

**STATE OF NEW YORK  
DEPARTMENT OF HEALTH**

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In the Matter of the Appeal of	:	
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<b>Atlantis Rehabilitation and Residential</b>	:	<b>Decision After</b>
<b>Health Care Facility, LLC</b>	:	<b>Hearing</b>
Medicaid Provider #00311151	:	
	:	#14-4064
from a determination to recover Medicaid Program	:	
overpayments.	:	

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Before: John Harris Terepka  
Administrative Law Judge

By videoconference  
April 28, 2021  
Record closed September 3, 2021

Parties: New York State Office of the Medicaid Inspector General  
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### JURISDICTION

The New York State Department of Health (the Department) acts as the single state agency to supervise the administration of the Medicaid Program in New York State. Public Health Law 201(1)(v); Social Services Law 363-a. The New York State Office of the Medicaid Inspector General (OMIG) is an independent office within the Department, responsible for the Department's duties with respect to the recovery of improperly expended Medicaid funds. PHL 30, 31 & 32.

The OMIG issued a final audit report for Atlantis Rehabilitation and Residential Health Care Facility, LLC, which owns and operates The Phoenix Rehabilitation & Nursing Center (the Appellant). The audit report concluded that the Appellant had received Medicaid Program overpayments. The Appellant requested this hearing pursuant to SSL 22 and former Department of Social Services (DSS) regulations at 18 NYCRR 519.4 to review the overpayment determination.

### HEARING RECORD

OMIG witnesses:	Babu Jacob, chief medical facilities auditor
OMIG exhibits:	1-26
Appellant witnesses:	██████████ CPA Ephi Carni, administrator ██████████ RN
Appellant exhibits:	A, B, C

A transcript of the hearing was made. (Transcript, pages 1-201.) After each side submitted two post-hearing briefs the record was closed on September 3, 2021.

### SUMMARY OF FACTS

1. Appellant Atlantis Rehabilitation and Residential Health Care Facility, LLC owns and operates The Phoenix Rehabilitation & Nursing Center, a 400-bed

residential health care facility, or nursing home, in Brooklyn, New York. The Appellant is enrolled as a provider in the Medicaid Program.

2. By notice dated July 28, 2014 the OMIG commenced a review of the Appellant's reimbursement from the Medicaid Program for the period May 1, 2007 through December 31, 2011. The Appellant's Medicaid reimbursement during this period was based upon its cost report filed on September 24, 2008 for the May 1, 2007 through April 30, 2008 base period, and on subsequent cost reports for calendar years January 1, 2008 through December 31, 2009. (Exhibit 1.)

3. On September 12, 2019, the OMIG issued a final audit report that identified several disallowances of reported costs. The OMIG advised the Appellant that it had determined to recover Medicaid Program overpayments in the amount of \$856,490. (Exhibit 8.) By letter dated September 27, 2019, the Appellant requested this hearing to review the overpayment determination. (Exhibit 9.)

4. The parties have resolved their differences regarding all of the audit findings except operating expense adjustment 2, "Reclassification of Expenses." This audit adjustment reclassified \$187,761 reported on the 2007-2008 cost report in cost center 020, "Utilization Review" to cost center 013, "Nursing Administration." (Exhibit 8, Bates pages 12-13; Transcript, pages 14-15.)

5. The \$187,761 that was reported as the facility's cost for utilization review was the entire salary and benefits of one facility employee, [REDACTED]. No other costs were reported in the utilization review cost center 020. (Transcript, pages 15-17, 43-45; Exhibit 13, page 11; Exhibit 15, page 92.)

### ISSUE

Has the Appellant established that the OMIG's operating expense audit adjustment 2, reclassifying and disallowing reported utilization review expenses, was not correct?

### APPLICABLE LAW

A residential health care facility (RHCF) can receive reimbursement from the Medicaid Program for costs that are properly chargeable to necessary patient care. 10 NYCRR 86-2.17. As a general rule, these kinds of costs are reimbursable if they are actually incurred and the amount is reasonable. Reimbursable costs include employee wages and benefits for administration and patient care. 10 NYCRR 86-2.10(a)(7).

The facility's costs are reimbursed in the form of a per diem rate established by the Department on the basis of costs reported by the facility. PHL 2808; 10 NYCRR 86-2.10. A facility's rate includes four components. 10 NYCRR 86-2.10(b). Some components of the rate, in particular direct operating costs, are subject to a reimbursement "corridor" that recognizes costs only to the extent they are between the "base" and the "ceiling" established for that kind of cost. 10 NYCRR 86-2.10(a)(10-12), (c)&(e). Nursing administration costs are included in the direct component of the rate. 10 NYCRR 86-2.10(c)(1)(i); 86-2.40(g)(1). Utilization review costs are included in the noncomparable component of the rate and are not subject to a reimbursement ceiling. 10 NYCRR 86-2.10(f)(xii); 86-2.40(x)(12).

A facility's rate is provisional and subject to audit. 10 NYCRR 86-2.7; 18 NYCRR 517.3(a). The facility is required to prepare and to maintain contemporaneous records demonstrating its right to receive payment, to keep all records necessary to disclose the nature and extent of services furnished, and to furnish records to the Department upon request. 18 NYCRR 504.3(a). If an audit identifies errors in reported

costs, the Department can retroactively adjust the rate. SSL Section 368-c; 10 NYCRR 86-2.7; 18 NYCRR 517.3. The Department may then require the repayment of any amounts not authorized to be paid under the Medicaid Program. 18 NYCRR 518.1.

If the Department determines to recover an overpayment, the facility has the right to an administrative hearing. 18 NYCRR 519.4. At the hearing, the facility has the burden of showing that the determination of the Department was incorrect and that all costs claimed were allowable. 18 NYCRR 519.18(d)(1).

DSS regulations pertinent to this hearing are found at 18 NYCRR Parts 517, 518 and 519, and address the audit, overpayment and hearing aspects of this case. Specific Medicaid reimbursement rules are addressed by Department of Health regulations at 10 NYCRR Part 86-2, which concerns reporting and rate certifications; Part 452, which outlines basic concepts, reporting principles and specialized reporting areas for nursing home cost reports; Parts 454 and 455, which describe functional reporting; and Part 456, which sets forth cost-finding practices and procedures.

### **DISCUSSION**

In May 2007 this nursing home was transferred by a former owner and became known as Atlantis Rehabilitation and RHCF. As a result of the change in ownership, Atlantis submitted a cost report to establish a new base year for operating costs of May 1, 2007 to April 30, 2008. (Transcript, pages 26-27.) That cost report was used to calculate the operating portion of the Appellant's reimbursement rate from May 2007 through 2011, and that cost report is the source for the operating adjustment under review.

In 2015 the nursing home changed hands again, came under the ownership of Atlantis Rehabilitation and Residential Health Care Facility, LLC, and became known as

The Phoenix. (Transcript, pages 84-85.) The Appellant complains that the prior owner was responsible for the cost report under audit. When the nursing home changed hands in 2015 and became The Phoenix, this audit was already underway. The Appellant took ownership in 2015 subject to the ongoing audit, and representatives along with the administrators of both the prior owner, Atlantis, and Phoenix were present at the May 21, 2019 audit closing conference. (Exhibit 2, Bates page 1; Exhibit 5, Bates pages 1, 38; Transcript, page 37.) The Appellant's contentions that these changes in ownership have any relevance to its responsibilities under 18 NYCRR 504.3(a), 517.3(a) & 519.18(d)(1) to prove that the reported costs under review are allowable, are without merit.

Also without merit are the Appellant's contentions that the audit was not timely commenced and conducted. (Appellant brief, pages 4, 12-13; reply brief, page 9.) The Appellant relies on 18 NYCRR 517.3(a)(1), which states that providers are subject to audit for six years after cost reports are submitted. According to the Appellant: "It follows that facilities are required to retain their books, records, and other relevant documentation only throughout that same six-year period." (Appellant brief, page 13.) This claim ignores 18 NYCRR 517.3(c), which goes on to provide: "Notification by the department to the provider of the department's intent to audit shall toll the six-year period for record retention and audit."

The 2007 cost report was filed on September 24, 2008. (Exhibit 15; Transcript, pages 75-76.) The OMIG's notice of intent to audit was dated July 28, 2014, which was within six years of the filing of the cost report. (Exhibit 1.) An audit having been timely commenced, the Appellant's record retention obligation was thereupon tolled. 18 NYCRR 517.3(a)&(c). The audit began within 60 days with an entrance conference held

on September 9, 2014, in accordance with 18 NYCRR 517.3(c)&(f). (Exhibit 2.) The audit was subsequently put on hold until 2016 because of litigation between the Department and many nursing homes including this one, that eventually led to a “universal settlement” on some issues between the Department and nursing homes throughout the state. (Exhibits 3, 4, 5; Transcript, pages 31-32.) There is no evidence the Appellant ever objected to this. The audit was then resumed in order to address the matters not covered by the universal settlement. A closing conference was held in accordance with 18 NYCRR 517.5(a) on May 21, 2019, and the draft audit report was issued on May 28. (Exhibits 5, 6.) The Appellant responded to the draft on July 1, and the final audit report was issued on September 12, 2019. (Exhibits 7, 8.) The OMIG complied with the time requirements established by the regulations.

Pointing out that the audit was commenced “almost six years after the submission of the Cost Report” (Appellant brief, page 4), “on the cusp of the applicable six-year statute of limitations” (Appellant reply brief, page 9), and that documentation was “lost or destroyed” (Appellant reply brief, page 9) is not an answer to the OMIG’s case. It is the OMIG’s case: The Appellant admittedly proved unable to produce for a timely audit, documentation it was contractually obligated as a condition of payment under the Medicaid Program to prepare, maintain and produce.

The audit adjustment: At issue in this hearing is the manner in which the Appellant’s cost report categorized the salary and benefits of one employee, ■■■. The audit adjustment was not a refusal to recognize ■■■ salary and benefits. The OMIG verified and accepts that ■■■ was employed at the nursing home on nursing home business, that the reported salary and benefits were paid, and that this expense was

properly includible on the facility's cost report. The issue is where that cost can properly be recognized on the cost report.

The cost report placed [REDACTED] salary and benefits in the utilization review cost center. 10 NYCRR 455.20. In this audit, the OMIG reclassified the salary and benefits from utilization review to the nursing administration cost center. 10 NYCRR 455.13. Nursing administration is an operating cost included in the direct component of the rate. 10 NYCRR 86-2.10(c). Utilization review is an operating cost included in the noncomparable component of the rate. 10 NYCRR 86-2.10(f). Reporting this employee's salary and benefits in the utilization review cost center substantially increased the Appellant's Medicaid reimbursement because it enabled the Appellant to avoid reimbursement ceilings that apply to the direct component of the rate. (Transcript, pages 24-26.) 10 NYCRR 86-2.10(a).

There is no dispute that the entirety of the salary and benefits of [REDACTED], and only the salary and benefits of [REDACTED], were what was reported on the cost report as utilization review. (Transcript, pages 15-17, 43-45; Exhibit 13, Bates page 11; Exhibit 15, Bates page 92; Appellant brief, page 6.) The audit reclassified [REDACTED] salary and benefits to nursing administration because it determined that the described duties of this employee, an RN who was the facility's assistant director of nursing (Transcript, page 190; Exhibit 13, page 8), did not consist entirely of utilization review and most closely fit nursing administration. (Transcript, page 42.)

On audit, the Appellant provided a description of its utilization review process and of [REDACTED] involvement in it. (Exhibit 13, Bates page 9.) Even if, as the Appellant claimed, [REDACTED] was the designated utilization review coordinator, or supervised utilization



review, that does not automatically justify reporting the entirety of her salary and benefits as utilization review. Job title is not dispositive or even relevant to the "functional reporting" required under 10 NYCRR Part 454. 10 NYRR 452.2(g).

█ may have performed utilization review but that was hardly the entirety of her function. Testimony of █, who was employed at the facility in 2007, actually suggests that █ had little involvement in utilization review. Asked if █' job responsibilities included utilization review, she testified: "I'm not sure. She did not come to our meeting... I mean, she had many job responsibilities. She did the investigations as far as accident reports..." The Appellant's evidence was that utilization review was conducted by means of these meetings, but then its only witness who was there at the time also said █ did not even attend them. (Transcript, pages 189-191.)

OMIG auditor Babu Jacob agreed that some of the duties performed by █ did qualify as utilization review but said that others did not. (Transcript, pages 100-110.) Pursuant to 10 NYCRR 454.2(c), if an employee is performing activities related to more than one function, an allocation between cost centers must be supported by a time study justifying the allocation. The Appellant failed to document that any time studies as required by this regulation were performed. If █' duties were not entirely utilization review, the entirety of her salary and benefits was not properly reported as the cost of utilization review. Odd Fellow & Rebekah v. Commissioner of Health, 107 A.D.3d 1095, 966 N.Y.S.2<sup>nd</sup> 587 (3<sup>rd</sup> Dept 2013).

█ salary does not constitute documentation of the facility's cost for utilization review. It was not one person who performed the function, it was by the Appellant's own account a committee. The Appellant's accountant, █, its administrator, Ephi

Carni, and MDS coordinator [REDACTED] all testified that utilization review involves the work of case management, social work, therapy, MDS and medical personnel in weekly meetings and that, as the Appellant puts it and as is contemplated by 10 NYCRR 455.20, "utilization review is performed by a committee." (Appellant reply brief, page 8.) The Appellant did not report costs associated with any such committee, but simply substituted the full salary of one employee who "was involved in the utilization review process." (Appellant reply brief, page 10.)

[REDACTED] salary was not the cost of utilization review, nor does it even match up with the rest of the cost report, which elsewhere specified staffing of 1.37 FTEs (full time equivalents) and 2,494 hours for utilization review, much of which was reported for clerical staff. (Exhibit 15, page 113; Transcript, pages 53-57.) The cost report also stated that 625 utilization review cases were reviewed for this 400-bed facility during the cost year. (Exhibit 15, page 105; Transcript, page 48.) Mr. Jacob pointed out that this was a low number for a facility of this size and that it would not require even one FTE to perform 625 reviews in a year. (Transcript, pages 48-52.) The Appellant did not dispute his assertions. Instead, Appellant witness [REDACTED] hazarded the explanation that the reported number 625 could have meant patients, not cases. (Transcript, page 128.) The Appellant offered no evidence to substantiate Mr. [REDACTED] speculation, which is contrary to explicit provisions of 10 NYCRR 455.20(a) that specify the unit of measure is cases, not individuals.

It is, on the Appellant's own evidence, not true that 100% of [REDACTED] duties were devoted to utilization review; nor is it true, by the Appellant's own evidence, that 100% of the facility's utilization review costs are properly attributable to [REDACTED] salary. No time

studies as would be required to allow a portion of [REDACTED] salary - or of any other employee salary - as a utilization review cost were done. This leaves little basis for approving the reported cost of \$187,761 or any portion of it, given the facility did not produce documentation required to establish either what portion of [REDACTED] salary is attributable to utilization review, or what portion of its utilization review costs are covered by that salary, or what its utilization review costs actually were if they are attributable to something other than that salary.

The Appellant's real argument is that while it reported [REDACTED]' salary as its utilization review cost, this was concededly only as a substitute for its actual utilization review costs. The Appellant characterized [REDACTED] salary as "an amalgamation of all the effort that went into utilization review." (Transcript, page 45.) Its justification for this was:

Appellant's accountant, [REDACTED], a CPA who has prepared and reviewed thousands of cost reports including the one at issue, testified that it is customary to report a facility's utilization review expenses in a cost report as the salary and benefits of one employee because of the logistical and accounting difficulty of tracking and reporting time spent on utilization review activities by all the people involved. (Appellant brief, page 9.)

Mr. [REDACTED] testified that coordination of the utilization review meetings was done by one person, and so that person's salary was what was reported in the utilization review cost center. (Transcript, pages 131-34, 162.) Reporting one salary may have simplified things and made it easier to prepare the facility's cost reports but, as Mr. [REDACTED] conceded, it is inaccurate cost reporting. (Transcript, page 163.)

The Appellant essentially took a shortcut in order to avoid actually documenting the costs attributable to utilization review, and now claims its reported figure should be accepted on audit as reasonably close enough. The bare claim of the Appellant's

accountant who approved that shortcut in the cost report that this is “customary” (Transcript, pages 119-20, 153; Appellant brief, page 9) is not an adequate basis for disregarding cost reporting requirements.

Finally, the Appellant argues that because utilization review is statutorily required to be performed, it must have been and was performed. (Appellant reply brief, pages 2-

4.) According to the Appellant:

The issue before the Court is whether or not there is enough evidence to prove that utilization review was actually being performed during the Base Year so as to justify reimbursement for the expense. (Appellant reply brief, page 8.)

The Appellant claims the adjustment suggests the “absurd” position that the facility did not do any utilization review. (Appellant brief, pages 10-11; Transcript, page 122.) That is not the audit finding. The issue in this audit adjustment is not whether utilization review was being performed nor, as the Appellant points out (Appellant brief, page 7), did the OMIG make any finding that required utilization review was not performed. The Appellant’s characterization attempts to elide the audit issue, which is whether it substantiated a reported noncomparable cost. It does not follow from the assertion that utilization review was performed, that the Appellant is entitled to reimbursement on the basis of whatever amount it reported on its cost report.

The Appellant’s argument (brief, page 5) that PHL Article 49 does not establish any specific documentation requirements for utilization review does not excuse it from its obligation under 18 NYCRR 504.3, 517.3 and 519.18 to document and prove a reported cost. This same confusion is evident in its assertion that it was not required to perform time studies:

OMIG cites no authority that *requires* that a time study to be performed as means of proof that utilization review as being performed by a facility or that a time

study is the only way to determine whether utilization review was being performed. (Appellant reply brief, page 4.)

This assertion is accurate as far as it goes, but time studies *are* required for the allocation of a salary between cost centers on a cost report. 10 NYCRR 454.2(c).

The Appellant claims the \$187,761 it reported was a reasonable amount for utilization review. (Appellant brief, page 7.) That is not the test for determining whether a cost was accurately reported and documented. The burden of proving by contemporaneous documentation that a particular employee salary was accurately reported in the appropriate cost center is on the Appellant, which failed to meet that burden. 18 NYCRR 519.18(d)(1). A plausible figure is not documentation of an actual cost incurred, and the OMIG is well within its regulatory authority in rejecting it as a basis for recognizing a noncomparable cost.

The Appellant's further claim (Transcript, pages 139-44, 149-51, 157; Exhibits A&B; Appellant brief, pages 10) that it does utilization review now and has always done it is irrelevant to its failure to substantiate the reported cost under audit in compliance with Medicaid reimbursement regulations. If this nursing home has, as it claims, specific costs attributable to utilization review, it has an obligation to report and document them accurately in order to obtain recognition in the noncomparable component of its rate. As to its complaint "the Appellant will now lose millions of dollars in reimbursement for utilization review in the future" (Appellant brief, pages 13-14), this characterization presumes precisely what the Appellant failed to demonstrate for the cost year under review: that it actually had identifiable and documented costs specifically attributable to utilization review. Its remedy for any future costs is to appeal rates pursuant to 10 NYCRR 86-2.13&14 as and when they are promulgated:


If petitioner did, in fact, incur actual [costs] during the rate years [subsequent to those reviewed in this audit], in consideration of the fact its [costs] were removed from its reimbursable base costs, its remedy was to notify DOH of these actual costs in those rate years and apply for an adjustment to the... base rate (see 10 NYCRR 86-2.13, 86-2.14[a][5]).

Northern Metropolitan RHCF v. Novello, 899 N.Y.S.2d 410, 72 A.d.3d 1383 (2010).

**DECISION:** Operating expense adjustment 2, a reclassification of reported costs in the amount of \$187,761, is affirmed.

This decision is made by John Harris Terepka, Bureau of Adjudication, who has been designated to make such decisions.

DATED: Rochester, New York  
September 24, 2021

  
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John Harris Terepka  
Administrative Law Judge