



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of:



DECISION

MOP/151199

PRELIMINARY RECITALS

Pursuant to a petition filed August 8, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Winnebago County Department of Human Services ["County"] in regard to Medical Assistance ["MA"], a Hearing was held via telephone on January 16, 2014. A Briefing schedule was set. The Briefing schedule closed on March 17, 2014. At petitioner's request Hearings scheduled for December 5, 2013, November 4, 2013, and October 15, 2013 were rescheduled.

The issue for determination is whether the following 9 Claims can be established against petitioner for alleged MA overpayments in the total amount of \$30,540.54 covering the time period March 2007 to October 2011:

- (A) Claim # [redacted]; \$3,038.16;
(B) Claim # [redacted]; \$3,077.62;
(C) Claim # [redacted]; \$5,169.10;
(D) Claim # [redacted]; \$2,691.53;
(E) Claim # [redacted]; \$2,165.27;
(F) Claim # [redacted]; \$3,841.82;
(G) Claim # [redacted]; \$2,311.30;
(H) Claim # [redacted]; \$3,989.01; and,
(I) Claim # [redacted]; \$4,256.73.

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

[redacted], petitioner's boyfriend
[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
BY: Leslie Vosters, ESS

Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187

OTHER PERSONS PRESENT:

, FEP
, Investigator, O'Brien & Associates
, Overpayment Specialist, O'Brien & Associates

ADMINISTRATIVE LAW JUDGE:

Sean P. Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # ) is a resident of Winnebago County, Wisconsin.
2. The County established the following 9 Claims against petitioner for alleged MA overpayments in the total amount of \$30,540.54 covering the time period March 2007 to October 2011:
 - (A) Claim # ; \$3,038.16;
 - (B) Claim # ; \$3,077.62;
 - (C) Claim # ; \$5,169.10;
 - (D) Claim # ; \$2,691.53;
 - (E) Claim # ; \$2,165.27;
 - (F) Claim # ; \$3,841.82;
 - (G) Claim # ; \$2,311.30;
 - (H) Claim # ; \$3,989.01; and,
 - (I) Claim # ; \$4,256.73.
3. The majority of the MA overpayment Claims detailed in *Findings of Fact #2*, above, were the subject of a prior Hearing held on June 22, 2012; that June 22, 2012 Hearing concerned alleged MA overpayments in the amount of \$26,149.10 for the time period February 2008 to October 2011. DHA Case No. MOP/141135 (Wis. Div. Hearings & Appeals July 10, 2012) (DHS).
4. A *Decision* dated July 10, 2012 was issued as a result of the June 22, 2012 Hearing:
 - (I) That *Decision* concluded that the Wisconsin Department of Health Services ["DHS"] "has not established an overpayment prior to July 2008." and "[DHS] has established an overpayment from July 1, 2010 to October 31, 2011."
 - (II) That *Decision* Ordered: "[DHS] shall review and determine the overpayment amount from July 1, 2010 to October 31, 2011" and "Any efforts to collect on an overpayment from the period February 2008 to June 30, 2010 must cease, and any record of such overpayment in CARES or elsewhere must be vacated."

DHA Case No. MOP/141135 (Wis. Div. Hearings & Appeals July 10, 2012) (DHS).

5. The July 10, 2012 *Decision* in MOP/141135 notes that the County “elected to calculate to [sic] overpayment back to 2008 because that was as far back as records were readily available, and because she understood from [the investigator’s] investigative report that petitioner admitted to living with [her boyfriend] for more than ten years.”

DISCUSSION

An overpayment of MA benefits may be recovered only in the following 3 circumstances:

- A. A misstatement or omission of fact by a person supplying information in an application for benefits;
- B. The failure of an MA or BadgerCare recipient or any other person responsible for giving information on the recipient's behalf to report the receipt of income or assets in an amount that would have affected the recipient's eligibility for benefits; or,
- C. The failure of an MA or BadgerCare recipient or any other person responsible for giving information on the recipient's behalf to report any change in the recipient's financial or nonfinancial situation or eligibility characteristics that would have affected the recipient's eligibility for benefits or the recipient's cost-sharing requirements.

Wis. Stat. § 49.497(1)(a) (2011-12); Wis. Admin. Code § DHS 108.03(3)(b) (May 2010); See also, *Badger Care + Eligibility Handbook* ["BC+EH"] 28.1.; *Medicaid Eligibility Handbook* ["MEH"] 22.2.1; BEM/DWS Operations Memo, No: 05-39, Date: 09/29/2005; and, BEM/DWS Operations Memo, No: 06-10, Date: 02/09/2006.

In this case, as detailed in the above *Findings of Fact*, the majority of the MA overpayment Claims at issue here were the subject of a prior Hearing held on June 22, 2012 and a resulting *Decision* dated July 10, 2012. Furthermore, the entirety MA overpayment Claims at issue here could have been the subject of that prior Hearing and *Decision*.

The legal doctrine of claim preclusion (formerly known as *res judicata*) provides that a final judgment on the merits bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences. Ordinarily a final judgment is conclusive in all subsequent actions as to all matters which were litigated or which might have been litigated in the former proceedings.¹ The following factors must be present:

- (1) an identity between the parties or their privies in the prior and present suits;
- (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and,
- (3) identity of the causes of action in the two suits.

¹ Administrative Decisions may carry preclusive effect. See, *Froebel v. Meyer*, 13 F.Supp.2d 843, 858, 47 ERC 1359 (E.D.Wis. 1998) rehearing and rehearing en banc denied by *Froebel v. Meyer*, 217 F.3d 928, 934, 50 ERC 2102, 30 Envtl. L. Rep. 20,746 (7th Cir.(Wis.) 2000) cert. denied by *Froebel v. Meyer*, 531 U.S. 1075, 121 S.Ct. 769, 148 L.Ed.2d 669, 69 USLW 3318, 69 USLW 3449, 69 USLW 3456, 51 ERC 2152 (2001); See also, *Acharya v. American Fed'n of State, County & Mun. Employees*, 146 Wis.2d 693, 697, 432 N.W.2d 140 (Ct.App.1988); and, *Patzer v. Board of Regents of the Univ. of Wis. Sys.*, 763 F.2d 851, 858 (7th Cir.1985) (“In general, a judgment affirming an administrative decision is *res judicata* as to the claims adjudicated, no less than a judgment entered after a trial on the merits.”).

Sopha v. Owens-Corning Fiberglas Corp., 230 Wis. 2d 212, 233-234, 601 N.W.2d 627 (1999); See also, *Northern States Power Co. v. Bugher*, 189 Wis.2d. 541, 550-551, 525 N.W.2d. 723 (1995).

Exceptions to the doctrine of claim preclusion, confined within proper limits, may occur when the policies favoring preclusion of a second action are trumped by other significant policies. Claim preclusion is a principle of public policy applied to render justice, not to deny it. *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d at 236. This is a narrow exception to the doctrine and applies when a second action, through no fault of the person seeking the exception, is necessary in the interest of justice. *Id.*, at 237-238.

The County had the opportunity at the Hearing for MOP/141135 to make all the arguments it now seeks to make. It could have argued that petitioner was overpaid \$30,540.54 covering the time period March 2007 to October 2011 (as it now does). It did not.² Additionally, the County did not ask for a rehearing of *Decision* MOP/141135 or appeal it to Circuit Court. The County chose not to make all the arguments it could have made in MOP/141135. The County chose not to ask for a rehearing and chose not to appeal to Circuit Court. It cannot be said, therefore, that a second action is necessary through no fault of the County's. It follows that the doctrine of claim preclusion now precludes the County (and DHS) from pursuing, in this action, the alleged MA overpayments detailed in *Findings of Fact* #2, above.

It is noted that the July 10, 2102 *Decision* in MOP/141135 Orders that “[DHS] shall review and determine the overpayment amount from July 1, 2010 to October 31, 2011. If [DHS] intends to recover that overpayment is [sic] must provide new notice to petitioner indicating the amount of overpayment during that period. The notice shall provide new appeal rights.” Nothing in this *Decision* prevents DHS, or the County, from implementing that Order.

The County argues that “[o]nce the initial requirement for the application of issue preclusion is met, then the circuit court must determine whether the application of the doctrine under the particular circumstances of the case would be consistent with fundamental fairness.”³ However, the fundamental fairness analysis applies to the doctrine of issue preclusion -- not to the doctrine of claim preclusion. See, *Mrozek v. Intra Financial Corp.*, 2005 WI 73 ¶¶ 17 & 28, 281 Wis. 2d 448, 463-464 & 470-471, 669 N.W.2d 54 (2005); *Town of Delafield v. Winkelman*, 2004 WI 17 ¶¶ 33-34, 269 Wis. 2d 109, 124-125, 675 N.W.2d 470 (2004); *Northern States Power Co. v. Bugher*, 189 Wis.2d. 541, 550-551, 525 N.W.2d. 723 (1995); and, *Masko v. City of Madison*, 2003 WI App 124 ¶ 6, 265 Wis. 2d 442, 448-449, 665 N.W.2d 391 (Ct. App. 2003). It is claim preclusion, not issue preclusion, that is relevant here. Therefore, the County's argument is misplaced.

CONCLUSIONS OF LAW

For the reasons discussed above, the County and DHS may not, in this action, establish the 9 Claims against petitioner for alleged MA overpayments in the total amount of \$30,540.54 covering the time period March 2007 to October 2011 that are detailed in *Findings of Fact* #2, above. The County and

² The July 10, 2012 *Decision* in MOP/141135 notes that, according to the investigative report, “petitioner admitted to living with [her boyfriend] for more than ten years” yet the county “elected to calculate to [sic] overpayment back to 2008 because that was as far back as records were readily available.” The County could have argued, as it does now, that the overpayment went back to March 2007. It did not.

³ The County cites to the following case: *Lands' End, Inc. v. City of Dodgeville*, 351 Wis.2d 223, 838 N.W.2d 865, (Table), Unpublished Disposition, 2013 WL 4836701, 2013 WI App 128 (Ct. App. September 12, 2013). That is an unpublished opinion. An unpublished opinion is not precedent or authority and is not binding on any court -- but may be cited for its persuasive value. However, a court need not distinguish or otherwise discuss an unpublished opinion. Wis. Stat. § 809.23(3) (2011-12).

DHS may, however, implement the Order contained in DHA Case No. MOP/141135 (Wis. Div. Hearings & Appeals July 10, 2012) (DHS).

THEREFORE, it is

ORDERED

That this matter be REMANDED to the County and DHS, that, within 10 days of the date of this *Decision*, the County take all necessary steps to REVERSE the 9 Claims against petitioner for alleged MA overpayments in the total amount of \$30,540.54 covering the time period March 2007 to October 2011 that are detailed in *Findings of Fact #2*, above. The County and DHS may implement the Order contained in DHA Case No. MOP/141135 (Wis. Div. Hearings & Appeals July 10, 2012) (DHS) {even if this means reestablishing some of the Claims detailed in *Findings of Fact #2*, above}.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 11th day of April, 2014

\sSean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on April 11, 2014.

Winnebago County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
appletonspine@gmail.com