

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

In the Matter of the Appeal of :
: **Decision**
Audrey Carter : **After**
: **Hearing**
Provider ID# 02837823, :
Appellant, :
: **Audit # 16-2426**
from a determination by the NYS Medicaid : **Case # 15-F-4522**
Inspector General to recover Medicaid :
Program overpayments in the Amount of :
\$544,977.26, plus interest, and to exclude the :
provider for three years and until reinstated. :
:

Before: Ann Gayle
Administrative Law Judge

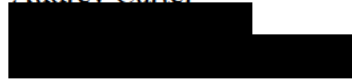
Held at: Hearing Day 1:
New York State Department of Health
Metropolitan Area Regional Office
90 Church Street
New York, New York 10007

Hearing Day 2:
Remotely Via Cisco Webex

Hearing Dates: February 11, 2020
November 17, 2020
Record closed July 23, 2021

Parties: Office of the Medicaid Inspector General
90 Church Street, 14th Floor
New York, New York 10007

By: Philip Hoffman, Esq.
Senior Attorney

Audrey Carter


By: Joseph Potashnik, Esq.
111 Broadway, Suite 901
New York, New York 10006

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. 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, in which the provider agrees to comply with all program requirements as a prerequisite to payment and continued participation. 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). 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 William Carter (Owner), Comfort and Convenience Transportation, LLC (Provider)¹ and Audrey Carter (Owner, Provider, and 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, pages 1-325 (T) of the hearing was made, and exhibits (Ex) were admitted into evidence as OMIG's 1-24. Appellant, given the opportunity, did not seek to introduce any documents into evidence.

Findings of Fact

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

1. At all times relevant hereto Audrey Carter, provider number 02837823, and CCT, provider number 03351195, were an ambulette and transportation service enrolled as providers in the New York State Medicaid Program. Audrey Carter enrolled for practice as a Registered Professional Nurse, and CCT enrolled in the Taxi (0603) Category of Service. CCT, located in Freeport, New York, and owned by Audrey Carter and William Carter, operates in Nassau County. (Ex 15; Ex 16; Ex 17; T 49-53, 122)
2. During the period July 13, 2011 through April 21, 2016, CCT was paid \$544,977.26 by the Medicaid Program on 15,227 claims for transportation services provided to Medicaid recipients. (Ex 1, specifically pages 90-339); Ex 3)
3. By notice of proposed agency action (NOPAA) dated August 12, 2016, OMIG notified Appellant that it had determined to exclude William Carter, CCT and

¹ *William Carter and Comfort and Convenience did not seek administrative review of OMIG's determinations to exclude them and recoup overpayments of \$544,977.26 from them.*

Audrey Carter from the Medicaid Program because they had engaged in unacceptable practices. The NOPAA further advised them that OMIG had determined to seek restitution of Medicaid Program overpayments in the amount of \$544,977.26 plus interest. Appellant, through its then attorney, Jan Gomerman, Esq., submitted a September 1, 2016 written response to the NOPAA. OMIG then issued its November 25, 2016 notice of agency action (NOAA) without changing its findings. (Ex 1; Ex 2; Ex 3)

4. OMIG's determinations were based upon Appellant's engaging in unacceptable practices in the Medicaid Program primarily attributable to having transported Medicaid recipients in for-hire vehicles without required Nassau County Taxi and Limousine commission for-hire vehicle registration and without required Village of Freeport taxicab operator's and driver's licenses, from CCT's inception in 2011 until it was excluded in 2016. The 15,227 claims disallowed² in the NOAA amounted to \$544,977.26. (Ex 1, specifically pages 85-88 and 90-339; Ex 3, specifically pages 455-458; Ex 22; T 67-69, 73, 80-88, 90-94; 101-109, 126-129)

5. By letter dated January 19, 2017, Appellant requested an administrative hearing to challenge OMIG's determination, and OMIG scheduled a hearing for August 9, 2018. Due to multiple adjournment requests and a change in OMIG attorneys, the first day of hearing was held on February 11, 2020³. Due to the Covid-19 pandemic, the second day of hearing was scheduled for July 22, 2020, and then adjourned to and held on November 17, 2020. (Ex 4)

² Some claims' bases were effective January 2016. (Ex 22; T 90-94)

³ Appellant's February 10, 2020 request for an adjournment of the hearing scheduled for the following day was denied.

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 \$544,977.26 plus interest correct?

Discussion

OMIG presented the audit file and summarized the case at hearing. OMIG presented Exhibits 1-24 and one witness, Christopher Bedell, an OMIG supervising investigator. Joseph Potashnik, Esq., represented Appellant and offered no exhibits, but presented three witnesses: Audrey Carter, 20% owner of CCT; [REDACTED], [REDACTED] of CCT's owners who assisted with setting up billing and payroll and running the business; and [REDACTED], one of CCT's occasional drivers who resided in CCT's owners' home. The hearing was held on February 11 and November 17, 2020. At the parties' request post-hearing briefs were submitted on June 25, 2021. The record closed July 23, 2021, when the parties reported that they would not be submitting reply briefs.

In the subject audit/investigation, OMIG excluded Appellant from participation in the Medicaid program for a period of three years, beginning on the date the NOPAA was issued, August 12, 2016, on the grounds that for the period July 13, 2011 to April 21, 2016, Appellant transported Medicaid recipients in for-hire vehicles without required Nassau County Taxi and Limousine Commission (NCTLC) for-hire vehicle registration and without required Village of Freeport taxicab operator's and driver's licenses.

Appellant submitted 15,227 claims, totaling \$544,977.26, for services provided in that time period in those vehicles which violated those requirements, and Appellant received the full \$544,977.26 it claimed. The Department is now seeking to have that exclusion determination confirmed and to recoup the full \$544,977.26, 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 2011-2, dated July 15, 2011, reads, at page 3 of 52, “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.” (Ex 23).

Transporting Medicaid patients in vehicles without NCTLC vehicle registrations or TLC markings driven by drivers not registered with the Incorporated Village of Freeport and not having been issued NCTLC for-hire driver licenses, and/or with expired insurance does not satisfy this guideline. It also violates NCTLC Rules and Regulations §§1-03, 1-05, and 1-06 which require for-hire vehicle owners to: register each vehicle with NCTLC license plates; be responsible for registration and for the acts of a driver who operates the for-hire vehicle; not dispatch nor permit another to dispatch a for-hire vehicle unless it is registered with the Commission and has a valid local for-hire vehicle license; and ensure that a valid Commission registration decal is affixed to the passenger side windshield and the driver’s for-hire license is present in the vehicle. It also violates Village of Freeport Code §188-14 which prohibits taxicabs from operating on the Village of Freeport streets without the required operator and driver licenses and required

compliance with the provisions and regulations contained within the Code. (Ex 3, page 457, 458; Ex 10; Ex 14; Ex 21, pages 605-615, 632-641; T 54, 56, 68).

Appellant's response to the NOPAA consisted of statements that Audrey Carter was not an owner of or involved in the day-to-day operation of CCT. The only documentation submitted with the NOPAA response, letters and a petition to reinstate CCT, did not support Appellant's claims (Audrey Carter was actually referred to as an owner) or prove that CCT/Appellant complied with Medicaid requirements.

Appellant's argument is that despite being listed as 20% owner of CCT on the Application to become a Medicaid provider for ambulette services and authorized to sign CCT's corporate checks, Audrey Carter is/was not an owner. The variations for this defense were that: Audrey Carter did not sign the Application (there was only one signature line); Audrey Carter received no payments from Medicaid and/or William Carter; the payment of CCT's and/or its drivers' fines that Appellant made was not from CCT's checking account but from her personal checking account as a loan/gift to William Carter; her name was included in the application for the sole purpose of expediting Medicaid's approval since she was already a Medicaid Provider as a Registered Professional Nurse; and the decision to name her as 20% owner was made on advice from ' [REDACTED] (a disbarred attorney) and/or Appellant's [REDACTED] who allegedly had more familiarity with the application process and/or ideas of how to be more quickly accepted/approved because he was simultaneously applying to be a Medicaid provider for his business related to eyewear.

I found the testimony of OMIG's witness, Christopher Bedell, to be credible. The testimony of Appellant's witnesses, Audrey Carter, [REDACTED], and [REDACTED],

lacked credibility and was unpersuasive in meeting Appellant's burden of proving that OMIG's determination that Appellant engaged in unacceptable practices in the Medicaid Program was not correct, that OMIG did not properly determine to impose Medicaid Program sanctions, and that OMIG's determination to recover Medicaid Program overpayments in the amount of \$544,977.26 plus interest was not correct. The three Appellant witnesses' testimony was circular and inconsistent with each other's testimony and documents in evidence. Their testimony can be summarized as:

-Appellant knew her name was on the application/she didn't know/she should have known but didn't know because she didn't read the document;

-Appellant herself and the witnesses couldn't tell if the handwriting was/wasn't Appellant's;

-The only occupants at 154 Wallace Street (CCT's business address) were William, Audrey, and William Carter, yet Mr. [REDACTED] has been living there for the past five years;

-Appellant is not affiliated with CCT because no payment checks were written to her. No such checks were written to William or [REDACTED] either;

-Appellant was not at all involved in CCT's business nor was she a CCT driver. Appellant advised William and she's listed as a driver and there was testimony that she was an occasional driver.

[REDACTED] testified that CCT "was never operated out of" 763 Bonnie Dr., Baldwin, New York (T 285, 287). In her July 11, 2016 letter to OMIG's James Fiammetta, [REDACTED] wrote, "Our address of operation is, 763 Bonnie Dr., Baldwin, New York 11510." (Ex 24)

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 five 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 fifteen 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 15,227 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 lack of TLC compliance, 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 every vehicle without TLC compliance for nearly five years created an extensive adverse impact in the form of serious risk to 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 CCT provided in its vehicles that were in violation of NYS and TLC regulations.
- (4) Mitigating circumstances. There were no mitigating circumstances for, but serious mitigating circumstances against, Appellant. On April 21, 2016, when NCTLC (pursuant to OMIG's and DOH's information) went to locations wherein CCT was dropping off/picking up Medicaid recipients and issued summonses to its drivers for NCTLC violations, CCT abandoned additional Medicaid recipients at already-scheduled locations and did not seek to make alternate arrangements for them. Appellant put the Medicaid recipients' health and safety at risk seemingly in order to avoid additional potential summonses for its noncompliance with Nassau County and NYS requirements. (T 81-83).
- (5) Other facts related to the nature and seriousness of the violations. The number of vehicles involved and the length of time the practice continued (from its date of inception, July 2011, to the time of exclusion, April 2016 – almost five years) created a very serious situation.

- (6) The previous record of the person under the Medicare, Medicaid and social services programs. Audrey Carter was enrolled as a Medicaid provider in 2007. CCT was enrolled as a Provider in the Medicaid program in 2011. While there are no known previous violations against Audrey Carter's provider number, the violations at issue here commenced within four years of her enrollment, and these violations which occurred the entire time of CCT's operation continued until CCT, Audrey Carter, and William Carter were excluded from participation in the Medicaid program.

There is no question that CCT, Audrey Carter, and William Carter 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 providers, CCT and Audrey Carter. Medicaid recipients were transported 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 (all) and amount of time (more than four years) that constituted the serious unacceptable practice of transporting Medicaid patients in violation of regulations and laws warrant recouping the overpayments from CCT, William Carter and Audrey Carter, jointly and severally. 18 NYCRR 515.9 and 518.3.

Decision

OMIG's determination that Audrey Carter, William Carter and Comfort and Convenience Transportation, LLC engaged in unacceptable practices in the Medicaid Program is affirmed.

Carter/OMIG

OMIG's determination to exclude Audrey Carter, William Carter and Comfort and Convenience Transportation, LLC as affiliates, is affirmed.

OMIG's determination to recover Medicaid Program overpayments from Audrey Carter, William Carter and Comfort and Convenience Transportation, LLC, jointly and severally, is affirmed.

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

DATED: New York, New York
December 1, 2021

Ann Gayle

Ann Gayle
Administrative Law Judge

TO:

Audrey Carter


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