, however, Forrest General confessed it has no such intent. This point is reason alone to disapprove the Application – it cannot be permitted, as a matter of law.

1. The Staff's Analysis Was Based on Inaccurate Information.

In her Findings of Fact and Conclusions of Law, the Hearing Officer states repeatedly her reliance on the Staff's initial analysis of the Application and its resulting approval recommendation. As this Court knows, there are numerous reasons not to rely on the Staff once a Hearing has been held, and in this case, the Staff actually agreed. When the Staff reviewed the Application, it concluded that Forrest General had substantially complied with both the specific criteria applicable to the relocation of acute care beds, as well as the applicable General Review Criteria. As is frequently the case, however, testimony at the Hearing proved that the Staff relied

on statements made in the Application and its Exhibits which were not accurate.[10] Dawkins's testimony on this point is key: he stated that where the Staff relies of representations later shown to be false, the Staff's conclusion will likely have to be changed. Specifically, on day one of the Hearing, Dawkins testified that the Department believed that Forrest General's proposal was to relocate the entirety of its orthopedic service. Dawkins at 14 (R.E. 4). He recognized that moving a part of the orthopedic service is a different matter altogether and acknowledged that if Forrest General intended to relocate only part of its service, the decision on this Application should be different. Dawkins at 63-64 (R.E. 4).

2. Relocation of PART of a Service Is Not Permitted.

According to the CON Review Manual, only a facility, a portion of a facility, or "a health service" may be relocated. Nowhere does the Manual, the *State Health Plan*, or Mississippi statutory law provide that a service may be split, with part to remain at the initial location and part to be "relocated." CON Review Manual at 51. The language of the statute is very clear. Mississippi Code Ann. §41-7-191 provides in part as follows:

> No person shall engage in any of the following activities without obtaining the required certificates of need:
>
> > The relocation of a health care facility or portion thereof, ...
> >
> > The relocation of **one or more health services from one physical facility or site to another physical facility or site.**

[10] As indicated, upon initial review of any CON application, the Department takes the applicant's representations as truthful and accurate, and performs no investigation or background check to determine the reliability of the application. That was the case here. Dawkins at 38-42 (R.E. 4). For this reason, among others, evidence presented at a hearing carries the day over the Staff's Analysis – not due to any fault by the Staff, but because the Staff is at a significant disadvantage from the outset in its initial review process, having no vehicle to allow an assessment of the accuracy of the information in the Application. Where, as here, the evidence at the hearing demonstrates that the Staff drew its conclusions based on wrong information, those conclusions cannot be relied on by the Department or the courts.

(emphasis added). While the statute speaks of relocating a "portion" of a health care facility, it makes no mention of a portion of a health service.[11] And, as this Court has previously held, "if the Legislature intended" a particular meaning by wording in a statute, "it would have stated so in the statute." *Singing River Hospital System v. Biloxi Regional Medical Center*, 928 So.2d 810, 813 (Miss. 2006) (attached as App. B). This Court went on to state, "the duty of this Court is to interpret the statutes as written. **It is not the duty of this Court to add language where we see fit.**" *Id.* at n. 5 (emphasis added).

In order to read the provision in the CON Review Manual as permitting the relocation of a portion of Forrest General's orthopedic service, language would have to be added to the Manual.[12] Dawkins implicitly recognized the Supreme Court's position on this issue when he testified that the Staff's approval recommendation was expressly based on its understanding that the entire orthopedic practice at Forrest General was being moved to the proposed new location. Dawkins at 13-14 (R.E. 4). Under *Singing River*, and (as Dawkins recognized) given that the entire service is NOT being relocated, this Application cannot be approved.

Forrest General contended below that it is relocating all of its orthopedic service except that which is necessary to support its participation in the statewide trauma network. Dawkins testified that it would be entirely appropriate for trauma-related orthopedics to remain at the main campus and that he would consider those services to be part of the emergency department and not the orthopedic service. Dawkins at 27-28 (R.E. 4).

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[11] A "health service" is defined as a diagnostic, treatment or rehabilitative service in the CON Review Manual.

[12] Forrest General will argue, as it did below, that because the statute does not require the relocation of "all" of a health service, Wesley's interpretation is inappropriate. The actual fact, however, is that the CON statute affirmatively permits the relocation of part of one thing (and health care facility), but does not affirmatively permit the relocation of part of another (a health service). Instead it is silent as to portions of service lines. The entirety of the statute must be considered, and the only internally consistent conclusion to be reached is that the statute does not provide for relocation of part of a service because that is not permitted.

However, to begin with, because of the recent changes in the law regarding our statewide trauma system, Forrest General's trauma system argument is now moot. Wesley, and every hospital in the State, will be participating in the trauma system either by "paying" or "playing." There can be no legal advantage to Forrest General due to its trauma system participation going forward.

Moreover, even if Forrest General's trauma system argument still held weight, it would fail here. Wesley agrees that if it were true that ONLY trauma-related orthopedics were to remain at the main campus while the entirety of the mainline orthopedic service was relocated, Dawkins's testimony would answer the question. The fact is, however, that Forrest General's argument on this point is not true. Instead, evidence elicited throughout the remainder of the Hearing established that Forrest General will not be relocating its entire service, but will instead leave nearly 20% of its existing orthopedic beds and 33% of its **non-trauma orthopedic services** at the current location.[13] In addition, Forrest General's medical staff includes orthopedic physicians from both SBJ and the Hattiesburg Clinic (whose office building is located adjacent to and is connected by an enclosed walkway with the Forrest General hospital facility). The Hattiesburg Clinic doctors were not invited to move their practices to the new facility. Moreover, members of the Hattiesburg Clinic testified that they will not move their practices to the new facility, and Bill Oliver, Forrest General's president and CEO, confirmed that Forrest General will continue to provide space, equipment and personnel to accommodate those physicians' day to day, **non-trauma-related orthopedic practices**. Oliver at 146-148 (R.E. 4).

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[13] Forrest General states in its post hearing brief that the SBJ physicians (the only group moving to the new facility) take care of only 67% of Forrest General's non-trauma cases. Once they are relocated, Forrest General contends "a majority of orthopedic surgeons practicing at Forrest General will have immediate access to their orthopedic surgery patients." Hrg. Off. Op. at 9 (R.E. 3). The CON Review Manual, however, does not make an exception and provide for the relocation of a portion of a service so long as that portion represents the "majority." In fact, there is no exception at all.

Notwithstanding Forrest General's version of the situation, the evidence at the Hearing was undisputed – Forrest General is "relocating" only a part of its orthopedic service.

In affirming the Department's decision to approve the Application, the Chancellor spent three sentences on this argument. In those three sentences, she states two bases for her disagreement with Wesley's position. First, she states that the statute only requires CON approval for the relocation of one or more health services . . . ." She then states that the statute "does not state that a hospital must relocate 'all' of . . . a service. . . ." Chancellor's Opinion at 6 (R.E. 2). The Chancellor's opinion flies in the face of logic, given the rest of the statutory provision which deals with facilities and parts of facilities.

She follows that argument up with a statement that the Department's Staff, the Hearing Officer, and the State Health Officer all agreed that this proposal should be approved. Her clear suggestion is that the Department's Staff, the Hearing Officer and the State Health Officer all considered and rejected Wesley's argument – that relocation of a part of a service is not permitted. That simply is not the case, however. The Staff admittedly believed that the entire service was being relocated.[14] Dawkins testified expressly to that fact and stated without condition that if that were not the case, his opinion regarding the matter would change. Once it became clear that Forrest General proposes only a partial relocation, neither the Staff nor Dawkins had the opportunity to address the issue. Furthermore, despite the fact that Wesley included this argument in its post-hearing brief, the Hearing Officer did not address it at all in her opinion. Instead, she adopted Forrest General's brief in its entirety – and because the parties to the Hearing submitted simultaneous post-hearing briefs, it is reasonably assumed that she never

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[14] While the applicable standard of review permits the Department great latitude in interpreting and applying its own rules and regulations, that standard has no effect here because, as Dawkins confirmed, the Department believed at all times until mid-way through the Hearing that the entire service was being relocated. Thus, the Department never gave consideration to this question, and no presumption in favor of the Department's decision applies as to this issue.

even considered Wesley's argument. Certainly she would have addressed her reasons for disagreement in her opinion if she had. Finally, the State Health Officer unquestionably did not consider this issue simply because he reviews the Hearing Officer's recommendations, and she never mentioned it.

In summary, the Hearing Officer failed to address this issue, and the Chancellor's reliance on the Staff, the Hearing Officer, and the State Health Officer is misplaced. Relocation of part of Forrest General's orthopedic service should not be permitted. The Application should be disapproved on this basis.

D. THE FINDING OF NEED FOR THIS PROJECT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT THE HEARING

As *Miss. Code Ann.* §41-7-191, the *State Health Plan*, and the CON Review Manual all recognize, the primary requirement imposed on any CON-regulated service or equipment is that there be a demonstrated need for the service or the equipment. Only where it is determined by the Department (or the court system) that a need exists will an applicant be permitted to proceed. Here, there is a Specific Criterion regarding need, and the General Review Criterion (GR-5) on need also applies. The Specific Criterion applied by the Staff provides as follows:

> **Projects which do not involve the addition of any acute care beds:**[15]
> The applicant shall document the need for the proposed project. Documentation may consist of, but is not limited to, citing of licensure or regulatory code deficiencies, institutional long-term plans (duly adopted

[15] In fact, under the Supreme Court's analysis in *Singing River Hospital System v. Biloxi General Medical Center*, 928 So.2d 810 (Miss. 2006), this Application does constitute the addition of acute care beds. In that case, Singing River Hospital sought to relocate acute care beds from its Pascagoula facility to a newly constructed building on the campus of its Ocean Springs Hospital. The Court concluded that the so-called "relocation" actually constituted the addition of beds at Ocean Springs, (because after the "relocation" there would be more beds there than there had been previously), and that, as a result, the applicant was required to demonstrate compliance with the Specific Need criterion applicable to projects which involve the addition of beds. That criterion requires a showing of at least 70% occupancy for two years before beds may be added. *Singing River*, 928 So.2d at 814. Here, FGH made no effort to demonstrate compliance with this criterion. As a result, under *Singing River*, the Application is deficient in its showing of need and must be disapproved. *Id.* This issue, too, was raised by Wesley following the Hearing, but went completely unaddressed by the Hearing Officer.

by the governing board), recommendations made by consultant firms, and deficiencies cited by accreditation agencies (JCAHO, CAP, etc.).

2006 *State Health Plan* (Hrg. Ex. 5) (emphasis supplied). GR-5 provides as follows:

Need for the Project: One or more of the following items may be considered in determining whether a need for the project exists:

A. The need that the population served or to be served has for the services proposed to be offered or expanded and the extent to which all residents of the area – in particular low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly – are likely to have access to those services.

B. In the case of the relocation of a facility or service, the need that the population presently served has for the service, the extent to which that need will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly, to obtain needed health care.

C. The current and projected utilization of like facilities or services within the proposed service area will be considered in determining the need for additional facilities or services. Unless clearly shown otherwise, data where available from the Division of Health Planning and Resource Development shall be considered to be the most reliable data available.

D. The probable effect of the proposed facility or service on existing facilities or services providing similar services to those proposed will be considered. When the service area of the proposed facility or service overlaps the services area of an existing facility or service, then the effect on the existing facility or service may be considered. The applicant or interested party must clearly present the methodologies and assumptions upon which any proposed project's impact on utilization in affected facilities or services is calculated. Also, the appropriate and efficient use of existing facilities/services may be considered.

E. The community reaction to the facility should be considered. The applicant may choose to submit endorsements from community officials and individuals expressing their reaction to the proposal. If significant opposition to the proposal is expressed in writing or at a public hearing, the opposition may be considered an adverse factor and weighed against endorsements received.

CON Rev. Man. at 58 (Hrg. Ex. 6).

1. Forrest General's Assertions of "Need" Are Insufficient.

In its Application, Forrest General contended that there is a need for the relocation of its orthopedic beds and supported that contention by asserting that its patient rooms are too small,

that they need to be larger and more specialized; that their bathrooms are too small and the doorways will not accommodate patients' wheelchairs (and, although "grandfathered in," are not in compliance with the ADA); and that it will benefit Forrest General and the orthopedic surgeons at SBJ (the largest orthopedic group in town) if Forrest General can move its orthopedic patient beds to the proposed new location, adjacent to SBJ's offices. CON App. at II-1, III-4 (Hrg. Ex. 2); Dawkins at 24, 26 (R.E. 4).

Importantly, Forrest General made no effort to demonstrate that it needs additional capacity for its orthopedic service (indeed, it is relocating only 30 of 37 beds, so its capacity for patient care at the new location will actually be lower). It made no effort to demonstrate that there is a shortage of orthopedic services in the Hattiesburg area or that other service providers in the area are at capacity. Dawkins at 46-47 (R.E. 4). Furthermore, despite the fact that one of the purported justifications for this project (and a point on which the Hearing Officer placed great significance) is that it will enhance the physicians' access and make it more convenient for them to treat their patients, Bill Oliver confirmed that Forrest General has had no problems with the response time of the SBJ physicians to cover orthopedic patients at the current hospital, and he confirmed that there has been no threat from the SBJ group to leave.[16] Oliver at 180, 182 (R.E. 4). In other words, the relationship is healthy and presents no "need" for the relocation of beds into SBJ's back yard. Oliver suggested during his testimony that Forrest General is experiencing capacity issues with OR's, but he confirmed on cross-examination that Forrest General is already CON approved to add several more OR's which have not yet been built out. Oliver at 123 (R.E. 4). Dawkins recognized further that there is no indication that the population growth in

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[16] In addition, Dawkins affirmed that merely enhancing convenience to physicians does not equate to a showing of need. Dawkins at 49 (R.E. 4). *See also St. Dominic-Jackson Memorial Hospital v. Mississippi State Department of Health*, 728 So.2d 81 (Miss. 1998) (no lesser standard of need or convenience may be applied to relocation of beds).

Hattiesburg or the surrounding area is such as is expected to produce significant growth in the orthopedic service area. Dawkins at 46 (R.E. 4).

In short, Forrest General did not present any evidence supporting a finding of true need for this project.[17] Larger patient rooms, wider bathroom doors and convenience to doctors who are a mere mile and a half away simply do not add up to "need" for a $31 million hospital project. Furthermore, as is detailed below, even the reasons provided by Forrest General (weak though they may have been) as the basis for its need assessment do not appear to be credible given the testimony of other witnesses in this Hearing.

2. Evidence at the Hearing Established There Is No Need for This Project.

Forrest General contended in its Application and during the Hearing that it has such serious structural problems (room and door sizes) with its older patient room tower, and specifically the floor known as "3T" where its orthopedic patients are located, that renovation is not feasible. Other evidence presented at the Hearing made it clear, however, that Forrest General's structural issues are not a sufficient basis for a finding of need in this case.

First, although Forrest General proposed that all SBJ patients will be relocated to the new facility, it is undisputed that the orthopedic physicians affiliated with the Hattiesburg Clinic, who currently provide a third of all of Forrest General's non-trauma orthopedic care, will continue their practices at the current Forrest General Hospital. Bill Oliver testified that Forrest General will continue to provide beds, support services, equipment, operating room time, and everything else necessary for the provision of basic, non-trauma orthopedic service to the Hattiesburg Clinic patients. Oliver at 147-148 (R.E. 4). Clearly, therefore, the structural problems which Forrest

[17] It is telling that when directly asked by his own counsel whether he believes there is a need for this project, Oliver was not able to respond that there is a "need." Instead, Oliver stated, "I think it would enhance orthopedic care. I think it would enhance the community to actually be even perceived stronger as a strong orthopedic facility market. I think both hospitals have good orthopedic programs, and I think this would further enhance that." Oliver at 128 (R.E. 4). "Enhancing" what are already "good programs" does not equal need.

General claims are serious enough to require this multi-million dollar project are not serious enough to force the Hattiesburg Clinic physicians or the other third of Forrest General's patients to go elsewhere. The inescapable conclusion is that orthopedic patients can be treated – and treated well, as part of a "good program," per Oliver – in the current location at Forrest General.

The testimony of several members of the Hattiesburg Clinic[18] confirmed this as fact. Dr. Weaver testified that he practices predominantly at Forrest General and has been practicing in Hattiesburg for twenty years. He stated that he does 99% of his surgery at Forrest General and that he does not intend to move his practice to another location. Weaver at 431-434 (R.E. 4). As to the structural issues, Weaver stated that neither the patient room size nor the width of the bathroom doors has impacted his practice at Forrest General and he's never had a patient complain about his/her room being too small. Weaver at 441-442 (R.E. 4). Weaver stated further that the patient rooms at Forrest General do accommodate wheelchairs and that most also have a couch and a chair in them, and that "even with those in there, we have hip chairs that go in there for a patient to sit up on by bedside, and I haven't noticed that to be a . . . big issue." Weaver at 442 (R.E. 4). Finally, Weaver confirmed that the size of the rooms on Forrest General's 3T floor has never prevented him from having necessary orthopedic equipment in his patients' rooms. Specifically, when asked about this issue, Weaver testified as follows:

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[18] Importantly, physicians from the Hattiesburg Clinic (a 195 physician group) are not affiliated in any manner with Wesley. They did not request a hearing or otherwise oppose this Application. What's more, the physicians who testified, for the most part, have the majority of their orthopedic practice at Forrest General, not Wesley. Regardless of the apparent objectivity of these physician witnesses, the Hearing Officer concluded that they were motivated purely by self-interest, or as she put it, concern about their own practices at Forrest General and whether, following this relocation, there would be sufficient provision at the old location of equipment, staff, OR space, etc. Hrg. Off. Op. at 21 (R.E. 3). To begin with, given Forrest General's plans (and the fact that the Hattiesburg Clinic physicians were not invited to participate or even notified of the details of the project in advance), concern by the Hattiesburg Clinic physicians about their practices and their patients is entirely appropriate. More importantly, however, the Hearing Officer's opinion was notable in that it omitted any mention of these physicians' testimony concerning the issue of Forrest General's claimed structural issues. The testimony of these third party physicians highlights the fact that Forrest General's current physical plant is more than adequate and that, if this project goes forward, Forrest General will be operating two identical services in two different locations with duplicative equipment, personnel, and space.

Q. Now, Dr. Weaver, have you ever had a patient who required orthopedic equipment in the room and the room would not accommodate that equipment at Forrest General?

A. No. Not that I'm aware of, no. Equipment such as what?

Q. Well, frankly, I don't know. I was hoping you could tell me.

A. I mean, I've never encountered it. I've had patients in traction in rooms, and I haven't ever encountered anything that we couldn't get in a room that I'm aware of.

Q. What about the ability to roll the actual patient beds in and out of the rooms?

A. Well, they got the beds in there, and those beds are the same beds they take them down to surgery, and they seem to get them in the room okay .... I don't think you can have a person walk on each side of it, but I don't think you can do that – I was in North Carolina for a year, I was in Kentucky for a year, and I don't think you could walk anybody through a door and you be on each side of the bed in any hospital I've ever been in, University included.

Weaver at 443 (R.E. 4). Finally, Weaver testified that the operating rooms at Forrest General are adequate as well, and that, although ten years ago he might have had a problem with OR room size, Forrest General's current OR's all accommodate even the most complicated orthopedic patients with no difficulty:

> Room 3, Room 15, Room 10 are generally a little bit larger rooms. So we do our major orthopedic stuff generally in there. But I have done every other type of case – total knee, hip, bipolar hip replacement, major trauma – in every room over there. And, you know, so I could do anything I ever do in any room they have over there. It's nice to be in the bigger rooms when we do, you know, the larger – the total knees and total hips and stuff, but they put me in every one of those rooms to do those types of procedures.

Weaver at 445 (R.E. 4).

Dr. Whitehead testified similarly to Dr. Weaver, stating that although the rooms at Forrest General could be larger, he believed a renovation would correct the problem and that a relocation project of the magnitude of the one proposed is not necessary. Whitehead at 471 (R.E.

4). He did not indicate that he has had any real problems or issues providing treatment to his patients due to the size of the patient rooms or the bathroom doors. Whitehead further agreed with Dr. Weaver's assessment of Forrest General's OR space, stating that "the rooms are plenty big enough. We have plenty of equipment. I have not really wanted additional equipment that they weren't providing . . . . We do need more I think OR capacity, but . . . they are at present remodeling I believe to add new and additional rooms." Whitehead at 472 (R.E. 4).

Dr. Humpherys, a third member of the Hattiesburg Clinic's orthopedic group, also agreed that the size of the patient rooms and the operating rooms at Forrest General is adequate and neither has caused him any problems in his practice there. Humpherys at 471 (R.E. 4).

In summary, Forrest General's plan (as conceded by its president and CEO) is to relocate only the SBJ portion of its orthopedic practice, to leave the Hattiesburg Clinic portion right where it is and to continue to provide the Hattiesburg Clinic physicians with all the same services as have previously been available to them. This fact alone belies Forrest General's argument that its rooms can no longer accommodate either orthopedic patients or the equipment that is necessary to treat them. No evidence was presented to differentiate the Hattiesburg Clinic patients from those of SBJ. If Forrest General's current facilities are sufficient to provide good patient care to one set of patients, they must necessarily be sufficient for the other as well. Forrest General's reliance on the patient room/bathroom size issue for its showing of need for this proposed project does not satisfy the need criterion.[19]

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[19] In addition, testimony at the Hearing revealed that there are multiple options for addressing the physical plant concerns identified by Forrest General. Forrest General did not give serious consideration to many of those options as it is required to do by the CON Review Manual. Even the Hearing Officer stated that the physical plan concerns Forrest General identified are the "primary reasons for renovation or replacement projects." Hrg. Off. Op. at 13 (R.E. 3). The Hearing Officer is right – and renovation or replacement of existing facilities would be the appropriate route for Forrest General to take in this matter, not relocation of beds and the construction of an entirely new facility in a remote location.

3. The Application Does Not Comply with the General Need Requirement.

As set forth above, General Review Criterion 5 (GR-5) regarding need must also be substantially complied with before any CON is granted. GR-5 provides several avenues for compliance. First, the criterion states that the Department must consider the need of the population to be served by the proposed service. In the case of a relocation, the Department is also to consider the need the population presently served has for the service. Here, because the population to be served is merely a subset of the population presently being served (with the exception of the patients who will remain at Forrest General's main campus), there is no reason to expect any real change in the need for services. The need for orthopedic services is being met at Forrest General at present, and that need would likely continue to be met in the proposed additional location. The only change will be the environment in which services are provided to the SBJ patients. There is no evidence of any need for this project in order for any segment of the patient population to be better served or to have adequate access to service.

Indeed, to the contrary, it must be considered that the proposed relocation of 80% of Forrest General's available orthopedic beds and 67% of its non-trauma orthopedic services – including the doctors who primarily carry the burden of call coverage for trauma care – will likely work to the disadvantage, indeed the detriment, of emergent and trauma care patients. During the Hearing, it was revealed that Forrest General has entered into a contract with the SBJ physicians to oversee all orthopedic trauma care at Forrest General. But if this project is approved, those physicians will no longer be on site caring for their patients. Instead, they will be at their clinic site, 1.5 miles away, and will be required to drive that distance in city traffic in order to appear at Forrest General and care for trauma patients. Dawkins acknowledged that this arrangement would create an additional service location for those physicians (because they will have to cover their patients at the new location and Forrest General's trauma care patients at the

old location), making the entire arrangement more costly and less efficient. Dawkins at 62-66 (R.E. 4).

In addition, Forrest General was unable to confirm whether there will be around-the-clock coverage at the new location from hospitalists and anesthesiologists. Ed Tucker (Forrest General's CFO) stated that he was uncertain about that question, but did not think so. Tucker at 325 (R.E. 4). It was presumed throughout the Hearing that no other specialists (neurosurgeons, cardiovascular surgeons, etc.) will be on site at the new location, and numerous witnesses, including Dawkins, testified to concerns about dangers posed to patients undergoing surgery who might suffer some extra-orthopedic issue and require immediate assistance. Dawkins at 60-62; Weaver at 434-37; Whitehead at 468-69 (R.E. 4).[20] This subject was also absent from the Hearing Officer's opinion.

Next, GR-5(c) indicates that the Department may give consideration to the current and projected utilization of like services in the service area. Testimony at the Hearing from Wesley's CEO, Ron Seal, established that Wesley has excess capacity at present for orthopedic surgical services. Forrest General did not dispute this fact. There is no lack of capacity in the service area which contributes to any finding of need for this project.

At some point in this process, Forrest General decided to come up with a new argument in support of its need analysis. That new argument is that its participation in the state trauma network somehow makes the relocation of the majority of its non-trauma orthopedic service,

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[20] Ron Seal, CEO of Wesley Medical Center, testified concerning two specialty hospitals (one in Abilene, Texas, and one in Portland, Oregon) which have recently suffered serious incidents in which patients undergoing orthopedic surgeries encountered other difficulties and had to be transferred to a facility with a full-service emergency department. In both cases, the patients died (one was an 88 year old female, the other a 44 year old male). Seal at 512-513 (R.E. 4). As Mr. Seal stated in his testimony, "to me, whether it's one death, it's too many. So why take a chance on a potential death if there's another opportunity or another option." Seal at 513 (R.E. 4). Forrest General was unable to provide any evidence at the Hearing to counter the concerns expressed on this subject. Surely the potential for emergency situations without qualified personnel on site to provide appropriate care weighs heavily against a finding of need for this project.

along with all of its trauma care orthopedic surgeons to a remote location necessary. It is difficult to fathom how Forrest General believes its own argument. To begin with, Forrest General presented no evidence concerning any need for additional space for trauma patients. It presented, at best, vague descriptions of the nature of its trauma care service. There were no statistics provided indicating that the trauma care system in any way requires the relocation of the orthopedic practice to another location. Furthermore, as has already been mentioned, because the SBJ physicians will have the exclusive authority and responsibility to operate the trauma care service at Forrest General, moving the SBJ doctors' entire non-trauma orthopedic practice to this remote location is counterintuitive at best.

In view of the totality of the evidence presented in this case, it is evident that there is no real need for this project. Instead, Forrest General's plan is one which, as was expressly stated in the Application, was formulated to benefit Forrest General through cementing its relationship with the largest group of orthopods in Hattiesburg and to benefit that group of orthopods by creating an enormous new revenue stream for it through its position as lessor to the Hospital. The Hearing Officer states in her opinion that "Wesley did not offer any evidence sufficient to refute the substantial evidence offered by Forrest General and the Department" on the need issue. Hrg. Off. Op. at 23 (R.E. 3). Again, the reliance of the Hearing Officer on Forrest General's brief is telling. Wesley presented abundant evidence and demonstrated throughout the Hearing numerous inconsistencies and misrepresentations contained in Forrest General's Application and in its witnesses' testimony. The Hearing Officer simply did not consider that evidence in rendering her opinion. The failure to do so constitutes an abuse of discretion on her part.

E. THE MANIFEST WEIGHT OF THE EVIDENCE ESTABLISHES THAT THIS PROJECT WILL NOT PROMOTE COST CONTAINMENT

For all of the reasons discussed throughout this Brief, including the monumental expenses Forrest General proposes to undertake in order to proceed with this project (together

with the additional expenses which are not accounted for anywhere in the Application, but which Tucker agreed will be incurred), the undisputed current annual $2 to 3 million loss Forrest General is experiencing in orthopedics, and the utter lack of proof of any true need for a "partial relocation," the costs associated with this proposal are astronomical and, in great part, wholly unnecessary. Regardless of Forrest General's contention during the Hearing that cost containment has historically referred to the cost of a project to the Medicaid or Medicare systems, there can be no question that money spent for an unnecessary relocation of a portion of a service 1.5 miles away, and creating an undisputed duplication of services in the process, is not money well-spent.[21] The millions in annual operational expense increases will only exacerbate the existing financial woes of Forrest General's orthopedics program. Factors which must be considered (but which the Hearing Officer and the Chancellor seem to have ignored or disregarded) are that both costs and charges will go up, and, as already stated, Forrest General projects a significantly increased ALOS, which will increase patient costs (and costs to Medicaid and Medicare). The higher ALOS also indisputably indicates a lack of efficient operation.[22] Dawkins at 74-76 (R.E. 4).

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[21] Any unnecessary duplication of service, by definition, creates unnecessary expense. And unnecessary expense, regardless of its connection to the Medicare or Medicaid systems, cannot be viewed as "promoting cost containment." The general goal, which the Mississippi Supreme Court has recognized as one of the two "primary goals" states that the Application must "promote" some cost containment. A project that is needed, which does not duplicate services, and which provides a new or additional service of value to its patient population would rarely be deemed not to promote cost containment, regardless of the cost. Here, however, there is an unnecessary duplication of services. There has been no showing of any real need for this project, and no patient population is going to receive anything new or different if this Application is approved – patients simply will receive the same service from the same doctors in a location that is more convenient for the doctors because of its proximity to their clinic. Where these are the facts, the duplication is unnecessary, and the expense it creates is contrary to the goal of cost containment.

[22] The Hearing Officer's opinion notes that some of FGH's witnesses testified that the new facility will bring about "reduced length of stay." Hrg. Off. Op. at 25 (R.E. 3). To the contrary, FGH projects an increased length of stay. There is nothing about this Application which supports a conclusion that it will promote cost containment.

As Dawkins agreed, in view of all the identified increased expenses, it does not appear that this project will save money. Dawkins at 76 (R.E. 4). Moreover, where there is no need demonstrated (as it is the case here) costs such as those proposed are even more distasteful. Forrest General presented no evidence that this project will promote cost containment – other than its already debunked argument that the proposed new facility will be "more financially feasible" than the current operation is.

Interestingly, in commenting on this – one of the "primary goals of the State Health Plan" – the Hearing Officer noted that Wesley did not take issue with the "reasonableness" on a price per square foot basis of the construction cost of the new facility.[23] Indeed, to the contrary, Wesley actually took issue with much more than that – the entire cost of that facility is unnecessary and contrary to the goals of the *State Health Plan* because the proposed relocation is not needed. This Application does not promote any cost containment.

CONCLUSION

For all the reasons set forth in this brief, and in view of the evidence contained in the record of this matter, the Department should have disapproved the application filed by Forrest General Hospital to relocate part of its orthopedic service area from its main hospital to a newly constructed hospital facility across town. That facility will not make money within three years of its establishment. There is no evidence in the record that it will. There is abundant evidence in

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[23] This statement by the Hearing Officer is flatly wrong – and again evidences the fact that the Hearing Officer, in adopting wholesale the proposed findings presented by Forrest General, simply did not give adequate attention to the entirety of the evidence from the Hearing. The facts are that, in his initial testimony at the Hearing regarding his summary of the Staff's Analysis, Dawkins testified that the cost per square foot of the proposed new building ($405) is nearly 50% higher than the high end of the "acceptable range" of construction costs set forth in the Means Construction Cost Data Index which the Department uses as a guide. The high end of the Means Data Index was $275 per square foot, according to Dawkins. Dawkins at 11 (R.E. 4). With Dawkins's own recognition of the exorbitant cost of the proposed new facility, Wesley had no need to present further evidence on the subject unless Forrest General could somehow rebut Dawkins's concerns. Forrest General did not address the subject. The end of the issue was uncontested – that Forrest General's construction costs were too high. And elevated construction costs do not promote cost containment. They do the opposite.

the record that it will not. Furthermore, there is no need for this project and it will not promote any cost containment. This proposal simply does not substantially comply with the Department's own requirements, and the approval of it was arbitrary and capricious, against the manifest weight of the evidence, and must be reversed.

Furthermore, the Department and the Chancellor committed legal error in giving approval to a project which by its very nature (relocation of part of a service) is not permitted under the CON laws. In so doing, the Department exceeded its statutory authority, and in affirming the Department's error, the Chancellor committed further error.

The decisions of both the Department and the Chancellor should be reversed, and the Application finally disapproved.

Dated this the 15th day of January 2009.

Respectfully submitted,
WESLEY MEDICAL CENTER

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Kathryn R. Gilchrist, do hereby certify that I have served the foregoing, by placing a true and correct copy of the same in the United States Mail, First Class postage prepaid, and properly addressed to the following:

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Chancellor Patricia D. Wise
Hinds County Chancery Court
316 S. President St.
Jackson, MS 39201

This the 15th day of January 2009.

Kathryn R. Gilchrist

H

Supreme Court of Mississippi.
MISSISSIPPI STATE DEPARTMENT OF HEALTH and Q.S.C., LLC d/b/a First Choice Surgical Center
v.
NATCHEZ COMMUNITY HOSPITAL.
No. 1998-SA-01055-SCT.

July 29, 1999.
Rehearing Denied Oct. 7, 1999.

Hospital appealed Department of Health's final order granting physician's request for certificate of need to establish a freestanding ambulatory surgery center. The Chancery Court, Hinds County, Denise Owens, Chancellor, reversed. Department of Health and physician appealed. The Supreme Court, Pittman, P.J., held that unsupported statements by physicians did not provide substantial evidence to support certificate of need.

Affirmed.

West Headnotes

[1] Health 245
198Hk245 Most Cited Cases
(Formerly 204k1 Hospitals)
Decision of the hearing officer and State Health Officer on application for certificate of need is afforded great deference upon judicial review by Supreme Court even though court reviews decision of chancellor. West's A.M.C. § 41-7-201(2)(f).

[2] Administrative Law and Procedure 744.1
15Ak744.1 Most Cited Cases
Constitution does not permit judiciary to retry de novo matters on appeal from administrative agencies.

[3] Administrative Law and Procedure 741
15Ak741 Most Cited Cases
Courts will entertain appeal from administrative agency to determine whether or not order of administrative agency (1) was supported by substantial evidence, (2) was arbitrary and capricious, (3) was beyond power of administrative agency to make, or (4) violated some statutory or constitutional right of complaining party.

[4] Health 243
198Hk243 Most Cited Cases
(Formerly 204k1 Hospitals)
It is within power of chancellor to reverse hearing officer's and State Health Officer's decision to grant certificate of need if such decision was not supported by substantial evidence. West's A.M.C. § 41-7-201(2)(f).

[5] Administrative Law and Procedure 791
15Ak791 Most Cited Cases
"Substantial evidence" means more than a scintilla or a suspicion.

[6] Administrative Law and Procedure 763
15Ak763 Most Cited Cases
If administrative agency's decision is not based on substantial evidence, it necessarily follows that decision is arbitrary and capricious.

[7] Administrative Law and Procedure 763
15Ak763 Most Cited Cases
Administrative agency's decision is "arbitrary" when it is not done according to reason and judgment, but depending on will alone.

[8] Administrative Law and Procedure 763
15Ak763 Most Cited Cases
Administrative agency's action is "capricious" if done without reason, in whimsical manner, implying either lack of understanding of or disregard for surrounding facts and settled controlling principles.

[9] Health 243
198Hk243 Most Cited Cases
(Formerly 204k1 Hospitals)
Testifying physicians' unsupported estimates as to number of surgeries they expected to perform, which were not in accordance with physicians' past practices, were not substantial evidence on issue of state's minimum usage requirements, as required to support Department of Health's granting certificate of need to establish freestanding ambulatory surgery center. West's A.M.C. § 41-7-201(2)(f).

[10] Health 243
198Hk243 Most Cited Cases
(Formerly 204k1 Hospitals)
Unsupported statements by physicians do not provide substantial evidence upon which the Department of Health should grant certificate of need. West's

A.M.C. § 41-7-201(2)(f).
*974 Office of the Attorney General by Ellen Y. Dale O'Neal, L. Carl Hagwood, J. Chadwick Mask, Robert N. Warrington, Kyle Leslie Holifield, Attorneys for Appellants.

Gail Wright Lowery, Kathryn H. Hester, Ellen Morris, Michael R. Hess, Jackson, Attorneys for Appellee.

BEFORE PITTMAN, P.J., WALLER AND COBB, JJ.

*975 PITTMAN, Presiding Justice, for the Court:

STATEMENT OF THE CASE

¶ 1. This case is appealed from the Chancery Court of Hinds County where Chancery Judge Denise Owens vacated the Final Order of the Mississippi State Department of Health ("the Department") granting a Certificate of Need ("CON") to Q.S.C., LLC, d/b/a First Choice Surgical Center ("QSC") to establish a freestanding ambulatory surgery center ("ASC") in Natchez, Mississippi. The Department and QSC perfected this appeal from the chancery court's judgment.

STATEMENT OF FACTS

¶ 2. On June 27, 1997, QSC filed a Certificate of Need application with the Department for the establishment and operation of an ASC in Natchez. The Department deemed the application complete on July 7, 1997, and sent notice to all affected parties. Natchez Community Hospital ("NCH") and Natchez Regional Medical Center ("NRMC") requested a public hearing.

¶ 3. On September 15-16, 1997, and October 6-7, 1997, a public hearing was held. The Department, QSC, NCH, and NRMC, appeared at the hearing and offered testimony and evidence.

¶ 4. QSC is owned by Dr. Arnold E. Feldman. QSC proposes to renovate a single specialty surgery center owned and operated by Dr. Feldman into an ASC that offers a full range of surgical services and procedures in general outpatient surgery. The facility will contain two operating rooms, three pre-op/recovery rooms, and business, staff, and counseling areas, and will require a capital expenditure of approximately $509,462.

¶ 5. QSC's CON application was filed under the 1996-97 Mississippi State Health Plan ("the Plan"). Chapter X of the Plan establishes the criteria and standards which the applicant must meet before receiving CON authority to establish an ASC. The Mississippi Certificate of Need Review Manual (Rev.1997) (the "Manual") provides general CON criteria and considerations by which the Department reviews all applications for Certificates of Need.

¶ 6. The Staff of the Health Planning and Resource Development Division of the Department ("the Staff") issued a Staff Analysis recommending disapproval of QSC's CON application. The Hearing Officer found, after the public hearing, that QSC had presented credible and substantial evidence that the proposed ASC met all the criteria set forth in the Plan. The Hearing Officer issued his Findings of Fact, Conclusions of Law and Recommendations ("Findings of Fact"), recommending that QSC's CON be granted. The State Health Officer reviewed the record, concurred in the Hearing Officer's recommendation, and granted the requested CON.

¶ 7. NCH appealed the Final Order of the Mississippi State Department of Health to the Chancery Court of the First Judicial District of Hinds County, Mississippi, on February 18, 1998. Oral argument was held on May 26, 1998. Chancellor Denise Owens reversed the Department's Final Order, issuing a Memorandum Opinion and Judgment vacating and setting aside QSC's CON on May 29, 1998. The Department and QSC appealed to this Court on June 4, 1998.

STATEMENT OF THE ISSUE

I. WHETHER THE CHANCELLOR ERRONEOUSLY ENGAGED IN FACT-FINDING WITH REGARD TO QSC'S COMPLIANCE WITH CRITERION ONE BY FINDING THAT QSC COULD NOT PERFORM 800 PROCEDURES PER YEAR, CONTRARY TO THE SPECIFIC FINDING OF THE DEPARTMENT.

**976 STANDARD OF REVIEW*

¶ 8. A strict standard governs judicial review of administrative agency decisions. Miss.Code Ann. § 41-7-201(2)(f) (1993) sets forth the applicable standard of review here:

> ... The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that the order of the State Department of Health 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....

[1] ¶ 9. Most recently, this Court has outlined this limited standard of review as follows:

> This is a proceeding for judicial review of administrative action, and it is important that we understand and accept what this fact implies. The Legislature has directed that a S[tate] H[earing] O[fficer]'s CON order be subject to judicial review, but that it ... shall not be vacated or set aside, either in whole or in part, except for errors of law, 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 ... Department ..., or violates any vested constitutional rights of any part involved in the appeal. Miss.Code Ann. § 41-7-201(4) (Supp.1990).
>
> This is nothing more than a statutory restatement of familiar limitations upon the scope of judicial review of administrative agency decisions. Magnolia Hospital v. Mississippi State Department of Health, 559 So.2d 1042, 1044 (Miss.1990); See also Mississippi State Dep't of Health v. Mississippi Baptist Med. Ctr., 663 So.2d 563, 573 (Miss.1995). **The decision of the hearing officer and State Health Officer is afforded great deference upon judicial review by this court even though we review the decision of the chancellor.** Mississippi State Dep't of Health v. Southwest Mississippi Reg'l Med. Ctr., 580 So.2d 1238, 1240 (Miss.1991).

St. Dominic-Jackson Mem'l Hosp. v. Mississippi State Dep't of Health, 728 So.2d 81, 83 (Miss.1998) (emphasis added).

[2][3] ¶ 10. This Court has stated:

> **[O]ur Constitution does not permit the judiciary of this state to retry de novo matters on appeal from administrative agencies.** Our courts are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal to hear the appeal. **The appeal is a limited one** ... since the courts cannot enter the field of administrative agency. **The court will entertain the appeal to determine whether or not the order of the administrative agency (1) was supported by substantial evidence, (2) was arbitrary and capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party.**

Cook v. Mardi Gras Casino Corp., 697 So.2d 378, 380 (Miss.1997) (emphasis added)(quoting *Mississippi Dep't of Envtl. Quality v. Weems*, 653 So.2d 266, 273 (Miss.1995) (quoting *State Tax Comm'n v. Earnest*, 627 So.2d 313, 319 (Miss.1993))).

DISCUSSION OF LAW

I. WHETHER THE CHANCELLOR ERRONEOUSLY ENGAGED IN FACT-FINDING WITH REGARD TO QSC'S COMPLIANCE WITH CRITERION ONE BY FINDING THAT QSC COULD NOT PERFORM 800 PROCEDURES PER *977 YEAR, CONTRARY TO THE SPECIFIC FINDING OF THE DEPARTMENT.

¶ 11. QSC and the Department allege that the chancellor engaged in impermissible fact-finding regarding QSC's compliance with Criterion 1 of the State Health Plan. The chancellor reviewed the evidence before her and found that there was not sufficient evidence for the State Health Officer to grant the CON.

[4][5] ¶ 12. It is within the power of the chancellor to reverse the decision to grant the CON if such decision was not supported by substantial evidence. Substantial evidence means more than a scintilla or a suspicion. *Mississippi Real Estate Comm'n v. Anding*, 732 So.2d 192, 196 (Miss.1999) (citing *Mississippi Real Estate Comm'n v. Ryan*, 248 So.2d 790, 793-94 (Miss.1971)).

[6][7][8] ¶ 13. If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious. An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone. *Burks v. Amite County Sch. Dist.*, 708 So.2d 1366, 1370, 125 Ed. Law Rep. 1012 (Miss.1998). An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles. *Id.*

[9] ¶ 14. We have reviewed the record in this case and determined the decision to grant the CON was not based on substantial evidence, thereby rendering the decision arbitrary and capricious. As such, we affirm the judgment of the chancellor in reversing the grant of the CON.

¶ 15. Criterion 1 of the State Health Plan states:

> Need Criterion: The applicant shall demonstrate that the proposed ambulatory surgery facility shall perform a minimum of 800 procedures per operating room or procedure room per year.

(1996-1997 State Health Plan, p. X-10.) In the Hearing Officer's recommendation to grant the CON, which was ultimately adopted by the State Health Officer, the Hearing Officer specifically found that "Q.S.C. provided credible and substantial evidence that its proposed ASC will perform the required number of procedures." The Hearing Officer took into consideration the testimony of Drs. Arnold E. Feldman, Richard M. Myers, Jr., and James R. Todd, Jr. and Ronald Calisher, QSC's expert witness, as well as letters and affidavits from other physicians supporting the ASC. The Hearing Officer discounted the testimony of other physicians who stated that they would not use the proposed ASF.

¶ 16. The chancellor noted in her memorandum order that "[t]he ability of Q.S.C. to meet that 800 procedure threshold is at best conjectural and speculative." Indeed, the numbers provided by the doctors as estimates of projected usage appear to be pure speculation.

¶ 17. Dr. Feldman, in his application for the CON, estimated his projected usage for the ASC to be 1,600 cases. He testified at the hearing that he arrived at that number because the State required a minimum usage of 800 cases per year per room. He had no factual basis for his estimated usage.

¶ 18. Dr. Feldman then testified that he would be the major admitting physician to this ASC. The record shows that Dr. Feldman performed only 235 surgeries at his single-service surgery center the year before the application for the CON was filed. The record further shows that Dr. Feldman performed only 87 additional out-patient procedures at NCH and NRMC. This totals only 322 procedures actually performed. While it is feasible that Dr. Feldman's practice will continue to grow, it is not realistic to believe that Dr. Feldman himself will be able to perform 800 to 1,000 cases at the ASC as he speculates.

*978 ¶ 19. Dr. James Todd, Jr., testified that he planned to use the ASC to perform approximately 200 surgeries per year. However, Dr. Todd later testified that he had performed only 90 surgeries in 1996 and 57 surgeries in 1997. He also testified that he would send approximately one-half of his surgery patients to the proposed ASC.

¶ 20. Taking Dr. Todd's information as true, he would have to perform 400 surgeries per year in order to transfer one-half to the ASC to reach the estimated rate of 200 surgeries. Dr. Todd would, in effect, have to more than triple his current rate of surgery to meet his estimate.

¶ 21. Additionally, NRMC proffered testimony that Dr. Todd, in previous litigation, swore under oath that he was permanently and totally disabled and that he had severe difficulties in performing even the simplest tasks. This further casts doubt on the ability of Dr. Todd to triple his current rate of surgery.

¶ 22. Dr. Feldman offered the testimony of other physicians to try to prove that the new ASC would meet the usage requirements. However, these other physicians also seemed to have overestimated their projected usage of the ASC.

¶ 23. Dr. Richard Meyers, Jr., testified that he would transfer 350-500 cases to the ASC from either his office or from Field Memorial Hospital. Dr. Meyers testified that he performed 99% of his surgeries at Field, estimating that number to be "[p]robably in excess of 400." The actual records show that Dr. Meyers performed only 165 procedures in 1995, 119 procedures in 1996, and 130 procedures in the first ten months of 1997. Dr. Meyers then changed his testimony to state that he would probably only transfer 100 cases to the ASC.

¶ 24. During and after the hearing, Dr. Feldman introduced letters and affidavits from other doctors who pledged to use the facility. Dr. Bernadette Sherman, through letter and affidavit, projected her usage to be in excess of 100 cases per year. However, affidavits from NCH and NRMC show that in 1997, Dr. Sherman performed only 21 procedures at the two hospitals. No evidence was offered in support of Dr. Sherman's projections.

¶ 25. Dr. Frank Guerdon submitted a letter in support of the ASC stating that he would perform between 50 and 100 procedures. Dr. Alphonse Reed, also through a letter, estimated his usage of the ASC at 100 or more. The affidavits submitted by NCH and NRMC show that Dr. Guerdon performed only 51 procedures in 1997, while Dr. Reed performed only 11. As was the case with Dr. Sherman, no evidence was offered to support this projected increase.

[10] ¶ 26. The majority of evidence offered in support of the ASC seems to be nothing more than unsupported estimates made by physicians. Moreover, these estimates are contradicted by the actual numbers of procedures these physicians have performed in the past. The estimate of projected procedures supplied to the Hearing Officer has no factual basis. This Court has stated that a physician's "... unsupported statements do not constitute 'substantial evidence.' " *Mississippi State Dep't of Health v. Mississippi Baptist Med. Ctr.*, 663 So.2d 563, 578 (Miss.1995). We agree with the chancery court that the decision to grant the CON based on an estimated usage of 800 procedures per room was not supported by substantial evidence and is, therefore, arbitrary and capricious.

¶ 27. Because we are affirming the chancellor's reversal in the court below, we need not address the other issues put forth by the parties.

CONCLUSION

¶ 28. Unsupported statements by physicians do not provide substantial evidence upon which the Department should grant a CON. The number of procedures projected by Dr. Feldman in his application, as well *979 as the estimates offered by other physicians, appear to be pure speculation. For these reasons, we affirm the judgment of the Hinds County Chancery Court reversing the Department's grant of the CON.

¶ 29. **AFFIRMED.**

SULLIVAN, P.J., BANKS, McRAE, SMITH, MILLS, WALLER AND COBB, JJ., CONCUR.

PRATHER, C.J., NOT PARTICIPATING.

743 So.2d 973

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Westlaw.
928 So.2d 810
928 So.2d 810
(Cite as: 928 So.2d 810)

H
Singing River Hosp. System v. Biloxi Regional Medical Center
Miss.,2006.

Supreme Court of Mississippi.
SINGING RIVER HOSPITAL SYSTEM d/b/a Ocean Springs Hospital and Mississippi State Department of Health
v.
BILOXI REGIONAL MEDICAL CENTER, Garden Park Medical Center and Gulf Coast Medical Center.
No. 2004-SA-02468-SCT.

March 30, 2006.
Rehearing Denied May 25, 2006.

Background: Protesting hospitals filed petition for judicial review of State Department of Health's issuance of certificate of need (CON) to hospital system which applied to relocate 60 beds from one hospital to another. The Chancery Court, Hinds County, William Hale Singletary, J., revoked issuance of the CON. Hospital system appealed.

Holding: The Supreme Court, en banc, Waller, P.J., held that Department should have used more stringent criterion pertaining to proposals for the "addition" of beds, and thus Department's issuance of CON was not supported by substantial evidence.

Affirmed.

Easley and Graves, JJ., dissented.

West Headnotes

[1] Health 198H ⇐245

198H Health
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk236 Licenses, Permits, and Certificates
198Hk245 k. Review. Most Cited Cases
A reviewing court may vacate a final order of the State Health Department regarding the issuance of a certificate of need (CON) if it finds that the final order is not supported by substantial evidence, or is contrary to the manifest weight of the evidence. West's A.M.C. § 41-7-201(2)(f).

[2] Health 198H ⇐239

198H Health
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk236 Licenses, Permits, and Certificates
198Hk239 k. Grounds and Defenses. Most Cited Cases

Health 198H ⇐243

198H Health
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk236 Licenses, Permits, and Certificates
198Hk243 k. Evidence. Most Cited Cases
State Department of Health should have used more stringent criterion pertaining to proposals for the "addition" of beds, rather than criterion pertaining to proposals which did not include the addition of beds, in reviewing hospital system's application to relocate 60 licensed but unused beds from one hospital to another, and thus Department's issuance of certificate of need (CON) was not supported by substantial evidence; relocation would result in the addition of 60 beds to latter hospital, and hospital system confessed it could not meet the criterion pertaining to proposals for the addition of beds. West's A.M.C. § 41-7-191 to § 41-7-209.

[3] Health 198H ⇐245

198H Health
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk236 Licenses, Permits, and Certificates
198Hk245 k. Review. Most Cited Cases
When reviewing State Department of Health's issuance of a certificate of need (CON) to a hospital, Supreme Court must consider the substance of the proposal rather than its label. West's A.M.C. § 41-7-201(2)(f).

[4] Statutes 361 ⇐191

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k191 k. Application of Terms to Subject-Matter. Most Cited Cases
In construing a statute, court's duty is to carefully review statutory language and apply its most reasonable interpretation and meaning to the facts of a particular case.

[5] Statutes 361 ⇐176

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial Authority and Duty. Most Cited Cases
The duty of Supreme Court is to interpret statutes as written.

[6] Statutes 361 ⇐181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases
Court's primary objective when construing statutes is to adopt that interpretation which will meet the true meaning of the Legislature.

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EN BANC.

WALLER, Presiding Justice, for the Court.
¶ 1. The Singing River Hospital System filed an application for a certificate of need to (1) relocate sixty beds from the Singing River Hospital in Pascagoula to the Ocean Springs Hospital in Ocean Springs; (2) renovate and expand the first floor of the Ocean Springs Hospital; and (3) construct a new three-floor tower on the Ocean Springs Hospital campus to house the sixty relocated beds. After Singing River's CON application was filed, other area hospitals [FN1] filed formal protests with the Health Department. After a hearing, the CON was issued. The protesting hospitals filed a petition for judicial review. The Chancery Court of Hinds County, Mississippi, revoked the issuance of the CON, and from this decision, Singing River appeals.

FN1. Appellees Biloxi Regional Medical Center, Garden Park Medical Center and Gulf Coast Medical Center.

¶ 2. Both the Singing River and the Ocean Springs Hospitals are under the purview of the Singing River Hospital System and are located in Jackson County, Mississippi. And, even though the State Department of Health has issued one license to operate both hospitals to the Singing River Hospital System, each of the hospitals has a "separate physical license," allowing the Singing River Hospital to have 404 licensed beds and the Ocean Springs Hospital to have 136 licensed beds.

¶ 3. The Mississippi State Department of Health has

the authority to grant permission to all hospitals in the state for, inter alia, building a new facility, expanding an existing facility, or relocating services to another facility. *See* Miss.Code Ann. §§ 41-7-171-41-7-209 (Rev.2005). The Health Department's formal grant of permission is termed the issuance of a certificate of need ("CON"). The beds which Singing River proposes to relocate are already-licensed but unused beds.

DISCUSSION

[1] ¶ 4. The standard of review for a final order of the State Health Department is controlled by Miss.Code Ann. 41-7-201(2)(f) (Rev.2001), which provides in part that a reviewing court may vacate the final order if it finds that the final order "is not *812 supported by substantial evidence, [or] is contrary to the manifest weight of the evidence," *St. Dominic-Jackson Memorial Hospital v. Miss. State Dep't of Health*, 728 So.2d 81, 83 (Miss.1998).

[2] ¶ 5. The *State Health Plan's* need criteria for existing hospitals desiring to expand, renovate, or build is entitled "Certificate of Need Criteria and Standards for Construction, Renovation, Expansion, Capital Improvements, Replacement of Health Care Facilities, and Addition of Hospital Beds" ("Hospital Construction"). Other need criteria exist for the establishment of a new hospital or for the purchase of a new "health service" [FN2] such as MRI imaging equipment. Each of the different need criteria require different standards of proof. The need criteria for Hospital Construction has two subparts: one for projects which do not involve additional beds (Criterion 1a) and one for projects which do involve additional beds (Criterion 1b).FN3 Neither of the two criteria use the term "relocate." The main dispute between the parties on appeal is whether "relocated" beds are "additional" beds as contemplated under the Need Criteria for Hospital Construction.

FN2. "Health service," as defined in the *Certificate of Need Review Manual*, is a diagnostic, treatment or rehabilitative service.

FN3. The *State Health Plan* provides as follows:

1. Need Criterion:

a. **Projects which do not involve the addition of any acute care beds:** The applicant shall document the need for the proposed project. Documentation may consist of, but is not limited to, citing of licensure or regulatory code deficiencies, institutional long-term plans (duly adopted by the governing board), recommendations made by consultant firms, and deficiencies cited by accreditation agencies (JCAHO, CAP, etc.). In addition, for projects which involve construction, renovation, or expansion of emergency department facilities, the applicant shall include a statement indicating whether the hospital will participate in the statewide trauma system and describe the level of participation, if any.

b. **Projects which involve the addition of beds:** The applicant shall document the need for the proposed project. In addition to the documentation required as stated in Need Criterion (1)(a) the applicant shall document that the facility in question has maintained an occupancy rate of at least 70 percent for the most recent two (2) years.

¶ 6. The distinction between the application of Criterion 1a or Criterion 1b is crucial because Criterion 1b requires a more stringent standard of proof than Criterion 1a. If a proposal involves additional beds, the petitioning hospital must show that it has "maintained an occupancy rate of at least 70 percent for the most recent two (2) years." There is no such requirement under Criterion 1a. In this case, the Health Department applied Criterion 1a,

finding that Singing River's application did not involve additional beds. The chancellor reversed the issuance of the CON, finding that the application did indeed involve additional beds and that the Health Department should have applied Criterion 1b.

¶ 7. Therefore, the issue before the Court is whether the Singing River beds proposed to be relocated to Ocean Springs are "additional" beds. Singing River and Ocean Springs argue that relocated beds cannot be called additional beds. This argument is based on their (and the Health Department's) interpretation of "relocated beds" as previously-licensed beds and of "additional" beds as newly-licensed beds.

[3] ¶ 8. However, we must consider the substance of the proposal rather than its label. *St. Dominic-Jackson Memorial Hospital v. Miss. State Dep't of Health*, 728 So.2d 81, 89 (Miss.1998). To make this determination, we look at the following factors:

*813 1. The "relocation" of unused, licensed beds from Singing River to Ocean Springs will result in the *addition* of sixty beds to Ocean Springs. Ocean Springs' bed complement will increase from 136 beds to 196 beds. There will be an additional sixty beds at Ocean Springs, whether those beds are "relocated" beds or newly-licensed beds.

2. Need Criteria 1a and 1b do not contain the words "relocate," "relocated," or "relocation." The criteria merely speak to whether a bed is "additional."

3. Section 41-7-191 of the Miss.Code Ann. (Rev.2005) delineates the "activities" for which a CON is needed. When speaking of a "relocation," 41-7-191 refers to the relocation "of a health care facility or portion thereof," or of the "relocation of one or more health services [FN4] from one physical facility or site to another physical facility or site." Miss.Code Ann. § 41-7-191(1)(b) & (e).[FN5] Singing River's CON application does not propose the relocation of a health care facility or of one or more health services. These two subparts are the only provisions which speak of a relocation.

FN4. A "health service," as defined in the *Certificate of Need Review Manual*, is a diagnostic, treatment or rehabilitative service.

FN5. Section § 41-7-191 provides in part as follows:

> (1) No person shall engage in any of the following activities without obtaining the required certificate of need:
> * * *
>
> (b) The relocation of a health care facility or portion thereof, ...
> * * *
>
> (e) The relocation of one or more health services from one physical facility or site to another physical facility or site....

4. Arguably, the relocation of some of a health care facility's beds could be considered to be the relocation of a "portion" of that health care facility. But 41-7-191(1)(c) specifically speaks to changes in a health care facility's number or type of beds. A CON must be issued for "any change in the existing bed complement of any health care facility through the addition or conversion of any beds or the alteration, modernizing or refurbishing of any unit or department in which the beds may be located...."Miss.Code Ann. § 41-7-191(1)(c). Under the statute, a "relocation" of a bed is not contemplated to be "[a]ny change in the existing bed complement." Instead, changes in the existing bed complement are made either by adding new beds or by the "conversion" of beds.

[4] 5. The *State Health Plan* does not define "conversion" but the *American Heritage Dictionary of the English Language* (1981 ed.) defines "convert" as "to change into another form, substance, state or product; transform; transmute." A reasonable interpretation [FN6] of subsection (c)'s use of the word "conversion" would therefore be the change of an existing bed into another kind of

bed, *e.g.*, the conversion of a bed designated for pediatric care to a bed designated for cardiac care.

FN6. "Our duty is to carefully review statutory language and apply its most reasonable interpretation and meaning to the facts of a particular case." *Pope v. Brock*, 912 So.2d 935, 937 (Miss.2005).

[5][6] 6. Subsection (c) does not use the words "relocate," "relocated" or "relocation." Yet other subsections of 41-7-191 do. We can only conclude that, if the Legislature intended subsection (c) to cover "relocated" beds, it would have stated so in the statute.[FN7]

FN7. "The duty of this Court is to interpret the statutes as written. It is not the duty of this Court to add language where we see fit. '[O]ur primary objective when construing statutes is to adopt that interpretation which will meet the true meaning of the Legislature.' " *See Mauldin v. Branch*, 866 So.2d 429, 435 (Miss.2003) (quoting *Stockstill v. State*, 854 So.2d 1017, 1022-23 (Miss.2003)).

*814 7. The *Certificate of Need Review Manual*, which is published by the Department of Health, uses the word "relocation" only when referring to "the relocation of a facility or service." [FN8] *See Certificate of Need Review Manual*, Chapter 8-Criteria Used by State Department of Health for Evaluation of Projects, ¶ 5, "Need for the Project," p. 51. A proposal for the relocation of beds is not discussed under "Need for the Project."

FN8. The *Certificate of Need Review Manual* provides in part as follows:

> 5. **Need for the Project**: One or more of the following items may be considered in determining whether a need for the project exists:
> * * *
>
> b. In the case of the relocation *of a facility or service*, the need that the population presently served has for the service, the extent to which that need will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly, to obtain needed health care.
>
> Chapter 8, p. 51 (emphasis added).

¶ 9. Therefore, we find that the designation or label of a bed as "relocated" or as "newly-licensed" is irrelevant when determining, under the Need Criteria for Hospital Construction, whether a bed is additional or not. The relocation of unused but already-licensed beds from one health care facility to another is not contemplated under the relevant statute. The statute only uses the word "relocation" when speaking of the relocation of an entire or a portion of a health care facility, or of health services, not of beds. The Need Criteria for Hospital Construction do not contain the words "relocate, relocated or relocation." The *Certificate of Need Review Manual* does not use the words "relocate, relocated or relocation" when speaking of beds. Finally, and most importantly, the proposal, in actuality, is for Ocean Springs to *add* sixty beds.

¶ 10. We find that the State Health Department's issuance of a Certificate of Need to Singing River Hospital System is not supported by substantial evidence because the proposal in Singing River's CON application results in the addition of sixty beds to Ocean Springs Hospital. Because sixty beds would be *added*, the State Health Department should have used Criterion 1b (pertaining to proposals for the addition of beds) under the Need Criteria for Hospital Construction instead of Criterion 1a (pertaining to proposals which do not include the addition of beds). The Singing River Hospital System has confessed it cannot meet the standard included in Criterion 1b; therefore, the chancellor

was correct in revoking the CON issued to them.

CONCLUSION

¶ 11. We affirm the chancellor's decision to revoke the Health Department's issuance of a certificate of need to the Singing River Hospital System for the relocation of beds from the Singing River Hospital to the Ocean Springs Hospital.

¶ 12. AFFIRMED.

SMITH, C.J., COBB, P.J., CARLSON AND DICKINSON, JJ., CONCUR. EASLEY AND GRAVES, JJ., DISSENT WITHOUT SEPARATE WRITTEN OPINION. DIAZ AND RANDOLPH, JJ., NOT PARTICIPATING.
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