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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PHIL MILLMAN et al., Plaintiffs and Appellants, v. DEPARTMENT OF HEALTH CARE SERVICES et al., Defendants and Respondents.	B233526 (Los Angeles County Super. Ct. No. BS120032)

APPEAL from an order of the Superior Court of Los Angeles County. Robert O'Brien, Judge. Affirmed.

Law Offices of Michael J. Khouri and Michael J. Khouri for Plaintiffs and Appellants.

Kamala D. Harris, Attorney General, Jennifer Kim, Assistant Attorney General, and Kenneth K. Wang, Deputy Attorney General, for Defendants and Respondents.

Phil Millman and Chemique Pharmaceuticals, Inc. (collectively, Plaintiffs) appeal from an order denying a motion in which they challenged the Department of Health Care Services and its director's compliance with a peremptory writ of mandate issued by the trial court. We affirm.

BACKGROUND[1]

Plaintiff Phil Millman is a licensed pharmacist. Plaintiff Chemique Pharmaceuticals, Inc. (Chemique) is the pharmacy where Millman operates his business. According to Plaintiffs, Chemique is "a home infusion pharmacy that serves patients who require long-term intravenous care."

Plaintiffs are Medi-Cal providers. As part of the Department's administration of the Medi-Cal program, the Department conducts audits of amounts paid to providers for "services provided to Medi-Cal beneficiaries." (Welf. & Inst. Code, § 14170, subd. (a)(1).)

In 2005, the Department conducted an audit of Plaintiffs' "Medi-Cal practices" for the period January 1, 2003 through December 16, 2004. In performing the audit, the Department compared records of Plaintiffs' drug purchases with records of Plaintiffs' billings to Medi-Cal for the dispensation of those drugs. The particular drugs reviewed were "Albutein 25% IV solution; Alburx 25% vial; Neumega 5mg vial; Neupogen 300; Procrit 40,000 units; and Zofran 2mg."

As the trial court explained in its final ruling on Plaintiffs' petition for writ of mandate, "the Department calculates the total amount of [Plaintiffs]' billings, calculates the amount of billings attributable to Medi-Cal and to other payors, and then determines

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[1] Plaintiffs filed an Appellants' Appendix as the record on appeal. Plaintiffs' appendix is not an adequate record for this court to review the merits of Plaintiffs' appeal. Plaintiffs did not include in their appendix the underlying moving and opposition papers that resulted in the order they appeal from. The Department filed a Respondents' Appendix which includes the remainder of the documents necessary for this court to decide Plaintiffs' appeal on the merits.

the percentage of total billings attributable to Medi-Cal. The Department applies the Medi-Cal percentage of billings to [Plaintiffs]' total inventory of a given drug to determine how much of that drug was available for Medi-Cal billings." If the audit reveals that the available inventory of a drug was less than the amount Plaintiffs billed to Medi-Cal for the drug, the Department makes a determination that Plaintiffs were overpaid for providing that drug to Medi-Cal beneficiaries.

On or about December 28, 2005, the Department notified Plaintiffs that it had determined based on the audit that Plaintiffs had been overpaid in the amount of $856,466 because Plaintiffs' inventory of the six drugs reviewed was insufficient to cover Plaintiffs' billings to Medi-Cal.

Plaintiffs challenged the overpayment determination through the administrative process. As the trial court stated in its final ruling on Plaintiffs' petition for writ of mandate: "[Plaintiffs] timely appealed the Department's overpayment determination. In June 2007 and January 2008, an administrative hearing was held to determine the propriety of [Plaintiffs]' appeal and the propriety of [the Department's] overpayment determination. At the conclusion of the administrative hearing, the administrative law judge made a recommendation upholding the Department's overpayment determination. [¶] "In March 2009, the Department adopted the ALJ's recommendation and entered a final order denying [Plaintiffs]' appeal and upholding the overpayment determination in the amount of $856,466.00."

On April 8, 2009, Plaintiffs filed a petition for writ of administrative mandate against the Department and its director (hereafter collectively referred to as the Department) seeking a peremptory writ of mandate "commanding [the Department] to set aside the overpayment determination and lift the withhold on current payments due [Plaintiffs] for services rendered to MEDI-CAL beneficiaries."

In their opening brief in support of the petition, Plaintiffs raised five issues. First, they contended that the audit was "arbitrary because the auditors relied upon a known data entry error rendering the audit result false." Plaintiffs asserted that the "Department incorrectly included in their calculation, an 8,000 quantity of Albutein as 800,000 units

supposedly dispensed to a single patient." Plaintiffs argued, "since there was no evidence that the 8,000 entry was ever disbursed to any patient, private or Medi-Cal, the entry clearly should not have been included in the audit. . . . [I]ncluding the mistaken entry drastically skewed the percentage of inventory available for Medi-Cal billing; and in turn severely overstated the alleged overpayment calculation against Chemique." (Fn. omitted.)

Second, Plaintiffs contended that the "Department committed a serious error of law in performing the audit and testifying to its reliability in the administrative hearing." Plaintiffs described the "serious error of law" as the Department's "withholding relevant discovery documentation," specifically a memorandum from the California Department of Justice regarding its investigation of Chemique. According to Plaintiffs, the memorandum "explains why the DOJ closed its investigation of Chemique" and "also details the DOJ's unfavorable review of the Department's audit," including its criticism of the Department's inclusion of the 8,000 units of Albutein even though it appeared to be a data entry error.

Third, Plaintiffs contended that "it was an abuse of discretion to find the Department's audit reliable when the Department refused to consider substantial inventory purchased from out-of-state wholesalers." Plaintiffs argued that "Chemique should have received inventory credit for purchases made during the audit period from out-of-state wholesalers because the Pharmacy Board had already made a finding that there was no violation of pharmacy law" by Chemique when it purchased products from these wholesalers.

Fourth, Plaintiffs contended that "it was an abuse of discretion to find the Department's audit reliable when the Department failed to consider substantial beginning inventory on hand before the audit period." Plaintiffs argued that the "Department refused to acknowledge that there was existing, viable inventory left over on Chemique's shelves from 2002 [citation]. In fact, Chemique had a total of 70,343 units of inventory on hand on January 1, 2003." Plaintiffs described this inventory as "12,600 units of Albutein + 25,400 units of Albumin + 7 units of Neumega + 32,336 units of Zofran . . . ."

Fifth, Plaintiffs contended that "it was an abuse of discretion to find the Department's audit reliable when the audit had already been deemed unreliable by the United States Government." Plaintiffs asserted that "Medicare" reviewed the Department's audit and rejected it, concluding that Chemique had not committed any fraud.

The Department filed an opposition brief in which it defended its audit and its overpayment determination.

On June 7, 2010, the trial court held a hearing on Plaintiff's petition for writ of mandate. The court issued a written tentative ruling, which it adopted as its final ruling on the matter. The court granted the petition and ordered that, "A writ shall issue commanding the Department to set aside its overpayment determination and remanding the matter for the Department to recalculate the overpayment, if any, based on the corrected entry for Albutien [sic] (i.e., 80 instead of 8,000), and to consider out-of-state inventory in its analysis."

The trial court rejected the other three claims Plaintiffs made (listed above), including the claim that the Department should have included Plaintiffs' beginning inventory in the audit. The court stated that Plaintiffs "had a legal obligation to provide records to the auditor. As the ALJ [administrative law judge] found, [Plaintiffs] did not keep records from which beginning inventory could be determined. The audit was based on the records provided by [Plaintiffs], as verified and corroborated from the auditor's efforts."

On July 9, 2010, the trial court entered judgment and issued the peremptory writ of mandate, ordering the Department to comply with the court's final ruling. Plaintiffs did not challenge the judgment or the final ruling.

On October 22, 2010, the Department filed its return to the writ of mandate, stating that the Office of Administrative Hearings had issued an order vacating the administrative decision "and remanding the audit overpayment determination to the Department for reconsideration consistent with the Writ."

On December 10, 2010, the Department sent Plaintiffs written notification that it had "recalculated the audit demand amount." The Department explained that, "In calculating the demand amount, we recalculated the Albutein from 8,000 units to 80 units, and considered the out-of-state inventory. The Department determined the total demand amount to be $569,778, a reduction of $286,689 from the original demand amount of $856,467."

On March 3, 2011, Plaintiffs filed a motion for an order commanding the Department to recalculate the overpayment determination, arguing that the Department had not complied with the writ of mandate. Plaintiffs raised three issues. First, Plaintiffs contended that the "Department's recalculation incorrectly calculates Albutein." Plaintiffs asserted: "The writ instructs the Department to use the 'corrected entry for [Albutein] (i.e., 80 instead of 8,000)' [citation]. However, the Court's use of the number '80' was merely by example. Whether the original data entry error read '8,000,000[,]' '800,' or '8' does not matter. The only fact that matters is that the 8,000 entry was never found to have been dispensed to any patient, nor billed to any payor, Medi-Cal, private or otherwise." Therefore, the only correct number that should have been used is zero ('0')."

Second, Plaintiffs contended that the "Department's recalculation incorrectly excludes known Albumin (Alburx) inventory." Plaintiffs argued: "The Department has continually refused to acknowledge, at least as far as the overpayment determination is concerned, the fact that Alburx and Albutein are essentially the exact same drug (Albumin), simply produced from different manufacturers. The Department's ignorance – or conscious disregard – on this issue is reflected by their total disallowance of any Albumin (Alburx) inventory for [Plaintiffs] [citation]. Indeed, the Department notes that such inventory existed, but refused to give [Plaintiffs] credit for any because no disbursements of Alburx appeared on [Plaintiffs]' log of scripts during the audit period."

Third, Plaintiffs contended that the "Department should allocate all of [Plaintiffs] available inventory for [Plaintiffs]' Medi-Cal billings." Plaintiffs criticized the Department for allocating some of the available inventory to Plaintiffs' "billings to private insurance during the audit period."

The Department filed a brief in opposition to Plaintiffs' motion.

On April 5, 2011, the trial court heard oral argument on Plaintiffs' motion challenging the Department's compliance with the writ of mandate. The court denied the motion.[2]

DISCUSSION

Appealable Order

We first address and reject the Department's argument that Plaintiffs have not appealed from an appealable order.

A "court which issues a writ of mandate retains continuing jurisdiction to make any order necessary to its enforcement." (*City of Carmel-By-The-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964, 971; Code Civ. Proc., § 1097.) A petitioner who challenges the respondent's compliance with a writ of mandate may proceed in one of three ways: (1) by filing a new petition for writ of mandate; (2) by filing a subsequent petition in the case in which the writ was issued; or (3) by filing a motion seeking an order requiring the respondent "to reconsider further." (*Ibid*.) Here, Plaintiffs chose the third option.[3]

An order on a motion challenging the respondent's compliance with a writ of mandate is an appealable order. (*City of Carmel-By-The-Sea v. Board of Supervisors*, *supra*, 137 Cal.App.3d at p. 971; *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 464, fn. 2 ["After the entry of judgment and issuance of a

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[2] Plaintiffs' appendix includes the minute order denying the motion. The record does not include a reporter's transcript from the hearing. We do not know the trial court's reasons for denial of the motion.

[3] Plaintiffs also filed below a new petition for writ of administrative mandate. We granted the Department's request for judicial notice of the new petition and preceding administrative decision dismissing Plaintiffs' appeal of the Department's recalculation of the overpayment. The Department represents in its respondent's brief that the trial court has stayed the new writ proceeding during pendency of this appeal.

peremptory writ of mandate, an order concerning compliance with the writ is a postjudgment order and is appealable as an order relating to the enforcement of a judgment"].)

Issues on Appeal

In the motion that we are reviewing on appeal, Plaintiffs challenged the Department's compliance with the writ of mandate. The writ ordered "the Department to recalculate the overpayment, if any, based on the corrected entry for Albutien [sic] (i.e., 80 instead of 8,000), and to consider out-of-state inventory in its analysis."

Two of the three issues Plaintiffs raised in their motion challenging the recalculation—and raise here on appeal—are outside the scope of the writ of mandate. Plaintiffs contend that the Department's recalculation should have included "known Albumin (Alburx) inventory," and should have allocated all of Plaintiffs' available inventory for Medi-Cal billings rather than allocating some of the available inventory to Plaintiffs' billings to private insurance.

When the trial court issued the writ of mandate and ordered the Department to recalculate the overpayment with two new parameters (the corrected entry for Albutein and the inclusion of inventory from out-of-state wholesalers), Plaintiffs did not challenge that decision in the trial court or in this court. Plaintiffs did not ask the trial court to reconsider its ruling and order the Department to include known Albumin (Alburx) inventory or allocate all available inventory to Plaintiffs' Medi-Cal billings. Plaintiffs did not appeal from the judgment.

Thus, Plaintiffs have waived these two issues. Neither is a proper basis for challenging the Department's recalculation of the overpayment. (See *City of Carmel-By-The-Sea v. Board of Supervisors*, *supra*, 137 Cal.App.3d at pp. 970-971 [by failing to appeal from the judgment granting a peremptory writ of mandate the Board "waived its right to appeal from those portions of the writ with which it voluntarily purported to comply" even though there were further proceedings in the trial court regarding the Board's compliance with the writ and the Board properly appealed from the order finding that it failed to comply with the writ].)

Department's Compliance with Writ

Plaintiffs contend that the Department failed to comply with the writ of mandate because the Department used a "corrected entry" of 80 units of Albutein in place of the erroneous entry of 8,000 units of Albutein. Plaintiffs assert that the Department should have used a "corrected entry" of 0.

As set forth above, the trial court's writ of mandate ordered "the Department to recalculate the overpayment, if any, based on the corrected entry for Albutien [sic] (i.e., 80 instead of 8,000) . . . ." Plaintiffs argue that the "court's use of the number '80' was merely by example," and that the Department should have figured out that the correct number was 0. We reject Plaintiffs' argument for three reasons.

First, the abbreviation of the phrase "for example" is e.g., not i.e. "I.e." is the abbreviation for the Latin phrase "id est," meaning "that is." (Webster's 3d New Internat. Dict. (1976) pp. 726, 1124.) Thus, the trial court ordered the Department to use the corrected entry for Albutein in its recalculation, *that is* 80 instead of 8,000. By using "i.e.," the court was defining the corrected entry as 80 units. We will not presume that the court used the abbreviation for "that is" when it meant to use the abbreviation for "for example."

Second, we do not believe it is reasonable to conclude that the trial court would have left this issue to the Department's subsequent determination. The court reviewed the evidence regarding this particular data entry, discussed it in its ruling, and concluded that the Department erred in using the 8,000 entry in its calculation. There would be no reason for the court to ask the Department to determine the value for the corrected entry based on the same evidence that was before the court. If that evidence unequivocally showed that the corrected entry should have been 0, as Plaintiffs contend, why would the trial court not have indicated that in its ruling and in the writ? We note that Plaintiffs did not ask the trial court to clarify the writ and state that the value of the corrected entry was 0.

Third, Plaintiffs do not point to anything in the record demonstrating that the corrected entry should be 0. The evidence before the trial court showed that the June 16, 2004 entry for 8,000 units of Albutein appeared on Plaintiffs' "log of scripts," which is the document that Plaintiffs provided to the Department's auditor when the auditor requested Plaintiffs' records of prescriptions filled and dispensed from the pharmacy. Plaintiffs' records demonstrate that an employee entered on the log of scripts that Plaintiffs were filling a prescription for Albutein for a particular patient on June 16, 2004. Plaintiffs presented evidence in the writ proceeding demonstrating that, based on her review of documents provided by Plaintiffs, the auditor came to the conclusion and "admitted to a criminal investigator that the 8,000 entry should have been 80." The auditor nonetheless used the 8,000 figure in calculating the amount of the overpayment.[4] Plaintiffs point to no evidence tending to show that the corrected entry in the log of scripts should be 0, meaning that Plaintiffs did *not* fill a prescription for Albutein on June 16, 2004 for the patient named in the entry, even though an employee indicated that such a prescription was filled.

Plaintiffs have not shown that the trial court erred in denying their motion challenging the Department's compliance with the writ of mandate.

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[4] The trial court explained: "The Department assigned the 8,000 entry to [Plaintiffs]' non Medi-Cal billing. The net effect was to increase (by a factor of 100) the total billings, and thereby reduce the percentage of total billings attributable to Medi-Cal by a corresponding factor of 100. The Department concluded that [a total of] 886,500 units of Albutein had been dispensed. Of those 76,000 were paid by Medi-Cal, or around 8%. [¶] If a drug is not actually dispensed, it should not be included in the audit. [Citation.] There were never 886,500 units of Albutein available in inventory, and no such amount was dispensed. Assuming that the June 16, 2004 entry should have been for 80 units rather than 8,000, the number of units of Albutein available should have been 166,500 rather than 886,500. Accordingly, the percentage available for Medi-Cal billings should have been around 46%, rather than 8%."

DISPOSITION

The order denying Plaintiffs' motion for an order commanding the Department to recalculate the overpayment determination is affirmed. The Department is entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.