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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

LEYA REKHTER, *et al.*,
Plaintiffs/Petitioners,
v.
STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, *et al.*,
Defendants/Respondents.

NO. 07-2-00895-8

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

NATASHA PFAFF,
Plaintiff,
v.
STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, *et al.*,
Defendants.

SERVICE EMPLOYEES
INTERNATIONAL UNION 775, *et al.*,
Plaintiffs,
v.
ROBIN ARNOLD-WILLIAMS, *et al.*,
Defendants.

THIS MATTER came before the Honorable Thomas McPhee of the above-titled Court upon the Client Class (sometimes referred to as "Recipients" or "Clients" or "Beneficiaries") Petition for Judicial Review.

1 **I. PROCEDURAL HISTORY AND MATTERS RESOLVED**
2 **BEFORE OR DURING TRIAL**

3 Three lawsuits were filed in May 2007 and consolidated by this Court on April 21,
4 2009. The three consolidated lawsuits are *Pfaff v. Robin Arnolds-Williams*, TCSC Cause No.
5 07-2-00911-3, *Rekhter et al. v. State of Washington, et al.* TCSC Cause No. 07-2-00895-8
6 and *Service Employees International Union 775, Weens v. Robin Arnold-Williams, et al.*,
7 KCSC Cause No. 07-2-17710-8SEA. These cases were consolidated under *Rekhter et al. v.*
8 *State of Washington, et al.*, TCSC Cause No. 07-2-00895-8.

9 Certain claims and issues in the cases were resolved or partially resolved by the
10 United States District Court, Western Washington District at Tacoma, which dismissed all
11 federal claims and remanded the case to this Court to decide the remaining state law claims.
12 See *Pfaff v. Washington*, 2008 WL 5142805 (W.D. Wash. 2008). Other claims and issues
13 have been resolved by this Court with pretrial motions or through CR 50, as indicated
14 below. The trial concluded on December 20, 2010.

15 **A. Class Certification For All Purposes Including Damages.** Plaintiffs' motion to
16 certify the classes and appoint class counsel pursuant to CR 23(b) for all purposes including
17 establishment of damages and engaging in class settlement negotiations was granted by
18 Order entered on January 4, 2010. The law firms of Livengood Fitzgerald & Alskog, PLLC
19 by and through its counsel of record John J. White, Jr., Kevin B. Hansen, Gregory A.
20 McBroom and Pfau, Cochran, Vertetis, Amala, PLLC, by and through its counsel of record
21 Darrell L. Cochran and Michael Pfau were appointed class counsel. The class definitions
22 are:

23 All persons who (1) were determined eligible for Medicaid or state funded in-
24 home personal care assistance and (2) had their base hours adjusted by the
operation of Wash. Admin. Code § 388-106-0130(3)(b) (or its predecessor),
except to the extent that they (3) requested an adjudicative proceeding
pursuant to Wash. Rev. Code § 74.08.080 challenging the downward
adjustment and have received or will receive back benefits as a result. [Client
Class]

 All providers of Medicaid or state funded in-home personal care employed by
persons who (1) were determined eligible for Medicaid or state funded in-
home personal care assistance and (2) had their base hours adjusted by the
operation of Wash. Admin. Code § 388-106-0130(3)(b) (or its predecessor),

1 except to the extent that they (3) requested an adjudicative proceeding
2 pursuant to Wash. Rev. Code § 74.08.080 challenging the downward
3 adjustment and have received or will receive back benefits as a result.
4 [Provider Class]

5 **B. Constitutional Violations.** Specified state constitutional claims were dismissed by
6 Order entered on June 4, 2010.

7 **C. Washington Law Against Discrimination.** All claims brought under the
8 Washington Law Against Discrimination chapter 49.60 RCW were dismissed by Order
9 entered on June 4, 2010.

10 **D. Eighth Cause of Action: Washington Wage Laws, RCW Ch. 49.52 and 49.46.**
11 All claims brought under this section, including claims brought under RCW 49.52 and
12 49.46, were dismissed by Order entered on May 7, 2010.

13 **E. Petition for Review of Agency Decisions On Hours and Shared Living Rule.** The
14 Client Class sought (1) judicial review of the shared living rule, (2) injunctive relief and (3)
15 monetary relief under the Administrative Procedures Act RCW 34.05 and RCW
16 74.08.080(3), and based on the decision of the state supreme court in *Jenkins v. DSHS*, 160
17 Wn.2d 287, 129 P.3d 849 (2007), which concluded that automatic deduction of hours
18 without conducting an individualized assessment part of the Shared Living Rule violated
19 Medicaid comparability laws. The Client Class claims under the APA, *Jenkins*, and RCW
20 74.08.080 have been addressed in part by opinion of the Court dated September 15, 2009,
21 oral opinion dated May 7, 2010 and by previous Orders of the Court entered on October 30,
22 2009, June 4, 2010 and September 30, 2011, identified below. The Client Class claims under
23 the APA, *Jenkins*, and RCW 74.08.080 are now resolved by these findings of fact,
24 conclusions of law, and order, which the Court enters pursuant RCW 34.05.574.

25 **F. Partial List Of Orders Pertaining To Class Claims**

1. The Defendants' Motion Requiring Plaintiffs to Notify the Classes was granted in part by Order November 12, 2010.

- 1 2. The Defendants' Motion Regarding the Individual Provider Remaining Claims &
2 Plaintiffs' Newly Raised Claims Regarding Home Care Agencies was denied by
3 Oral Ruling dated October 5, 2010 and by Order entered on November 12, 2010.
- 4 3. The Class Plaintiffs' Motion for Partial Summary Judgment regarding Informal
5 Supports and Incidental Benefit to the Provider Class was denied by Oral Ruling
6 dated October 5, 2010 and Order entered on November 12, 2010.
- 7 4. Order Granting In-Part and Denying In-Part Defendants' CR 50 Motion and
8 Denying Plaintiffs' CR 50 Motion, dated September 30, 2011.
- 9 5. Order Amending Period for Retroactive Relief, dated September 30, 2011.
- 10 6. Order Denying Defendants' Revised Motion for Summary Judgment and Motion
11 for Reconsideration, dated September 30, 2011.

12 The Client Class claim under the APA, *Jenkins* and RCW 74.08.080 is now resolved
13 by these findings of fact, conclusions of law, and order, which the Court enters pursuant to
14 RCW 34.05.574.

15 II. FINDINGS OF FACT

16 1. The claim in this case involves long term care in-home assistance programs
17 administered by the Department of Social and Health Services (the "Department") for
18 certain persons. The assistance programs are funded in part by the federal government under
19 Title XIX of the Social Security Act—the Medicaid Act. The programs include RCW
20 74.39A.030 and 42 U.S.C. § 1396n(c), known as "COPEs," which serves low income
21 Washingtonians with functional disabilities as defined in RCW 74.39A.009 and pays for
22 someone to provide "personal care services" such as meal preparation, ordinary housework,
23 essential shopping, wood supply, and travel to medical services, as defined by WAC 388-
24 106-0010 and RCW 74.39A.009. Other funded programs involved in this case include the
Medicaid Personal Care program (42 USC § 1396d(a)(24) and RCW 74.09.520(2), the

1 Medically Needy In-Home Waiver program, and the state-only Chore program. These are
2 known collectively as the “in-home” service programs.

3 2. On April 1, 2003, the Department began phasing in the Care Assessment
4 Reporting and Evaluation tool, commonly referred to as the “CARE tool,” to assess needs of
5 recipients of assistance programs. Under WAC 388-106-0050 through -0145, applicants for,
6 and recipients of these federal and state programs are periodically assessed using the CARE
7 tool. The CARE tool assessment is used to determine whether an individual is functionally
8 eligible for long-term care services under one of the programs identified in Finding 1 above,
9 and, if so, the total amount of services he or she is entitled to receive in the form of
authorized hours-per-month.

10 3. The assessment process is not intended to identify all hours that a client
11 might need for in-home assistance, because there are limits to the total number of hours a
12 client can receive based on their classification group and other factors. The total number of
13 hours is commonly referred to as the base hours. WAC 388-106-0126.

14 4. With regard to members of the Client Class, a CARE assessment is
15 conducted upon application for long-term care services and reassessments occur at least
16 annually and more often if necessitated by a significant change in the individual’s condition.
17 Following the CARE assessment or reassessment, the Department issues a “planned action
18 notice” (PAN) to notify the recipient of the Department’s determination of his or her total
number of authorized hours. This determination can be appealed.

19 5. In April 2003, the Department first applied and adopted what became known
20 as the “Shared Living Rule” (“the Rule”). The Rule was promulgated as WAC 388-106-
21 0130 (earlier regulations embodying the Rule included WAC 388-71-0460 and WAC 388-
22 72A-0095) and addressed clients of the assistance programs who chose live-in providers to
23 provide in-home services. The difference in the Rule compared to periods before April 2003
24 is that this version of the Rule automatically reduced in-home service hours by
approximately 15% for shopping, laundry, housekeeping, meal preparation, and wood

1 supply services ("Rule related tasks"), and the automatic deduction applied only to the
2 clients with providers who lived in their home. In the absence of the Rule, as with clients
3 using providers that lived outside their homes, Client Class members would have received
4 an individualized assessment involving these particular Rule related tasks. Any reduction of
5 in-home service hours would have been based on the individual determination rather than an
6 automatic deduction.

7 6. The Client Class includes clients whose in-home service hours were
8 determined and reduced based on the Rule and excludes clients who previously filed an
9 administrative review of a Department decision on benefits and received back benefits as a
10 result. Only three clients (Gasper, Myers, and Jenkins) were eliminated from the class by
11 this exclusion.

12 7. In 2004, three clients (Gasper, Myers, and Jenkins) timely filed separate
13 administrative appeals contesting the Department's planned action notices determining their
14 in-home service hours. Administrative law judges (ALJ) dismissed the three appeals because
15 the appeals were based on the contention that the Shared Living Rule itself was invalid. The
16 ALJs did not have authority to consider that contention. In July 2004, Gasper and Myers
17 timely filed petitions for judicial review in Thurston County Superior Court, seeking review
18 of the agency orders which dismissed their administrative appeals. Both judicial review
19 petitions sought a declaration that the Rule was invalid. The two cases were consolidated. In
20 December 2004, a third client, Jenkins, filed a petition for judicial review in King County
21 Superior Court on the same basis.

22 8. In March 2005, Thurston County Superior Court concluded that the Shared
23 Living Rule was invalid because it violated the Medicaid comparability law and that in-
24 home service hours had been erroneously determined for Gasper and Myers. In August
2005, King County Superior Court issued a similar ruling in the *Jenkins* petition. The
Department appealed both cases and obtained stays of both decisions.

1 9. In March 2006, the Court of Appeals affirmed the Thurston County Superior
2 Court. *Gasper v. DSHS*, 132 Wn. App. 42, 129 P.3d 849 (2006). The Department then
3 sought discretionary review to the Washington Supreme Court and obtained a stay of the
4 decision. In May 2006, the Supreme Court accepted direct review of the King County
5 Superior Court ruling. In July 2006, the Supreme Court also accepted discretionary review
6 of the *Gasper* decision.

7 10. On May 3, 2007, the Supreme Court held that the Rule violated Medicaid
8 comparability laws. *Jenkins v. DSHS*, 160 Wn.2d 287, 303, 129 P.3d 849 (2007). The
9 *Jenkins* Court remanded each case for a determination of the number of hours the
10 Department wrongfully withheld. *Jenkins*, 160 Wn.2d at 302-03. The claims of all three
11 clients were then resolved administratively; the superior courts only awarded fees and costs.
12 This case was filed immediately after the Supreme Court's decision in *Jenkins*.

13 11. While the *Gasper and Myers* and the *Jenkins* cases were on appeal, and based
14 on judicial stays, the Department continued to apply the Rule to the Client Class members
15 who were assessed for in-home service hours. Following the *Jenkins* decision in May 2007,
16 the Department repealed the Rule effective June 29, 2007. The change in the CARE
17 assessment required by repeal of the Rule was applied to each individual member of the
18 Client Class at the time each member received a reassessment in the year following repeal of
19 the Rule. At the time of the reassessment, the in-home service hours were recalculated and
20 granted without application of the Rule. By June of 2008, all members of the Client Class
21 and all affected clients had been reassessed without application of the Rule.

22 12. The facts recited above show that the Rule was applied to members of the
23 Client Class as each individual member was assessed with the CARE tool beginning in April
24 2003 and then subsequently reassessed, until the repeal of the Rule and reassessments in
2007 and 2008. The Rule affected approximately 17,000 unduplicated members of the
Client Class between April 2003 and June 2008. However, for some members of the Client

1 Class, the Rule affected service hours for only a part of this period if, for example, the
2 member received in-home services for a shorter period.

3 13. No Client Class member sought and obtained relief through administrative
4 review or judicial review of the Rule or any planned action notices prior to bringing this
5 lawsuit on May 4, 2007. This fact is inherent in the class definition.

6 14. Pursuit of administrative remedies by individual Client Class members would
7 have been futile. Any administrative appeal related to the validity of the Shared Living Rule
8 would have been dismissed for lack of jurisdiction. Furthermore, the Department lacked the
9 capacity to conduct timely administrative hearings had Client Class members filed
10 individual administrative review petitions and had no mechanism for considering appeals en
11 mass.

12 15. At trial the evidence established that the Client Class members received Rule
13 related services from their in-home providers or other non-paid providers. In the
14 presentation of evidence relating to the damage claims of both classes, the plaintiffs and the
15 Department expert witnesses agreed that the calculation methodology involved first a
16 statistical analysis to determine the number of hours lost because of the Rule, and second,
17 application of that determination of hours to the providers' hourly rate, lost pay raises and
18 lost vacation hours.

19 16. During the period of the Rule, the Department conducted an annual
20 individualized assessment for each client to determine base hours for that client. Included in
21 each assessment was consideration of the tasks impacted by the Rule – i.e., shopping,
22 laundry, housekeeping, meal preparation, and wood supply services. For clients who used
23 live-out providers, an individualized assessment was conducted and for some the base hours
24 were reduced where a shared benefit between the client and the provider or other members
of the household existed for these tasks or where informal supports were available. This
individualized assessment for these tasks did not occur for the Client Class. For these

1 clients, with live-in providers, the Rule was applied to automatically reduce base hours by
2 approximately 15%.

3 17. At trial, plaintiffs sought recovery for all hours reduced because of the Rule
4 regardless of shared benefits or informal supports. The Department contended that recovery,
5 if any, should account for shared benefit and informal supports.

6 18. During the period of the Rule, for clients not affected by the Rule, the
7 individualized assessment conducted by the Department included consideration of informal
8 support and shared benefit. For those clients, if a client had informal support 100% of the
9 time for a given task, the client was then assessed to have a totally "met" need for that task
10 and the algorithm used by the Department reduced the base hours to reflect that met need. If
11 a client was assessed to have a shared benefit or partial informal support, the client was
12 determined to have a "partially met" need for the given task being assessed. In a partially
13 met situation involving shared benefit, the case manager attempted to assess the percentage
14 of the benefit shared for the task and apply the percentage allocated to the client to hours for
15 performing that task. In a partially met situation involving informal support, the case
16 manager attempted to assess the percentage of hours provided by the informal support. The
17 case manager assessed whether the need was partially met less than 25% of the time, 25% to
18 50% of the time, greater than 50% but less than 75% of the time, and greater than 75% of
19 the time. In performing this aspect of the individualized assessment, the case manager was
20 expected to exercise professional judgment in determining a client's needs.

21 19. During the period of the Rule, the Department's individualized assessment to
22 identify the degree of shared benefit or informal support regarding Rule related tasks did not
23 occur for Client Class members. There is no direct data from the CARE Tool assessment for
24 the Rule period that informs the trier-of-fact regarding the degree of shared benefit or
informal support that would have existed during that period.

20. There was no direct evidence quantifying the hours worked by Provider Class
members for Rule related tasks, but the evidence viewed as a whole establishes that they

1 performed these tasks and that some work included shared benefit and informal support, as
2 these concepts were applied to individualized assessments for clients with live-out providers
3 during the period of the Rule.

4 21. Although the Department denied any wrongful act justifying award of
5 damages, both sides offered expert witnesses who relied on statistical analysis of the data for
6 Client Class members and other clients for periods before and after repeal of the Rule.
7 Plaintiffs' experts did not attempt to account for any degree of shared benefit and informal
8 support; the Department's experts did. The Department's primary expert witness utilized
9 data from the period after the Rule and applied a case mix statistical analysis ("case mix
10 adjustment"), and a weighted average to determine an average of shared benefit and
11 informal support for Client Class base hour calculations that he concluded would have been
12 applied to individual assessments had the Rule not required the automatic deduction. This
13 calculation resulted in the greatest difference between the damage calculations of the two
14 sides, although there were other differences and adjustments that were disputed. In final
15 arguments to the jury on the claim of the Provider Class, plaintiffs argued for a maximum
16 verdict of approximately \$90 million; the Department argued for a minimum of
17 approximately \$50 million. Both sides argued for amounts in between.

18 22. The opinions and explanations of the Department's expert witnesses were
19 more persuasive. In determining the amount for unpaid hours on the claim of the Client
20 Class, the approach and calculation of the Department's experts is adopted by the Court. The
21 range established by that approach and calculation is between \$52,754,771 and \$61,675,806.

22 23. In the trial of the Client Class claim, the Department made an offer of proof
23 outside the presence of the jury that identified estimated damages using several different
24 timeframes for damages other than April 2003 through June 2008. The Court has rejected
those other timeframes for calculating damages.

25 25. The jury awarded the Provider Class damages in the amount of
\$57,123,794.50. The court finds that the Client Class suffered the same damages as the

1 Provider Class, \$57,123,794.50.

2
3 **III. CONCLUSIONS OF LAW**

4 1. By written opinion on September 15, 2009, and order dated October 30,
5 2009, the Court declared that the Client Class may seek relief including money damages
6 from the Department pursuant to RCW 34.05.570(2), which provides for judicial review of
7 agency rules. As the Court ruled in its opinion and order, the APA does not provide for
8 money damages as a remedy, but does permit money damages as a remedy when authorized
9 by another statute. RCW 34.05.574(3) (“The court may award damages, compensation, or
10 ancillary relief only to the extent expressly authorized by another provision of law.”). The
11 Court has ruled that relief would be allowed under RCW 74.08.080(3). Subsection (3)
12 applies “[w]hen a person files a petition for judicial review” and provides that “[i]f a
13 decision of the court is made in favor of the appellant, assistance shall be paid from date of
14 the denial of the application for assistance or thirty days after the application for temporary
15 assistance for needy families or forty-five days following the date of application, whichever
16 is sooner; or in the case of a recipient, from the effective date of the local community
17 services office decision.”

18 2. The Court further ruled in its opinion on September 15, 2009, and its order of
19 October 30, 2009, that the Client Class claim for judicial review and money damages is not
20 barred by failure to exhaust administrative remedies or statutes of limitations applicable to
21 seeking an administrative remedy or judicial review. On June 4, 2010, the Court ordered that
22 the Client Class members “shall be permitted to seek compensatory relief from the wrongful
23 withholding of benefits as a result of the application of the invalid Shared Living Rule from
24 November 1, 2003, to the last date that DSHS applied the rule to a Class Recipient
member.” Prior to trial, the Court modified this order orally to extend back to April 2003 at
the request of the parties because the experts for both sides used April 1, 2003 as the start
date for their calculations. The November 1, 2003 start date was based on the mid-point

1 between April 1, 2003, the date of first application of the Rule, and April 1, 2004, the last
2 date that a Client Class member would have completed reassessment after application of the
3 Rule. The bench ruling regarding this change in the beginning date for damages computation
4 was issued on October 5, 2011 and the Order regarding the change was entered on
5 September 30, 2011.

6 3. The jury was not instructed to render an advisory verdict on the Client Class
7 claim because to so instruct would have possibly confused the jury, to the prejudice of either
8 party. Nevertheless, this jury heard all the same evidence that an advisory jury would have
9 heard except evidence from the offer of proof considered and rejected by the court. See
10 Finding 23. Accordingly, the verdict of the jury on the claim of the Provider Class is
11 accorded by the Court the same substantial weight in considering the claim of the Client
12 Class as would be accorded a formal advisory verdict.

13 4. The Plaintiffs have argued that the Client Class should be awarded a money
14 judgment, subject to offset from payment of a judgment to the Provider Class. The Court
15 concludes that this is not appropriate. The Client Class has proved the same damages
16 claimed by the Provider Class claim, except that the Client Class actually received the Rule
17 related services and thus it sues to pass damages through to the Provider Class. The Court
18 previously ruled that legal authority allows the Client Class to claim damages under *Jenkins*.
19 However, the Client Class is not entitled to judgment for the damages because judgment for
20 that amount will be entered in favor of the Provider Class and only one recovery can be
21 permitted. The presence of a judgment entered in favor of the Provider Class precludes entry
22 of a judgment in favor of Client Class.

23 5. The Plaintiffs' offset proposal implies a concern that the provider judgment
24 will not survive appeal. But that possibility does not countenance issuing a money judgment
for the Client Class when the Court has concluded it will enter a final judgment for the
Provider Class. Accordingly, the result for the Client Class must account for and
acknowledge that judgment. Further, the Court does not necessarily conclude that, in the

1 absence of a judgment in favor of the Provider Class, the Client Class would be entitled to
2 judgment for the amount of damage it proved at trial. That uncertainty is because the clients
3 cannot receive directly the monetary payment for services that were wrongfully withheld.
4 The Court did not need to address that issue in its above determinations regarding the Client
5 Class claim for damages based on *Jenkins*. However, these reasons cause the Court to
6 conclude that it will not enter a judgment for the Client Class subject to offset.

7 6. The Court does not adopt the Department's proposed conclusions that would
8 deny the Client Class a money judgment based on the need for proof that the party is
9 aggrieved under the APA, RCW 34.05.530, and RCW 74.08.080. A conclusion that the
10 Client Class has not shown itself to be aggrieved would affect standing, which is
11 jurisdictional. The Court concludes that an order addressing standing must focus on standing
12 at the time of filing the case, not the party's status based on the results of the case. The Court
13 previously ruled that the Client Class has standing to bring this case in light of the *Jenkins*
14 decision, and concludes here that it is not deprived of jurisdiction by considering the results
15 of the Client Class claim.

16 7. Because no judgment for money is awarded to the Client Class, the issue of
17 prejudgment interest for the Client Class is not before the court.

18 8. As noted in Section II, Finding 12 above, because the Defendants repealed
19 the Rule on June 29, 2007, the Plaintiffs' request to invalidate the rule and for injunctive
20 relief is moot.

21 9. A final judgment shall be entered in this case. The judgment shall state that
22 no money judgment for damages is entered for the Client Class.

23 DATED: December 2, 2011

24 

HONORABLE THOMAS MCPHEE
THURSTON COUNTY SUPERIOR COURT JUDGE