COMMONWEALTH OF PENNSYLVANIA

PRESBYTERIAN MEDICAL CENTER OF OAKMONT and PRESBYTERIAN MEDICAL CENTER OF OAKMONT, PENNSYLVANIA, INC.	:	BEFORE THE BOARD OF CLAIMS
VS.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE	:	DOCKET NOS. 1906-P, 2112-P, 2530-P

OPINION

This case comes before the Board of Claims based upon three (3) separate Complaints filed by Oakmont, a nursing facility providing nursing care and services to Medicaid recipients. Oakmont is requesting payment for services provided in 1990, 1991, 1992, 1994 and 1995.

On March 5, 1995, at Docket No. 1906-P, Oakmont filed a Statement of Claim for fiscal years ending (FYE) 1990, 1991 and 1992. The Defendant, Commonwealth of Pennsylvania, Department of Public Welfare (DPW), filed Preliminary Objections which were dismissed by the Board of Claims on August 30, 1995. An Answer and New Matter was filed by DPW.

On May 23, 1996, at Docket No. 2112-P, Oakmont filed a Statement of Claim for FYE 1994. An Amended Claim was filed on May 28, 1996. DPW filed its Answer and New Matter on June 13, 1996.

On November 13, 1997, at Docket No. 2530-P, Oakmont filed a Statement of Claim for FYE 1997. On December 19, 1997, DPW filed an Answer and New Matter. All three (3) of the Claims were consolidated for purposes of discovery and hearing.

The discovery process in these proceedings was not uneventful. The Board issued pre-trial

Orders and at one point in time refused to permit any further discovery. After much wrangling, the case was heard by Panel Members Daniel F. Bekavac, Esquire and A. T. McLaughlin, P.E. on September 14, 1999, at Greensburg, Pennsylvania. However, as in the discovery process, several issues were raised by both counsel at the hearing concerning whether or not the opposing side had violated "the rules." The hearing was delayed as a result of the objections. As a result, several evidentiary issues remain unresolved and must be decided in this Opinion. This is in addition to the myriad of issues that have been raised by both counsel concerning the merits of the case.

It should be stated that at the hearing, DPW agreed to settle certain issues that had been raised by Claimant. (N.T. 135, 230-236, 247-250, 257-258) DPW agreed that Oakmont should be allowed to claim a loss on refinancing relating to the 1994 refinancing. In addition, DPW agreed that it made errors in its calculation of the $22,000 bed limit. Finally, DPW agreed to reimburse Oakmont for the cost of its non-allowable cost centers in light of the Commonwealth Court's decision. Meadows Nursing Center v. Commw., Dept. of Public Welfare, 127 Pa. Commw. 146, 561 A.2d 68 (1989) The parties had agreed to determine the exact amount of additional reimbursement owed relative to the issues. At the present time, the Board is not aware of any meeting taking place and admonishes the parties to do so as soon as possible if same has not already occurred.

PROCEDURAL ISSUES:

Prior to a discussion of the facts, there are several procedural issues that must be decided. The first issue is whether or not the Board has subject matter jurisdiction to hear the case. A corollary to that is whether or not the Claimant has exhausted its administrative remedies. The second issue is whether or not the testimony of Timothy Ziegler should be excluded because

Claimant did not comply with Pa. R.C.P. 4003.5. Both of these issues have been raised by the Defendant, DPW.

A court has the inherent power to determine whether it has the jurisdiction to decide the case before it. See Marcus v. Diulus, 363 A.2d 1205 (1976) It is the affirmative duty of the Court to consider the issue of subject matter jurisdiction. Id. The issue of subject matter jurisdiction can never be waived by either party.

The Board of Claims has subject matter jurisdiction over all claims against the Commonwealth arising from contracts entered into by the Commonwealth, including claims in express and implied contract and claims in quasi contract. **72 P.S. §4651-4** Smock v. Commw. of PA., 496 Pa. 204, 436 A.2d 615 (1981) It has been held on numerous occasions that such claims before the Board include those brought by nursing facility providers against DPW for reimbursement due under the Medical Assistance Program. Commw., Dept. of Public Welfare v. Maplewood Manor Convalescent Center, Inc., 650 A.2d 1117 (1994); Commw., Dept. of Public Welfare v. Moran, 480 A.2d 356 (1984)

DPW cites three (3) cases to show the proposition that the mere existence of a contractual relationship between an agency and another party does not cause the Board of Claims to have jurisdiction over a dispute between the two. In Keenheel v. Commw., Pennsylvania Securities Commission, 523 Pa. 223, 565 A.2d 1147 (1989), the Supreme Court held that "the jurisdiction of the Board of Claims is not triggered simply because a contract may be involved in the action, but only when the Claimant relies upon the provisions of that contract in asserting the claim against the Commonwealth." In that case, the Supreme Court held that the Board did not have jurisdiction to consider the question of whether a settlement agreement was breached. Likewise, the Court held similarly in Porreco v. Maleno Developers, Inc., 717

A.2d 1089 (1998), concluding that the Board did not have jurisdiction because the rights derived from claims of negligence and nuisance, not from contract.

Thus, the fundamental question for the Board to decide is whether or not the claims before it are derived from a contract or otherwise. If derived from a contract, then the Board has subject matter jurisdiction.

DPW contends that Oakmont claims that the Provider Agreement is a Contract, but Oakmont does not cite any provision alleging a breach. DPW further claims that the dispute involves a determination as to what its [DPW's] regulations mean and how they are applied.

Oakmont, on the other hand, claims that this argument has been consistently rejected by the Courts, and that it is inconsistent with DPW's own public notice stating that its relationship with providers is contractual in nature.

The Board believes that the Claims are derived from a Contract and that, therefore, it does have subject matter jurisdiction. Oakmont signed a Provider Agreement. DPW advised Oakmont by public notice that the Provider Agreement involves a contractual relationship with DPW, and neither party objected.

The next jurisdictional argument advanced by DPW is that the Board lacks jurisdiction because the Claims are not ripe. DPW claims that Oakmont's filing of administrative appeals to DPW's Bureau of Hearings and Appeals renders any previous decision of DPW non-final. As a result, DPW claims, the Claims of Oakmont have not accrued since the two-prong test of Darien Capital Management, Inc. has not been met. Darien Capital Management, Inc. v. Commw., Public School Employees' Retirement System, 700 A.2d 395 (1997) In essence, DPW believes that the failure of DPW's Board of

Appeals to issue a final Order means that Oakmont has not been affirmatively notified that it will not be paid by DPW, which is a requirement of the Darien case. DPW misapplies the Darien case to the facts of this case. The Darien case dealt specifically with when the Statute of Limitations should be applied to bar a case from being heard by the Board. It had nothing to do with the present issue before the Board. Secondly, the Enabling Statute creating the Board of Claims gives the Board of Claims exclusive jurisdiction over all claims against the Commonwealth and its agencies, arising from contracts entered into by the Commonwealth. **72 P.S. 4651-4** Thus, the Board has the authority to rule on these types of claims.

Next, DPW claims that the Board lacks jurisdiction because Oakmont has not exhausted its administrative remedies. DPW cites Smock v. Commw. of Pa., 436 A.2d 615 (1981), for the proposition that exhaustion of administrative remedies is required in matters before the Board of Claims. However, the issue in Smock was that Mr. Smock should have requested licensing reinstatement of his nursing home prior to bringing reimbursement claims before the Board of Claims. Hence, the issue was not whether administrative remedies had been exhausted but whether the matter was properly before the Board. The Commonwealth Court ruled it was not, and sent the case to DPW for a determination of the license status.

DPW further cites Pennsylvania Pharmacists Association v. Commw. of Pa., Dept. of Public Welfare, 733 A.2d 666 (1999), for the proposition that any matter involving the interpretation and application of Medicaid guidelines should have initial consideration by the entity with expertise in implementing the program. However, that case also stated that all administrative remedies do not have to be exhausted where irreparable harm would occur to the plaintiffs during pursuit of the remedy. Id.

The Board believes that irreparable harm would occur to the Claimant if this matter were to be pursued through administrative channels. The parties have already presented the case to the Board and it involves a substantial sum of money. The Board is quite confident after hearing the evidence that it is able to understand the complex issues involved in this litigation.

Finally, DPW claims that the Board should stay the proceedings pending a decision by the Secretary of Public Welfare on the related administrative appeals. In doing so, DPW invokes the Doctrine of Primary Administrative Jurisdiction which was first adopted by the Pennsylvania Supreme Court in Weston v. Reading Co., 282 A.2d 714 (1977) In cases where the Doctrine applies, the Board should refer the matter to the appropriate agency for a determination. The civil litigation is then stayed pending a decision by the administrative agency.

In Machipango Land and Coal Co. v. Commw., Department of Environmental Resources, 624 A.2d 724 (1993), the Court established a set of principles to determine whether primary jurisdiction applies. These factors are succinctly listed below:

a). the industry is heavily regulated;
b). resolving the matter requires special expertise;
c). the issue is fact specific and requires voluminous and conflicting testimony;
d). the administrative agency was created to focus on the type of problem before the Court; and
e). the agency has jurisdiction over the issue and most of all, the system will work better if the administrative agency hears the matter. Id. at 752-753

The Board is not convinced that these factors apply to the present case. There is no indication that the regulatory system will work any better if DPW hears the case. To the contrary, the protracted delay in determining DPW liability leaves Oakmont in the depths of uncertainty. There is no

special expertise necessary to resolve the case. The testimony was not voluminous and most of it was not conflicting. In fact, the entire case was tried in a single day with part of the time spent with the lead attorneys' wrangling over evidentiary issues. The Board sees no reason to invoke the Doctrine of Primary Jurisdiction and is confident it can render a decision in this matter.

For all of the above reasons, the Board dismisses the Motion of Defendant, DPW, and retains jurisdiction in this matter.

The second procedural matter that must be disposed of is the trial Motion of DPW to exclude the testimony of the Claimant's expert, Mr. Timothy Ziegler, for failure to comply with Pa. R.C.P. 4003.5. Claimant was requested by DPW to provide information concerning its expert witness by DPW's Third Motion to Compel Discovery. Claimant never responded and the Board ordered the Claimant to answer the interrogatory on August 30, 1999. By the date of the trial, September 14, 1999, Claimant had still not responded; hence, DPW objected to the introduction of the expert testimony.

Pa. R.C.P. 4003.5 does provide a methodology for discovery of expert opinions and the facts upon which those opinions were based. It is clear that Claimant did fail to provide the information DPW requested. However, at no time did the Board prior to trial, issue an order precluding Mr. Ziegler from testifying; nor was such an order ever requested by DPW. Moreover, Mr. Ziegler testified almost exclusively from the work product of DPW. Consequently, it follows logically that the expert witness should be permitted to testify at trial even if an expert interrogatory remained unanswered. This is particularly true in light of Pa. R.C.P. 126 which states that "the rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every action or proceeding."

Consequently, the Board holds that Mr. Timothy Ziegler shall be permitted to testify as an expert witness in this proceeding.

FINDINGS OF FACTS

1. The Claimant, Presbyterian Medical Center at Oakmont "Oakmont" is a long-term care facility located at 1215 Hulton Road, Oakmont, Pennsylvania 15130. (Complaint, para. 1)

2. Oakmont participates in the Pennsylvania Medical Assistance Program. (Complaint, para. 2)

3. The Defendant is the Commonwealth of Pennsylvania, Department of Public Welfare "DPW", located at P.O. Box 2675, Harrisburg, Pennsylvania 17105. (Complaint, para. 3)

4. Oakmont receives payment from DPW based upon annual Medical Assistance audits for providing services to residents approved for Medical Assistance. (Complaint, paras. 7-8)

5. DPW has consistently reimbursed nursing facilities for movable equipment. (N.T. 270-271, 254-256)

6. DPW and Oakmont executed an Agreement on January 1, 1990 concerning Oakmont serving as a facility for Medicaid patients. (Complaint, Exhibit B)

7. Movable equipment is anything that is not permanently affixed to the wall, such as a floor scrubber or medical carts. (N.T. 73)

DOCKET NO. 1906-P (FYE 12/31/90 - 12/31/92)

8. DPW issued Audit Report No. 91-012 on September 7, 1994 for FYE 12/31/90. (N.T. 70; Complaint, Exhibit A)

9. The "moratorium" evolved from regulations stating that after August 1, 1982, DPW would no longer pay capital depreciation and interest for any new nursing bed construction. (N.T. 76)

10. There is no construction associated with movable equipment. (N.T. 77)

11. Movable equipment was added to the facility after construction was concluded. (N.T. 77)

12. No part of the $9.4 Million cost to construct the facility included movable equipment. (N.T. 77-78)

13. The construction contract for the facility does not list any specific payments for movable equipment. (N.T. 84-85)

14. Movable equipment would be required in the facility regardless of the amount of beds. (N.T. 91)

15. Prior to 1994 DPW reimbursed Oakmont for its deferred financing costs associated with the construction of the nursing facility in 1984. (N.T. 114)

16. DPW did not allow reimbursement for any of the loss or the refinancing in connection with Oakmont's Medicaid audit fiscal year ending 12/31/95. (N.T. 116)

17. Prior to 1995, DPW allowed working capital interest to be reimbursed. (N.T. 131)

18. DPW has consistently applied the moratorium to movable equipment since fiscal year ending 12/31/82. (N.T. 269-270)

19. Prior to fiscal year ending 12/31/95, no one ever made interest income offsets or home office offsets. (N.T. 318)

20. Oakmont has no control over the Debt Service Reserve Fund. (N.T. 336)

21. Depreciation and capital interest expenses generally are an allowable cost according to DPW regulations. (N.T. 337)

22. DPW did not allow $220,634 in capital interest reimbursement based on a moratorium against the award of capital interest in cases involving movable equipment. (Complaint, Exhibit A)

23. DPW did not allow $102,656 in depreciation reimbursement based upon a moratorium against awarding depreciation reimbursement in cases involving movable equipment. (N.T. 70; Complaint, Exhibit A)

24. Oakmont is claiming damages as follows: $61,156 ($29,262 interest plus $31,894 depreciation) for the moratorium to movable equipment as well as additional sums which were settled prior to the hearing (N.T. 72-73)

25. Oakmont is also requesting pre-judgment interest at the rate of six (6%) percent from the date the Claim was filed March 9, 1995 until the exit date of this Order. (N.T. 97; Exhibit C-38)

26. Oakmont is also requesting interest at the rate of six (6%) percent from the exit date of this Order for post-judgment interest. (N.T. 97; Exhibit C-38)

27. The regulations concerning the moratorium are codified in part at 55 Pa. Code Section 1181.65. (N.T. 26; Exhibit 17)

28. In sub-paragraph (c)(4), the relevant section of the Pa. Code clearly states: "The $22,000 bed limit does not include the cost of movable equipment." (N.T. 26; Exhibit 17)

29. The moratorium does not apply to movable equipment. (N.T. 330-331)

FYE 12/31/91

30. DPW issued Audit Report No. 92-005 for FYE 12/31/91 on September 7, 1994. (Complaint, Exhibit A)

31. DPW did not allow $223,653 in capital interest reimbursement based upon a moratorium against awarding capital interest in cases involving movable equipment. (N.T. 99; Complaint, Exhibit A)

32. DPW did not allow $95,684 in depreciation reimbursement based upon a moratorium on depreciation reimbursement in cases involving movable equipment. (N.T. 99; Complaint, Exhibit A)

33. Oakmont is claiming damages for 1991 as follows: $62,815 ($32,420 interest plus $30,395 depreciation) for the moratorium to movable equipment. (Exhibit C-38)

34. Oakmont is also requesting interest at six (6%) percent from the exit date of this Order for post-judgment interest. (N.T. 97; Exhibit C-38)

35. Oakmont is further requesting pre-judgment interest at six (6%) percent from the date the Claim was filed until the exit date of this Order. (N.T. 97; Exhibit C-38)

36. The regulations concerning the moratorium are found at 55 Pa. Code Section 1181.65. (N.T. 26; Exhibit 17)

37. In sub-paragraph (c)(4), the regulations state, in part: "The $22,000 bed limit does not include the cost of movable equipment." (N.T. 26; Exhibit 17)

38. The moratorium does not apply to movable equipment. (N.T. 330-331)

FYE 12/31/92

39. DPW issued Audit Report No. 93-020 for FYE 12/31/92 on September 7, 1994. (Complaint, Exhibit A)

40. DPW did not allow $220,086 in capital interest reimbursement based upon a moratorium on capital interest reimbursement in cases involving movable equipment. (N.T. 99; Complaint, Exhibit A)

41. DPW did not allow $96,260 in depreciation reimbursement based upon a moratorium on depreciation interest in cases involving movable equipment. (N.T. 99; Complaint, Exhibit A)

42. Oakmont is requesting damages for FYE 12/31/92 as follows: $73,089 ($37,491 interest plus $35,598 depreciation) for the moratorium to movable equipment. (Exhibit C-38)

43. Oakmont is further requesting pre-judgment interest at six (6%) percent from the date the Claim was filed until the exit date of this Order. (N.T. 97; Exhibit C-38)

44. Oakmont is also requesting interest at six (6%) percent from the exit date of this Order for post-judgment interest. (N.T. 97; Exhibit C-38)

45. The regulations concerning the moratorium are codified in part at 55 Pa. Code Section 1181.65. (N.T. 26; Exhibit 17)

46. In sub-paragraph (c)(4), the regulations state, in part: "The $22,000 per bed limit does not include the cost of movable equipment." (N.T. 26; Exhibit 17)

47. The moratorium does not apply to movable equipment. (N.T. 330-331)

DOCKET NO. 2112-P (FYE 12/31/94)

48. DPW issued Audit Report No. 95-019 on March 27, 1996 for FYE 12/31/94. (Complaint, Exhibit B)

49. DPW did not allow $213,194 in depreciation reimbursement based upon a

moratorium on depreciation reimbursement in cases involving movable equipment. (N.T. 100; Complaint, Exhibit B)

50. DPW did not allow $333,244 in capital interest reimbursement based upon a moratorium on capital interest reimbursement in cases involving movable equipment. (N.T. 100; Complaint, Exhibit B)

51. Oakmont is requesting damages for FYE 12/31/94 as follows: $57,678 ($34,926 interest plus $22,752 depreciation) for the moratorium to movable equipment as well as additional sums which were settled prior to the hearing. (See settled issues described later in this Opinion)

52. Oakmont is further requesting pre-judgment interest at six (6%) percent from the date the Claim was filed until the exit date of this Order. (N.T. 97; Exhibit C-38)

53. Oakmont is also requesting interest at six (6%) percent from the exit date of this Order for post-judgment interest. (N.T. 97; Exhibit C-38)

54. The regulations concerning the moratorium are codified in part at 55 Pa. Code Section 1181.65. (N.T. 26)

55. In sub-paragraph (c)(4), the regulations state, in part: "The $22,000 per bed limit does not include the cost of movable equipment." (N.T. 26)

DOCKET NO. 2530-P (FYE 12/31/95)

56. DPW issued Audit Report No. 95-653 for FYE 12/31/95 on May 13, 1997. (Complaint Exhibit A)

57. DPW did not allow $226,867 in depreciation reimbursement based upon a moratorium on depreciation reimbursement in cases involving movable equipment. (N.T. 100; Complaint Exhibit B)

58. DPW did not allow $15,246 by not reclassing capital interest as working capital interest. (N.T. 128; Complaint Exhibit B)

59. DPW did not allow $255,157 in capital interest reimbursement based upon a moratorium on capital interest reimbursement in cases involving movable equipment. (N.T. 100; Complaint Exhibit B)

60. Oakmont is requesting damages as follows: $7,466 for working capital interest and $49,120 ($24,542 interest plus $24,578 depreciation) for the moratorium on movable equipment. (Exhibit C-38)

61. Oakmont is further requesting pre-judgment interest at six (6%) percent from November 13, 1997 until the exit date of this Order. (N.T. 97; Exhibit C-38)

62. Oakmont is also requesting interest at six (6%) percent from the exit date of this Order for post-judgment interest. (N.T. 97; Exhibit C-38)

63. The regulations concerning the moratorium are codified in part at 55 Pa. Code Section 1181.65. (N.T. 26)

64. In sub-paragraph (c)(4) the regulations state, in part: "The $22,000 per bed limit does not include the cost of movable equipment." (N.T. 26)

65. The moratorium does not apply to movable equipment. (N.T. 330-331)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the subject matter of this action and the parties thereto. **72 P.S. 4651-1, et seq.**

2. DPW consented to the formation of a contractual relationship between itself and Oakmont.

3. The moratorium regulations are codified at 55 Pa. Code Section 1181.65, with the relevant part being found at sub-paragraph(c)(4), as applied to this case: "The $22,000 per bed limit does not include the cost of movable equipment."

4. The letter of a regulation must be followed if its words are unambiguous. Commw., Dept. of Environmental Resources v. Rannels, 610 A.2d 515 (1992)

5. Depreciation and capital interest reimbursement on movable equipment is not subject to a moratorium pursuant to 55 Pa. Code Section 1181.65, and is, therefore, due and owing.

6. A court need not give deference to an agency where its construction of a regulation may be contrary to its plain meaning. Leader Nursing Centers, Inc. v. Commw., Dept. of Public Welfare, 475 A.2d 859 (1984)

7. DPW wrongfully reclassified working capital interest to capital interest in 1995.

8. Pre-judgment interest should apply to any amount that was reclassified as capital interest. Northampton Convalescent Center v. Commw., Dept. of Public Welfare, 703 A.2d 1034 (1997)

9. When a contract is fully performed, the obligation to make payment for that performance arises from the date of completion. Green Construction Co. v. Commw., Dept. of Transportation, 643 A.2d 1129 (1994)

10. The Board of Claims is authorized to make awards against the Commonwealth and such monetary awards may include pre-judgment interest. Department of Property and Supplies v. Berger, 312 A.2d 100 (1973)

11. Pre-judgment interest shall be awarded on all matters presently pending before the Board of Claims relative to this case.

12. No statute exists precluding the award of post-judgment interest as to provider claims against DPW.

13. Post-judgment interest is hereby awarded on all matters pending before the Board of Claims relative to this issue.

14. The defenses of recoupment, mistake, and off-set are affirmative defenses that must be clearly stated in New Matter or they are waived. Household Consumer Discount Co. v. Vespaziano, 415 A.2d 689 (1980) Pa. R.C.P. 1032(a)

15. The defenses of recoupment, mistake, and off-set are hereby waived; moreover, to permit them would be highly prejudicial to the Claimant, Oakmont.

16. The matter presently before the Board of Claims is a final determination, notwithstanding an appeal, of all matters concerning the 1990-1992, 1994, and 1995 audits.

17. DPW failed to adequately plead that the interest income generated from the Debt Service Reserve Fund should be used to off-set Oakmont's capital interest reimbursement and is, therefore, barred from raising that as an issue.

OPINION

This matter was called to hearing before the Board of Claims' Panel, composed of Daniel F. Bekavac, Attorney Member, and A.T. McLaughlin, P.E., Engineer Member. The Panel Report has

been submitted and reviewed.

This case involves three (3) separate Claims that have been filed by Oakmont, a nursing facility providing nursing care and services to Medicaid recipients. The Claims, which have been consolidated, involve payment for services provided in 1990, 1991, 1992, 1994 and 1995.

Several ancillary issues have also been raised by Oakmont, such as whether Oakmont is entitled to pre- and/or post-judgment interest, and, if so, from what date.

The initial issue is whether the moratorium regulations codified at 55 Pa. Code Section 1181.65 apply to this case. It is clear that the moratorium does not apply to movable equipment. Sub-section (c)(4) clearly states that: "The $22,000 per bed limit [on depreciation and interest on capital interest reimbursement] does not include the cost of movable equipment." The words used within the regulation are clear and unambiguous. Freeze v. Donegal Mutual Insurance Co., 603 A.2d 595, 598 (1992). Hence, the Board grants the request of Oakmont. Oakmont's depreciation and capital interest costs for movable equipment for these time periods will be recognized by DPW. Moreover, the plain language of the statute permits DPW to disallow these costs (depreciation and capital interest) only with respect to new or additional beds. There is no specific regulation that states that the moratorium applies to movable equipment. Oakmont shall be reimbursed $303,858 in damages with respect to this issue.

The second issue for discussion is whether or not Oakmont is entitled to receive reimbursement for working capital interest as a result of the reclassification of working capital interest to capital interest. This reclassification resulted in the facility losing Medicaid reimbursement from 1986 to 1994 because of being over the net operating cost ceilings. However, in 1995, Oakmont should have

received $7,466 due to the reclassification as a result of being under the net operating cost ceilings. DPW, suddenly and without any apparent reason, decided that this reclassification was improper, even though they had been receiving the benefit of such a reclassification for years. This change was totally inappropriate and inconsistent with past previous treatment practice of this type of interest.

The record is devoid of any testimony or evidence produced by DPW to rebut the position of Oakmont that the interest should be treated as working capital interest. Hence, the Board awards $7,466 to Oakmont.

The third issue that arises is whether Oakmont may be awarded pre- and post-judgment interest. The Pennsylvania Supreme Court has emphatically ruled that nursing facilities may not recover pre-judgment interest against DPW when they proceed administratively. This case, however, is not being heard administratively, but rather through the Board of Claims.

Generally speaking, pre-judgment interest is a matter of right in contract actions in determining the applicable damages. Sun Pipe Line Co. v. Tri-State Telecommunications, Inc., 655 A.2d 112 (1994) The Board has entered such judgments in previous actions before it involving DPW. These cases have been upheld by the Appellate Courts.

The question becomes - from what date should pre-judgment interest be awarded? The Pennsylvania Appellate Courts have held that the obligation to make payment for a performance under a contract arises from the date of completion of that contract. Green Construction Co. v. Commw., Dept. of Transportation, 643 A.2d 1129 (1994) It does not matter that the amount of the pre-judgment interest has not been liquidated prior to the matter coming to trial. Burkholder v. Cherry, 607 A.2d 745 (1992)

As a result, the Board orders pre-judgment interest as follows: For FYE 1990-92, interest is awarded from March 9, 1995; for FYE 1994, interest is awarded from May 23, 1996; and for FYE 1995, interest is awarded from November 13, 1997.

A corollary issue is post-judgment interest. The general rule is that post-judgment interest shall be awarded unless it is specifically stated otherwise by statute. King v. Boettcher, 616 A.2d 57 (1992) (Case Affirmed at 645 A.2d 219 (1994) Defendant cannot point to any statute that would preclude the awarding of post-judgment interest. Moreover, the issue has previously been litigated by DPW before the Board in other cases and the Appellate Courts have upheld the awarding of post-judgment interest.

DPW attempted to raise several defenses at the trial of this matter, among them were recoupment and mistake. Neither of these defenses was plead in Answer and New Matter by Defendant. Furthermore, DPW did not give Oakmont any notice of its intent to raise any defenses until four days prior to the hearing, according to the trial record. Specifically, DPW claimed that certain off-sets from the Debt Service Reserve Fund should be used to reduce the additional capital interest reimbursement due to Oakmont.

It is clear that the defenses of recoupment, mistake, and set-off must be pleaded as New Matter, if not, they are effectively waived. Pa. R.C.P. 1032(a) as interpreted in Household Consumer Discount v. Vespaziani, 415 A.2d 689 (1980) The Board thus holds that any evidence appearing on the record relative to these defenses shall be excluded since it was taken subject to Oakmonts' counsels objection, which is sustained. Thus, the off-set of interest income from a Debt Service Reserve Fund is hereby denied.

Finally, the Enabling Statute that created the Board of Claims makes it clear that the Board has exclusive jurisdiction over any matter arising from a contractual relationship against the Commonwealth or any of its agents. Shovel Transfer and Storage, Inc. v. Simpson, 565 A.2d 1153 (1989) The matter before the Board involves a determination of the amount of allowable Medicaid costs due to Oakmont for 1990, 1991, 1992, 1994 and 1995. Any attempt by DPW to re-audit

Oakmont for any reason during these periods, including laundry costs, shall not be determinative since the Board's decision in this matter shall be conclusive.

ORDER

AND NOW, this 17th day of April, 2001, after hearing and review of the Briefs, it is hereby **ORDERED** and **DECREED** that judgment shall be entered in favor of the Claimants, Presbyterian Medical Center of Oakmont and Presbyterian Medical Center of Oakmont, Pennsylvania, Inc. and against the Defendant, Commonwealth of Pennsylvania, Department of Public Welfare, in the amount of Three Hundred Eleven Thousand Three Hundred Twenty-Four Dollars ($311,324) plus costs and interest at the rate of six (6%) percent per annum from the date of this Order.

Pre-judgment is also awarded as follows at the legal rate of six (6%) percent per annum:

For fiscal year ending 12/31/90 from March 9, 1995 until the exit date of this Order on the sum of $61,156;

For fiscal year ending 12/31/91 from March 9, 1995 until the exit date of this Order on the sum of $62,815;

For fiscal year ending 12/31/92 from September 7, 1994 until the exit date of this Order on the sum of $73,089;

For fiscal year ending 12/31/94 from March 27, 1996 until the exit date of this Order on the sum of $57,678; and

For fiscal year ending 12/31/95 from May 13, 1997 until the exit date of this Order on the sum of $49,120.

BOARD OF CLAIMS

_____
David C. Clipper
Chief Administrative Judge

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Louis G. O'Brien
Engineer Member

_____
James W. Harris
Citizen Member

Opinion Signed