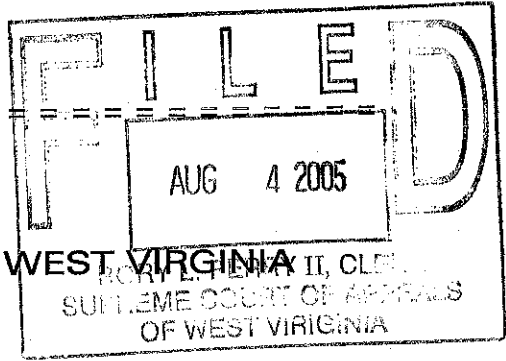


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32771
NO. 050864



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: BOBBY LEE B.

BRIEF OF APPELLANT,
STATE OF WEST VIRGINIA,
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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Dated: August 3, 2005

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I. KIND OF PROCEEDING AND NATURE OF THE RULING OF THE LOWER TRIBUNAL

This appeal is brought by the West Virginia Department of Health and Human Resources ("Department") to contest that certain Order entered herein on December 13, 2004 by the Circuit Court of Randolph County, West Virginia, wherein the Court denied the Department's motion to vacate a previously entered payment order which the Department believes was issued in violation of West Virginia Code § 49-7-33. A copy of said Order entered on December 13, 2004 is attached hereto as **Exhibit A**, and made a part hereof.

The Department contends that the Circuit Court's original order of May 5, 2004 herein directing payment to Dr. Thomas Adamski for conducting a sexual offender evaluation on the juvenile was issued properly in accordance with West Virginia Code § 49-7-33 by directing payment to Dr. Adamski at the medicaid rate. Subsequently, however, the Circuit Court issued an Order dated September 2, 2004 without the benefit of a hearing which directed payment to Dr. Adamski for said evaluation at a rate well in excess of the statutory rate mandated in the aforesaid statute. The Department then filed a motion seeking an order from the Circuit Court to vacate its September 2, 2004, Order in light of West Virginia Code §49-7-33 and/or that said order be amended to reflect the correct rate of payment for said evaluation (at the medicaid rate as per statute).

The Department presents its appeal in this juvenile delinquency matter seeking an Order from this Honorable Court reversing the Circuit Court's December

13, 2004, Order denying the Department's motion to vacate below.

II. STATEMENT OF FACTS

On May 5, 2004 a preliminary hearing was convened in the underlying juvenile proceeding wherein the juvenile was charged with Sexual Abuse in the First Degree,¹ in violation of West Virginia Code § 61-8B-7 (a)(3). As a result of the hearing, the parties stipulated to an adjudication whereby the juvenile entered an "Alford" plea denying the facts alleged in the petition but agreeing to the adjudication. The Court then ordered that the juvenile undergo a 60 day evaluation at the West Virginia Industrial Home for Youth, Industrial, WV, and further that the juvenile be placed in a detention facility pending transfer to Industrial, WV.

In addition, the Court further ordered that, "Dr. Thomas Adamski perform an appropriate sexual offender evaluation of the juvenile and that the Department of Health and Human Services [Resources] shall pay for services not covered by insurance, at **Medicaid rates.**" Emphasis added. A copy of the May 5, 2004, Order directing said evaluation by Dr. Adamski is attached hereto as **Exhibit B**, and made a part hereof.

By order dated July 23, 2004 (and entered on September 2, 2004), without the benefit of a hearing the Court found that Dr. Adamski's evaluation report had been received and directed the Department to pay Dr. Adamski \$1,000.00 (four hours at \$250.00 per hour) for his services in performing the evaluation on the

¹The petition alleged that the juvenile, being over the age of fourteen years, subjected another juvenile under the age of eleven years (the victim was five years old), to sexual contact.

juvenile. This Order is contrary to the previous order of the Court (see Exhibit B) which directed that Dr. Adamski be paid for services not paid by insurance, at the medicaid rate. A copy of the Order entered on September 2, 2004 is attached hereto as **Exhibit C**, and made a part hereof. The medicaid rate that was applicable to Dr. Adamski's evaluation on the juvenile was determined to be \$214.89², verses \$1,000.00 which was directed by the Court to be paid to Dr. Adamski. Dr. Adamski's evaluation was further conducted even after the juvenile had undergone a 60 day evaluation at the Industrial Home for Youth.

The Department then filed its motion to vacate the Order entered on September 2, 2004 which directed the Department to pay Dr. Adamski well in excess of the medicaid rate. The Department's motion was based primarily upon West Virginia Code § 49-7-33, which the Court's earlier order of May 4, 2004 had complied with in ordering Dr. Adamski to conduct the evaluation. The Court denied the Department's motion to vacate the September 2, 2004, Order. In so doing the Circuit Court specifically found that, ". . . the Court believes it has inherent power to take such action as it deems necessary to have this juvenile evaluation. . . ." See, p. 3, Exhibit A. The Circuit Court further denied the Department's subsequent motion for stay by Order dated January 21, 2005.

²Determination of the medicaid rate is set forth in an October 5, 2004, letter from the Bureau for Medical Services (Medicaid), which is attached hereto as **Exhibit D**, and made a part hereof.

III. ASSIGNMENT OF ERROR

The circuit court erred in ordering payment for an evaluation conducted on the juvenile by Dr. Thomas Adamski in violation of West Virginia Code § 49-7-33, which provides that payment for the evaluation conducted by Dr. Adamski be paid in accordance with the Medicaid rate.

IV. STANDARD OF REVIEW

"For appeals resulting from abuse and neglect proceedings . . . we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W. Va. 325, 332, 540 S.E.2d 542, 549 (2000)."

"Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abuse or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." *Syl. Pt. 1, In re Tiffany Marie S.*,

196 W. Va. 223, 470 S.E.2d 177 (1996).

Accordingly, the Department asserts that the Circuit Court's interpretation and/or application of West Virginia Code § 49-7-33 herein merits a *de novo* review.

V. DISCUSSION OF LAW

West Virginia Code § 49-7-33 states as follows:

At any time during any proceedings brought pursuant to articles five [§§ 49-5-1 et seq.] and six [§§ 49-6-1 et seq.] of this chapter, the court may upon its own motion, or upon a motion of any party, order the West Virginia department of health and human resources to pay for professional services rendered by a psychologist, psychiatrist, physician, therapist or other health care professional to a child or other party to the proceedings. Professional services include, but are not limited to, treatment, therapy, counseling, evaluation, report preparation, consultation and preparation of expert testimony. **The West Virginia department of health and human resources shall set the fee schedule for such services in accordance with the Medicaid rate, if any, or the customary rate and adjust the schedule as appropriate. Every such psychologist, psychiatrist, physician, therapist or other health care professional shall be paid by the West Virginia department of health and human resources upon completion of services and submission of a final report or other information and documentation as required by the policies and procedures implemented by the West Virginia Department of health and human resources.**

W. Va. Code § 49-7-33 (2004 Repl.Vol.) (Emphasis added).

Accordingly, the amount directed to be paid to Dr. Adamski by the Department pursuant to the Circuit Court's Order entered on September 2, 2004, directly violates West Virginia Code § 49-7-33, as said amount is clearly not representative of the medicaid rate of payment. In fact, the amount the Department was directed by the Court to pay Dr. Adamski is over four times in excess of the applicable medicaid rate (\$1,000.00 verses \$214.89).

The Department has issued payment to Dr. Adamski in this matter pursuant to the applicable medicaid rate in the amount of \$214.89. This payment fully comports with the mandates of West Virginia Code § 49-7-33 and fulfills the Department's statutory obligation herein. In fact, if the Department were to comply with the September 2, 2004, payment order directing payment to Dr. Adamski in the amount of \$1,000.00 said action would constitute a direct violation of statutory law by the Department.

Furthermore, the Circuit Court initially ordered that Dr. Adamski perform the juvenile's evaluation and that the Department pay for same utilizing the medicaid rate. See, Exhibit B. Curiously, the Court then reversed course and ordered that Dr. Adamski be paid at a flat rate of \$250.00 per hour for a total of four (4) hours of work (or \$1,000.00). See, Exhibit C.

On at least two occasions, this Honorable Court has recognized the application of West Virginia Code § 49-7-33. In *Hewitt v. State of West Virginia Department of Health and Human Resources*, 212 W. Va. 698, 575 S.E.2d 308 (2002), also cited as *Hewitt I*, this Court identified that there is a split of responsibility for payment of evaluative services verses testimonial services of experts in abuse and neglect cases as well as juvenile delinquency proceedings - with the Court being responsible for payment of testimonial services and the Department being responsible for evaluative services. In *Hewitt I*, the Court did not apply § 49-7-33 to the payment orders involved because the statute had not taken effect until nearly a year after the order had been entered. Otherwise, in

Footnote 10 the Court stated that, “. . . Those statutory provisions [§49-7-33] operate as a restriction on the amount that can be charged when DHHR is ordered by a trial court to pay for health care services in connection with matters arising under articles five and six of chapter 49.” *Hewitt I*, 212 W.Va. 703, 575 S.E.2d 308, 313, n. 10.

In *State ex rel. Artimez v. Recht*, 2005 WL 350566 (*Hewitt II*), this Court further stated in considering West Virginia Code § 49-7-33:

That statute [§ 49-7-33] provides that the DHHR “shall set the fee schedule for such services in accordance with the Medicaid rate, if any, or the customary rate and adjust the schedule as appropriate.” . . . Consequently, the *Hewitt I* Court concluded the abuse and neglect fee issue by upholding the fees in underlying payment orders entered before June 7, 2002 [the effective date of § 49-7-33], and explaining that the payment orders entered after June 7, 2002, were subject to the statute’s provisions regarding the Medicaid rate. [FN2] 212 W.Va. at 703, 575 S.E.2d at 313.

2005 WL 350566, p. 2. Even though both *Hewitt I* and *II* involved payment orders for expert services in abuse and neglect cases, the Court noted the application of § 49-7-33 also to proceedings brought pursuant to West Virginia Code § 49-5-1, et seq., or juvenile delinquency matters. *Id.*

This Court has further stated in *Hewitt I* that,

“While the Court is not unappreciative of the budgetary constraints facing DHHR, we cannot resolve the issues presented here based upon the operating costs of a state agency. Our decision must be grounded in the law, rather than a response to a specific agency’s financial woes.”

212 W.Va. at 701, 575 S.E.2d at 311. In seeking and gaining passage of West Virginia Code § 49-7-33, the Department has taken measures and has a legitimate

purpose to establish some uniformity and expectancy in fees for services which fall under the statute. Dr. Adamski, in agreeing to provide services to the juvenile in this proceeding, as well as the Court in ordering same, are subject to the mandates of § 49-7-33. Dr. Adamski may not wish to become a Medicaid provider of health care services and has every right to that status. However, pursuant to § 49-7-33 when he does engage in an expert evaluation in a juvenile delinquency matter, he expressly falls under this statute's obligatory payment rate scheme.

The Circuit Court invoked its "inherent" power to order the Department to pay for an evaluation at a rate which the Department contends is in violation of § 49-7-33. The Circuit Court provided no rule, case authority or statute for such invocation of power. On the contrary, the Department provides this Court with a specific statutory provision that clearly defines the limits of an expert's fee for a service which has an applicable medicaid rate.

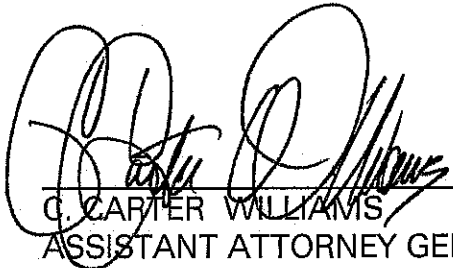
VI. CONCLUSION AND RELIEF REQUESTED

In light of the foregoing, the Department would respectfully pray for an Order of this Honorable Court reversing the Circuit Court's order denying the Department's motion to vacate the September 2, 2004, Order which directed payment by the Department to Thomas R. Adamski, MD for evaluation services in an amount well in excess of the medicaid rate of payment in direct violation of West Virginia Code § 49-7-33.

Respectfully Submitted,

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES
Petitioner,
By Counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

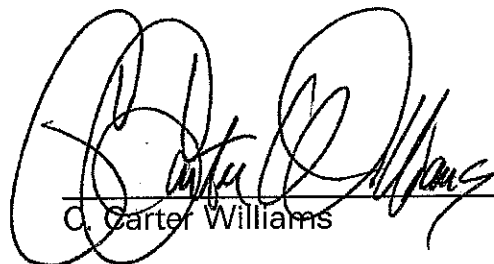


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VII. CERTIFICATE OF SERVICE

I, C. Carter Williams, do hereby certify that I have served a true copy of the foregoing **Brief of Appellant, State of West Virginia, Department of Health and Human Resources**, upon the following individuals by United States mail, postage prepaid, on this the 3rd day of August, 2005:

Shannon Jones, Assistant Prosecuting Attorney
Randolph County Prosecuting Attorney's Office
Randolph County Courthouse
4 Randolph Ave.
Elkins, WV 26241



C. Carter Williams