



enforcement actions against any individual or entity that engages in fraud, abuse, unacceptable practices, mistake or improper claiming in the Medicaid program, and to recover improperly expended Medicaid funds.

The OMIG determined to seek restitution of payments made by Medicaid to Lifeline Infusion Services, Inc. (Appellant), provider #01420626. (Ex. 15)

The Appellant requested a hearing pursuant to SSL § 22 and the former Department of Social Services (DSS) regulations at 18 NYCRR § 519.4 to review the determination. (Ex.19)<sup>1</sup>

### **APPLICABLE LAW**

Medicaid fee for service providers are reimbursed by Medicaid on the basis of the information they submit in support of their claims. The information provided in relation to any claim must be true, accurate and complete. Providers must maintain records demonstrating the right to receive payment for six years, and all claims for payment are subject to audit for six years. 18 NYCRR §§ 504.3(a)&(h), 517.3(b), 540.7(a)(8).

If a Department audit reveals an overpayment, the Department may require repayment of the amount determined to have been overpaid. 18 NYCRR §§ 504.8(a)(1), 518.1(b). An overpayment includes any amount not authorized to be paid under the Medicaid program, whether paid as the result of inaccurate or improper cost reporting, improper claiming, unacceptable practices, fraud, abuse or mistake. 18 NYCRR § 518.1(c).

---

<sup>1</sup> Numbers in parentheses refer to transcript page numbers or exhibits. Transcript references will be cited as a "T." followed by the appropriate page number(s); exhibits will be cited by an "Ex." followed by the appropriate exhibit number(s) or letter(s).

A person is entitled to a hearing to have the Department's determination reviewed if the Department requires repayment of an overpayment. 18 NYCRR § 519.4. At the hearing, the Appellant has the burden of showing that the determination of the Department was incorrect and that all claims submitted and denied were due and payable under the Medicaid program. 18 NYCRR § 519.18(d).

The DSS regulations generally pertinent to this hearing decision are at: 18 NYCRR § 360-7 (payment for services), 18 NYCRR § 505 (medical care, in particular § 505.3 regarding drugs), 18 NYCRR § 517 (provider audits), 18 NYCRR § 518 (recovery and withholding of payments or overpayments), and 18 NYCRR § 519 (provider hearings).

The New York State Medicaid program issues Medicaid provider manuals, which are available to all providers and include, *inter alia*, billing policies, procedures, codes and instructions. [www.emedny.org](http://www.emedny.org). The Medicaid program also issues a monthly Medicaid Update with additional information, policy and instructions. [www.emedny.org](http://www.emedny.org). Providers are obligated to comply with these official directives. 18 NYCRR § 504.3(i); Lock v. NYS Department of Social Services, 220 A.D.2d 825, 632 N.Y.S.2d 300 (3d Dept. 1995); PSSNY v. Pataki, 58 A.D.3d 924, 870 N.Y.S.2d 633 (3d Dept. 2009).

### **ISSUE**

Is the OMIG's determination to recover Medicaid overpayments from the Appellant correct? If correct, what is the amount of the overpayment?

**FINDINGS OF FACT**

1. At all times relevant hereto the Appellant, Lifeline, was enrolled as a pharmacy provider in the New York State Medicaid program. (Ex. 12; Ex. 15) Lifeline is not a pharmacy patronized by the public. It is an infusion pharmacy. It only serves between four and seven patients at any particular time. (T. 6, 41)

2. The Appellant submitted claims to Medicaid for pharmacy services, which were paid by Medicaid during the period January 1, 2007 through December 31, 2009 for patients who were eligible for coverage under the Medicaid program. (Ex. 11; Ex. 15, p. 2) This was the audit period in this case.

3. The OMIG reviewed all 235 claims paid by Medicaid in the audit period in order to determine whether they were submitted in compliance with Medicaid program requirements. (T. 71; Ex. 2; Ex. 11; Ex. 16; Ex. 18)

4. The Appellant submitted claims for refills of a prescription that were not authorized by the original prescription. (Ex. 16; Ex. 17) This finding involved the original prescription (sample number 80) and claims for five refills (sample numbers 83, 87, 89, 93, and 95). The total amount paid for the five refills was \$26,161.75. (Ex. 15, ex. II)

5. No prescription or fiscal order was produced by the Appellant to support the claim in sample number 114. The amount of this claim was \$31.53. (Ex. 18) This finding was uncontested by the Appellant. (T. 31, 143-144)

6. At hearing, the OMIG withdrew findings that the Appellant billed in excess of the prescribed quantity with respect to sample numbers 92 and 96. (Ex. 15, ex.

III; T. 143) The overpayment that had been claimed for these findings was \$7,615.56. (Ex. 15)

7. By final audit report dated October 2, 2013, the OMIG notified the Appellant that the OMIG had determined to seek restitution of Medicaid overpayments, in the amount of \$33,808.84. (Ex. 15) In light of the withdrawal of the findings with respect to samples number 92 and 94, this amount is now reduced to \$26,193.28. (Ex. 15, ex. II & III)

### **DISCUSSION**

The OMIG introduced documents (Exhibits 1-25) and the testimony of Russell Martin, the Chief Executive Officer of the Appellant pharmacy, and Molly Kommer, the lead auditor and a principal in the Bonadio Group, which company conducted this audit for the county of Suffolk. (T. 83-85) The Appellant testified through its proprietor/CEO on the OMIG's case. The Appellant also introduced documentary evidence. (Exhibit A)

The OMIG presented the audit file and summarized the case, as is required by 18 NYCRR § 519.17. Ms. Kommer explained the audit process in this case and how the audit was conducted. (T. 85-116, 129-130) The Bonadio Group compared the claim information Medicaid received from the Appellant to the information on the prescription copies it retrieved from the Appellant at the time of the field audit.

Mr. Russell Martin, Chief Executive Officer of the Appellant, testified that the original prescription number 1217 (sample number 80), which was refilled without authorization from the prescriber, was a companion to prescription number 1216 (sample number 79). (Ex. 16; Ex. 7, pp. 79-P and 80-P) One prescription is written for [REDACTED]

██████████ (prescription 1216; sample number 79) and one prescription is written for ██████████  
██████████ (prescription 1217; sample number 80). There is a ██████████ in the refill  
box for prescription 1216, but the refill box on prescription number 1217 ██████████ (Ex.  
16) The patient would be infused with ██████████ over a period of ██████████ for a total  
infusion amount of ██████████. (T. 48-55) Mr. Martin explained that this  
patient had been receiving these ██████████ for some period of time and that  
there had always been a ██████████ in the refill box on both prescriptions. (T. 52-54; see also,  
Ex. 7) He admitted that this prescription course for this patient had become routine in his  
pharmacy and that he could not deny that everyone missed the fact that no refills were  
authorized by prescription number 1217 (sample 80). (T. 53; Ex. 13)

It is important to note that this case is not a case in which the OMIG is seeking to  
sanction this provider pursuant to 18 NYCRR Part 515. This is simply a case where a  
provider audit pursuant to 18 NYCRR Part 517 determined that the Appellant “has  
submitted or caused to be submitted claims for medical care, services or supplies for  
which payment should not have been made.” 18 NYCRR §518.1(b). The overpayments  
in this matter are not alleged by the OMIG to be anything more than errors.  
Nevertheless, these are errors for which the Appellant should not have been paid.

Education Law §6810(2) states, in relevant part: “A prescription may not be  
refilled unless it bears a contrary instruction and indicates on its face the number of times  
it may be refilled.” The Department of Health regulation governing the prescription of  
drugs under the Medicaid program echoes the Education Law and states in relevant part:  
“Prescription refills. (1) A written order may not be refilled unless the practitioner has  
indicated the number of allowable refillings on the order.” 18 NYCRR § 505.3(d)(1). In

addition, the New York State Medicaid Program Pharmacy Manual Policy Guidelines Version 2006-1, p.5, reiterates: “A prescription or fiscal order may not be refilled unless the prescriber has indicated on the prescription or fiscal order the number of refills.”

In accord with the above, Education Law §6810(4)(a) states in relevant part:

An oral authorization for the refill of a prescription, other than a prescription for a controlled substance, may be made by a practitioner legally authorized to prescribe drugs. The pharmacist receiving such oral authorization for the refill of a prescription shall write on the reverse side of the original prescription the date, time, and name of the practitioner authorizing the refill of the prescription.

The Appellant admitted that there was no call made to the prescriber in this case and that there was nothing noted on the reverse of prescription number 1217. (T. 55-56) It is a significant error for a pharmacist/pharmacy to refill a prescription when no refills have been ordered.

The Appellant did not challenge the presumption of accuracy of the OMIG’s computer records regarding the payments Medicaid made. 18 NYCRR §519.18(f). The Appellant acknowledged that it could not provide a prescription to support a claim based on sample number 114. The Appellant also acknowledged that the prescription in sample number 80 did not authorize refills.

It is the Appellant’s burden to prove that the audit is in error. 18 NYCRR § 518.1(c) The Appellant has failed to carry its burden of proof.

**DECISION:**

The OMIG's determination to recover Medicaid overpayments is correct and is affirmed. The overpayment due is \$26,193.28. This decision is made by Denise Lepicier who has been designated to make such decisions.

DATED:  
October 28, 2014  
New York, New York

---

Denise Lepicier  
Administrative Law Judge