

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

In the Matter of the Appeal of :
: **Decision**
: **After**
: **Hearing**
Prompt Transit Service Inc. :
& Malena, Gregorio, :
Provider ID# 02961080, :
Appellant, :
: **Audit # 11-F-3250**
:
from charges of unacceptable practices :
and a determination to recover :
Medicaid Program overpayments. :
:

Before: Ann H. Gayle
Administrative Law Judge

Held at: New York State Department of Health
Metropolitan Area Regional Office
90 Church Street
New York, New York 10007

Hearing Dates: March 4, 2016¹
June 3, 2016²
February 27, 2017
April 24, 2017
Record closed May 8, 2017

Parties: Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204

By: Ricja Rice-Ghyll, Esq.
Senior Attorney

Prompt Transit Service Inc.
20 Brookdale Place
Mount Vernon, New York 10550
and
Malena, Gregorio
[REDACTED]

By: Felix Adames
[REDACTED]

¹ Appellant appeared Pro Se on this date.
² Appellant was represented by Quemi Familia on this date.

Jurisdiction and Relevant Statutes and Regulations

The New York State Department of Health (Department) acts as the single state agency to supervise the administration of the Medicaid Program in New York State. Public Health Law (PHL) §201(1)(v); Social Services Law (SSL) §363-a. The New York State Office of the Medicaid Inspector General (OMIG), an independent office within the Department, has the authority to pursue administrative enforcement actions against any individual or entity that engages in fraud, abuse or unacceptable practices in the Medicaid Program, and to recover improperly expended Medicaid funds. PHL §§30, 31, 32.

Regulations of the former Department of Social Services (DSS) most pertinent to this matter are found at Title 18 of the New York Code of Rules and Regulations (NYCRR) Parts 504 (enrollment of providers), 505 (medical care, in particular section 505.10, regarding transportation for medical care), 515 (provider sanctions), 518 (overpayments), and 519 (provider hearings).

In order to receive payment for services to Medicaid recipients, a provider must be lawfully authorized to provide the services on the date the services are rendered. A transportation service must comply with all requirements of the Departments of Transportation and Motor Vehicles. An ambulette service operating in New York City (NYC) must also be licensed by the NYC Taxi and Limousine Commission (TLC). 18 NYCRR 505.10(e)(6).

An unacceptable practice in the Medicaid Program is conduct contrary to the official rules, regulations, claiming instructions or procedures of the Department. 18 NYCRR 515.2(a). Upon a determination that a person has engaged in an unacceptable practice, the Department may impose one or more sanctions, including exclusion from

the program. 18 NYCRR 515.3(a). When the Department sanctions a person, it may also sanction any affiliate of that person. Affiliate means any person having an overt, covert or conspiratorial relationship with another such that they are under common control or ownership, as in persons with an ownership or control interest in a provider. 18 NYCRR 504.1(d)(1). The Department may also require the repayment of overpayments determined to have been made as a result of an unacceptable practice or improper claiming. 18 NYCRR 515.3(b) and 518.1(b) and (c). Interest may be collected upon any overpayments determined to have been made. 18 NYCRR 518.4(a).

Medicaid program participation is a voluntary, contractual relationship between the provider of service and the State. SSL §365(a); 18 NYCRR 504.1; *Schaubman v. Blum*, 49 NY2d 375 (1980); *Lang v. Berger*, 427 F.Supp. 2d 204 (S.D.N.Y. 1977). A Medicaid provider agrees to comply with all program requirements as a prerequisite to payment and continued participation in the program. 18 NYCRR 504, 515, 517, 518. The provider certifies at both the time of enrollment and when submitting claims that the provider will comply or has complied with all its contractual responsibilities. 18 NYCRR 504.3, 540.7(a)(8). Based on these contractual obligations, the Medicaid program employs a pay-first-and-audit-later system to insure compliance. This process helps ensure that providers are paid promptly. 18 NYCRR 504.3, 540.7(a)(8).

A person is entitled to a hearing to have the Department's determination reviewed if the Department imposes a sanction or requires repayment of an overpayment, however, new matter not brought to the Department's attention in response to a notice of proposed agency action may not be raised at hearing. 18 NYCRR 519.4 and 519.18(a). At the hearing, Appellant has the burden of showing by substantial evidence that the

determination of the Department was incorrect and of proving any mitigating factors affecting the severity of any sanction imposed. 18 NYCRR 519.18(d) and (h).

This case stemmed from the Department's determination to exclude Prompt Transit Services Inc. (Provider) and Malena, Gregorio (Owner) (collectively, Appellant) from the Medicaid Program and to recover Medicaid overpayments. Appellant requested a hearing pursuant to SSL §22 and 18 NYCRR 519.4 to review these determinations, and a hearing was held. Witnesses testified, a transcript [T] of the hearing was made³, and exhibits [Ex] were admitted into evidence as OMIG's A-O. Appellant sought to introduce three exhibits; they were marked for identification as Appellant's 1-3 but not accepted into evidence.

Findings of Fact

An opportunity to be heard having been afforded the parties and all evidence having been considered, it is hereby found:

1. At all times relevant hereto Appellant Prompt Transit Service Inc. (Prompt) was an ambulette and transportation service enrolled as a provider in the New York State Medicaid Program. Prompt, located in Mount Vernon, New York, and owned by Gregorio Malena since at least 2008, operates in the metropolitan New York City region. [Ex C; Ex D]
2. During the period January 2 through July 29, 2013, Prompt was paid \$115,667.80 by the Medicaid Program on 1,936 claims for transportation services provided to Medicaid recipients. [Ex D; T 80-81]

³ "T" will refer to the transcripts of the February 27, 2017 and April 24, 2017 hearing dates, numbered 1-17 and 18-135, respectively. The transcript for the March 4, 2016 hearing date, numbered 1-21, will be referred to as "3/4/16 transcript." The transcript for the June 3, 2016 hearing date, numbered 1-23, will be referred to as "6/3/16 transcript."

3. By notice of proposed agency action (NOPAA) dated April 21, 2014, OMIG notified Appellant that it had determined to exclude Prompt and Malena, Gregorio from the Medicaid Program because they had engaged in unacceptable practices. The NOPAA further advised Appellant that OMIG had determined to seek restitution of Medicaid Program overpayments in the amount of \$115,667.80 plus interest. [Ex C; T 77-78]

4. Appellant did not submit documents or a written response to the NOPAA. OMIG then issued its November 6, 2015 notice of agency action (NOAA) without changing its findings. [Ex D; T 78-79; 98-99]

5. OMIG's determinations were based upon Appellant's engaging in unacceptable practices in the Medicaid Program primarily attributable to having transported Medicaid patients in four separate vehicles, all with expired TLC authorization, over a period of more than six months. The 1,936 claims disallowed in the NOAA amounted to \$115,667.80. [Ex D, specifically Exhibits 2, 3, 4, 5, and 6 of Ex D; T 80-82, 85-86, 108-111]

6. By letter dated December 1, 2015, Appellant requested an administrative hearing to challenge OMIG's determination, and a hearing was scheduled for March 4, 2016. The parties and ALJ appeared for the March 4 hearing and the record opened, but the case was adjourned at Appellant's request, with OMIG's consent, because Appellant's representative was out of the country on that day. [Ex G; 3/4/16 transcript, pages 7-12].

7. The parties and ALJ appeared for hearing on the next-scheduled hearing date, June 3, 2016. The record opened and documents were marked for identification.

The parties, believing they had reached an agreement for settling the matter, requested that the case be marked off-calendar. The case was marked off-calendar, with a control date of September 13, 2016. [Ex J; 6/3/16 transcript, pages 12-18].

8. On November 15, 2016, the Parties requested that a hearing date be scheduled for February 24 or 27, 2017. The parties and ALJ appeared for the February 27, 2017 hearing, but the language interpreter became ill that morning and could not attend. The matter was adjourned, and the hearing was held on April 24, 2017. [Ex M]

Issues

Was OMIG's determination that Appellant engaged in unacceptable practices in the Medicaid Program correct?

Did OMIG properly determine to impose Medicaid Program sanctions?

Was OMIG's determination to recover Medicaid Program overpayments in the amount of \$115,667.80 correct?

Discussion

OMIG presented the audit file and summarized the case at hearing. OMIG presented Exhibits A-O and one witness, Gregory Waring, an OMIG investigator. Appellant's accountant, Felix Adames, represented Appellant and presented Exhibits 1-3, which were not accepted into evidence. Mr. Adames and Gregorio Malena testified on Appellant's behalf. The parties waived the opportunity given to them to submit post-hearing briefs.

In the subject audit, OMIG excluded Appellant from participation in the Medicaid program for a period of three years, beginning on the date the NOPAA was issued, April

21, 2014⁴, on the grounds that for the period January 2, 2013 to July 29, 2013, Appellant transported Medicaid recipients in four of Appellant's ambulettes which lacked TLC authorization. Appellant submitted 1,936 claims, totaling \$115,667.80, for services provided in that time period in those vehicles which lacked TLC authorization, and Appellant received the full \$115,667.80 it claimed. The Department is now seeking to have that exclusion determination confirmed and to recoup the full \$115,667.80, plus interest.

For safety of Medicaid patients and integrity of the Medicaid program, TLC authorization is required for vehicles transporting Medicaid patients/recipients. The Transportation Manual – Policy Guidelines, Version 2013-1, dated January 1, 2013, reads, at page 4, “Although it is often difficult to accommodate the needs of a medically-fragile population, we expect appropriate transportation for all Medicaid enrollees, and that every effort will be made to meet the needs of those enrollees utilizing Medicaid-funded transportation services.” Transporting Medicaid patients in four separate vehicles with expired TLC authorization does not satisfy this guideline. It also violates Title 35, §59A-11(a)(1)(iii) of the Rules of the City of New York, which demands that “A For-Hire Vehicle Owner must not allow any of Owner's Vehicles to be dispatched unless ... the vehicle has a Valid For-Hire Vehicle License.” OMIG's determination to exclude Prompt and Mr. Malena was based on the “nature of the offense” that the Medicaid recipients could have been injured when they were transported in unauthorized vehicles

⁴ The NOAA (OMIG Exhibit D) reads, at #8 on page 5, “The effective date of this exclusion shall be twenty (20) days from the date of this Notice,” and reads at #10 on page 6, “This Exclusion is effective twenty (20) days from the date of this notice.” The date of that Notice was November 6, 2015. The Parties, however, reported that the three-year exclusion was from April 21, 2014 (the date of the NOPAA; see OMIG Exhibit C, page 7) until April 21, 2017 (three days before the hearing date). See T 35-36, 112, 122-123.

that had not been inspected (T 85-86). It was also the basis for OMIG's determination to recoup the \$115,667.80 paid on the 1,936 claims Appellant submitted for services provided when the four vehicles were not authorized to transport Medicaid recipients.

Appellant did not respond to the NOPAA, but did challenge both the exclusion and overpayment at hearing. Appellant argued that since the services for which it claimed payment from the Medicaid program were provided, the \$115,667.80 was payment to which it was entitled and not an "overpayment." Appellant's contention that an overpayment would have occurred if Appellant was paid more than \$115,667.80, or paid \$115,667.80 twice, is not accurate. Appellant, due to its unacceptable practice of utilizing vehicles that were unauthorized pursuant to TLC rules, was entitled to \$0 reimbursement. Therefore any payment over \$0, *i.e.*, \$115,667.80 in the instant case, is an overpayment of that amount.

Pursuant to 18 NYCRR 515.4(b), in determining the sanction to be imposed the following six factors will be considered:

- (1) The number and nature of the program violations or other related offenses. Over one hundred thousand dollars in Medicaid reimbursement was paid; there is no dispute that the services for which the Medicaid Program paid were provided, and that they were appropriate services for the Medicaid recipients. The nearly two thousand claims/violations in this case are entirely attributable to lack of TLC compliance. Whether the nature of the violation is more akin to one longstanding, ongoing violation that applied to multiple claims or to 1,936 separately committed violations is irrelevant because the nature of the violation was very serious.
- (2) The nature and extent of any adverse impact the violations have had on recipients. Although there is no evidence that any Medicaid recipients were harmed due to the expired TLC authorization, the purpose of requiring that Medicaid recipients are transported in TLC-authorized vehicles is to assure that the vehicles have met safety and other standards required for TLC authorization. Transporting Medicaid recipients in not one, but four, vehicles with expired TLC authorization for multiple months creates an extensive adverse impact on recipients who were transported in these vehicles.

- (3) The amount of damages to the program. While there is no evidence, nor does OMIG allege, that the services for which the Medicaid Program paid were not provided or were billed in excessive amounts, the damage to the Program can be found in the misuse of the Program's limited funds. Those funds were used to pay for services Prompt provided in its vehicles that were in violation of NYS and TLC regulations.
- (4) Mitigating circumstances. Appellant did not respond to the NOPAA, but at hearing provided information that Mr. Malena incurred debt to keep the business afloat, and that his [REDACTED] subsequent diagnosis of [REDACTED] and its emotional and financial impact should be taken into consideration. Appellant has not established mitigating circumstances. The debt was incurred as a result of Appellant's unacceptable practices which led to the exclusion which resulted in the inability of the business to provide reimbursable services. A debt such as this does not constitute mitigating circumstances, nor does the emotional and financial impact of Mr. Malena's [REDACTED] diagnosis of [REDACTED] as unfortunate and sad as such a diagnosis is.
- (5) Other facts related to the nature and seriousness of the violations. The number of vehicles involved (four) and the length of time the practice continued (six months) created a very serious situation.
- (6) The previous record of the person under the Medicare, Medicaid and social services programs. Prompt was enrolled as a Provider in the Medicaid program in 2009; these violations occurred within four years of its enrollment. Additionally, Prompt and Malena owe a debt of \$74,871 to the Medicaid Program pursuant to a 2013 audit.

There is no question that Prompt and Malena, Gregorio are affiliates under the definition set forth at 18 NYCRR 504.1(d)(1).

In accordance with the guidelines set forth at 18 NYCRR 515.4(b), it is concluded that the proposed exclusion is an appropriate sanction for both Prompt and Malena.

Appellant transported Medicaid recipients in vehicles under circumstances that violated Medicaid reimbursement rules.

Regarding overpayments, 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). The payments under review are overpayments within the meaning of this regulation. The number of vehicles (four) and amount of time (six months) that constituted the serious unacceptable practice of transporting Medicaid patients in violation of regulations and laws warrant recouping the overpayments from Prompt and Malena, Gregorio, jointly and severally. 18 NYCRR 515.9 and 518.3.

Decision


OMIG's determination that Appellant, Prompt Transit Services Inc. and Malena, Gregorio, engaged in unacceptable practices in the Medicaid Program is affirmed.

OMIG's determination to exclude Appellant, Prompt Transit Services Inc. and Malena, Gregorio, as affiliates, is affirmed.

OMIG's determination to recover Medicaid Program overpayments from Appellant, Prompt Transit Services Inc. and Malena, Gregorio, jointly and severally, is affirmed.

This decision is made by Ann H. Gayle, Bureau of Adjudication, who has been designated to make such decisions.

DATED: New York, New York
August 10, 2017


Ann H. Gayle
Administrative Law Judge

Prompt/Malena /OMIG

TO:

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