

State of New York : Department of Health

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In the Matter of the Request of

RITE AID OF NEW YORK STORE #1852

Case #08-F-1273  
MMIS Provider #00519622

For a hearing pursuant to Part 519 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York (18 NYCRR) to review the Determination of the Office of the Medicaid Inspector General to Censure Rite Aid of New York, Inc. #1852 and to recover \$4,664,966.95 in Medicaid Overpayments.

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Before: James F. Horan, Administrative Law Judge

Held at: New York State Department of Health  
90 Church Street  
New York, NY 10007  
February 10, 2015

Parties: Office of the Medicaid Inspector General (OMIG)  
Office of Counsel  
217 Broadway, 8<sup>th</sup> Floor  
New York, NY 10007  
BY: Francis Ruddy, Esq.

Rite Aid of New York Store # 1852  
Morgan, Lewis & Bockius, L.L.P.  
101 Park Avenue  
New York, NY 10178-0060  
BY: Kelly A. Moore, Esq. and  
Martha B. Stolley, Esq.

The Appellant, a provider under the Medicaid Program, requested a hearing pursuant to Title 18 NYCRR §519.4 to appeal a determination by the Office of the Medicaid Inspector General (OMIG) seeking to recover overpayments from the Appellant on the grounds the Appellant engaged in unacceptable practices by failing to provide prescriptions and fiscal orders supporting Medicaid payments. The Appellant-Pharmacy admitted to destroying original prescriptions inadvertently and had entered a Consent Decree with New York Board of Pharmacy in which the Appellant agreed to pay a fine. The Appellant challenged the OMIG Determination on the grounds that 1.) the Consent Decree and unreasonable delay barred the OMIG from seeking further monetary sanctions against the Appellant, 2.) no violation occurred because no statute or regulation under the Medicaid Program required the Appellant to maintain original prescriptions and the Appellant presented other records to support the claims for Medicaid reimbursement, and 3.) the Appellant sought an excessive recoupment sum. The ALJ determines that the Appellant committed an unacceptable practice by failing to maintain original prescriptions for 54,726 claims that Medicaid paid, thus preventing the OMIG from verifying that the Appellant dispensed the medications the prescribing physician ordered. The OMIG may recoup what the evidence established as a \$4.00 average dispensing fee for each destroyed prescription or \$218,904.00.

### Background

The Appellant entered into a Consent Decree with the Board of Regents of the State of New York in which it agreed to pay a \$10,000.00 fine and operate on probation

for two years for practicing with gross negligence, a violation under New York Education Law (EL) § 6810(5)(McKinney Supp. 2009), on August 21, 2006, by inadvertently destroying all records of prescriptions prior to February 1, 2006 [Ex A, Tab 3]. The OMIG issued a Notice of Proposed Agency Action on July 11, 2009 moving pursuant to 18 NYCRR §§ 515.2, 515.3, 518.1 and 518.3 to recover overpayments totaling \$4,664,966.95 for failure to provide prescriptions or fiscal orders to support 63,664 claims which Medicaid paid between January 1, 2004 and March 16, 2006 [Ex. 2, page 381/598]. The OMIG issued an Amended Notice of Proposed Agency Action on December 14, 2011 which repeated the recoupment claim, added the intent to Censure and Reprimand the Appellant and added the allegation that the prescription destruction violated the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rules [Ex 2, page 378/598].

The Appellant responded to the Amended Notice of Proposed Agency Action on March 12, 2012 [Ex A]. The Response raised the five following arguments:

- the OMIG's attempted retrial of a matter settled by the Consent Order is arbitrary, capricious, an abuse of discretion and barred by the doctrine of res judicata (Point 1);
- the OMIG can no longer issue a final notice of agency action and must terminate the audit because of the unreasonable delay in conducting the audit (Point 2);
- issuance of an amended notice of proposed agency action in violation of the Medicaid audit regulations violated due process (Point 3);

- the OMIG claim concerning HIPAA violations lacked any basis in fact and the OMIG lacks authority to enforce HIPAA (Point 4); and
- the OMIG's blanket claim for the full value of 63,664 claims submitted to Medicaid during the relevant time period is inconsistent with the letter and spirit of applicable regulations and ignores other Rite Aid records relating to these claims and is arbitrary capricious and an abuse of discretion (Point 5).

The Response also noted that the OMIG had already begun to recover the alleged overpayment by withholding over \$425,000 in funds owing to the Appellant as reimbursement on other Medicaid claims.

The OMIG issued a Notice of Final Agency Action on June 5, 2013 that sought the same recoupment, requested a Censure and Reprimand and alleged the HIPAA violation [Ex 2, page 373/598]. The Appellant then requested a hearing.

Prior to the hearing, the parties entered a 17 paragraph stipulation of facts that appears at Exhibit G in the hearing record. The ALJ adopts the stipulated facts as Findings of Fact 7-23 in this Decision. Finding of Fact 23 states that the OMIG is not charging the Appellant with violating HIPAA. At hearing, the OMIG withdrew the request to recoup \$4,664,966.95 for failure to provide prescriptions or fiscal orders to support 63,664 claims which Medicaid paid between January 1, 2004 and March 16, 2006. The OMIG indicated that they were thereafter seeking to recover a total of \$246,267. That figure represented a \$4.50 dispensing fee for each of 54,726 prescriptions that related to \$3,967,295.64 in claims that the Appellant submitted for payment to Medicaid for the period between January 1, 2004 and December 31, 2005. The OMIG

indicated that it was withdrawing the request for a censure and reprimand and the allegation that the Appellant violated HIPAA.

The ALJ conducted the hearing in this matter pursuant to New York Social Services Law (SSL) Articles 1 and 5 (McKinney Supp. 2015), New York Public Health Law (PHL) Article 1 (McKinney Supp. 2015), New York Administrative Procedure Act (SAPA) Articles 3-5 (McKinney 2015) and Title 18 NYCRR Parts 504, 515, 518 & 519. The OMIG presented as hearing witnesses Senior Medicaid Investigator Pedro Contrares and Pharmacy Consultant and Licensed Pharmacist Ian Weitz. The Appellant presented Ride Aide [REDACTED]. All witnesses testified under oath and subject to cross-examination. The OMIG offered six exhibits into evidence that the ALJ received into the record:

- Exhibit 1. Index for OMIG's Investigative File (3 pages)
- Exhibit 2. OMIG's Investigative File (598 pages)
- Exhibit 3. Compact disk (CD)
- Exhibit 4. Memo from OMIG pharmacist, Andrew Nelson
- Exhibit 5. Notice of Hearing
- Exhibit 6. Certification of Kevin Ryan, dated 10/29/14 (3 pages)

The Appellant offered into evidence nine exhibits that the ALJ received into evidence:

- Exhibit A. Rite Aid's March 23, 2012 Submission and Exhibits
- Exhibit B. Amazing! Pest Control Invoices - October 28, 2005 to August 3, 2006
- Exhibit C. Rite Aid Internal SYSM Communication re: 1852 - Pending Injunction
- Exhibit D. Email dated November 8, 2012
- Exhibit E. OMIG Medicaid Update
- Exhibit F. Articles
- Exhibit G. Fully executed Stipulation re: Store 1852 Hearing
- Exhibit H. Materials pertaining to a random sample of 100 claims
- Exhibit I. Rite Aid-OMIG Settlement
- Exhibit J. Weitz Memorandum
- Exhibit K. Office of the Professions Document

The record also contained the hearing transcript pages 1-256.

Under SAPA § 306(2), all evidence, including records and documents in an agency's possession of which an agency wishes to avail itself, shall be offered and made a part of the record of a hearing. Under Title 18 NYCRR § 519.18(f), computer generated documents prepared by the Department or its fiscal agent to show the nature and amounts of payments made under the program will be presumed, in the absence of direct evidence to the contrary, to constitute an accurate itemization of the payments made to a provider. In addition to testimony and documents in evidence, and pursuant to SAPA § 306(4), an ALJ may take Official Notice of any matter for which Judicial Notice may be taken.

Under SAPA § 306(1), the burden of proof in a hearing falls on the party which initiated the proceeding. Title 18 NYCRR § 519.18(d) provides that the Appellant bears the burden to show a determination of the Department was incorrect and that all claims submitted were due and payable. Title 18 NYCRR 519.18(h) and SAPA § 306(1) provide that a decision after hearing must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or fact; less than a preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision, Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3<sup>rd</sup> Dept. 1984), appeal dismissed 63 N.Y.2d 649. The substantial evidence standard demands only that a given inference is reasonable and plausible, not necessarily the most probable, Ridge Road Fire District v. Schiano, 16 N.Y.3d 494 (2011).

## Findings of Fact

The ALJ made the following findings of fact (FF) after affording the parties an opportunity to be heard and after considering the evidence. The items in brackets that follow the findings represent documents in evidence [Ex], testimony from the record [T] and matters under Official Notice [ON] on which the ALJ relied in making the findings. In instances in which conflicting evidence appears in the record, the ALJ considered and rejected that other evidence.

1. The New York State Department of Health (Department) is the single state agency responsible for administering the Medicaid Program in New York State [ON SSL § 363-a, PHL § 201.1(v)].
2. The OMIG is an independent office within the Department with the responsibility for investigating, detecting and preventing Medicaid fraud, waste and abuse and for recouping improper Medicaid payments [ON PHL § 30].
3. The Office of Professional Discipline (OPD) within the New York State Education department handles complaints of professional misconduct and illegal practices of licensed professionals [Ex A, page 3, footnote 3].
4. The State Board of Pharmacy within OPD regulates the practice of pharmacy, investigates alleged violations, conducts hearings and levies monetary penalties [ON EL § 6804].
5. Although OMIG has a deep concern with patient care, OMIG is also interested in guarding one-third of the State Budget [T 166].
6. Store 1852 is located in Peekskill, New York, and services a large Medicaid population. The store sells everyday household products and has a pharmacy. It is in a strip mall with several restaurants and various other stores [Ex G].
7. Beginning in 2005, the strip mall was plagued by a rodent infestation, believed to have originated in the roof space of the adjacent Family Dollar store, which had stored food items in that space [Ex G].

8. Management for Store 1852 repeatedly tried to resolve the rodent problem and contracted with pest control experts Terminex and Amazing! Pest Control to address the issue [Ex G].
9. Rite Aid Exhibits A (at Tab 4) and B contain Terminex and Amazing! Pest Control invoices from March 2005 through August 2006 related to efforts to eliminate the rodent infestation at Store 1852 [Ex G].
10. On December 13, 2005, representatives of the New York Department of Agriculture conducted an inspection of Store 1852 and found violations of the Agriculture and Marketing laws arising from the rodent infestation [Ex G].
11. On December 23, 2005, the Department of Agriculture sent a letter warning that, without immediate corrective action, the matter would be referred to the Department of Agriculture's Counsel's Office [Ex G].
12. A re-inspection was conducted by the Department of Agriculture on March 23, 2006, and unsanitary conditions were found to still exist. The inspection report focused on four conditions one of which was the back room [Ex G].
13. On April 6, 2006, the Department of Agriculture threatened an injunction against Store 1852 if compliance with the Agriculture and Marketing laws was not attained by the time of a third inspection [Ex G].
14. After it became apparent that Amazing! Pest Control's efforts to eliminate the rodent infestation were not succeeding, Front End Store Manager Sheik Z. Lopez instructed a store employee, Juan Carlos ("JC") Munoz, to clean out the storage space in the back room of Store 1852, where numerous boxes of documents, including pharmacy records, were kept [Ex G].
15. Many of those boxes were unsanitary and contained rodent nests and rodent droppings [Ex G].
16. Neither Sheik Lopez nor JC Munoz worked in Store 1852's pharmacy [Ex G].
17. When the supervising pharmacist discovered the records were missing, efforts were made by the Pharmacy District Manager to retrieve the records from the distribution center. This occurred in August 2006. Those efforts were not successful [Ex G].



18. After efforts to retrieve the records proved unsuccessful, Rite Aid, on its own initiative, contacted Lawrence Mokhiber, Executive Director of the New York Board of Pharmacy (the “Board of Pharmacy”), to self-report the destruction of the records and to seek guidance with respect to appropriate remedial measures. Mr. Mokhiber advised [REDACTED], an employee in Rite Aid’s Government Affairs Department, that she should send a letter to the Board of Pharmacy regarding the destruction of the pharmacy records [Ex G].
19. On September 18, 2006, [REDACTED] sent a letter to the Board of Pharmacy self-reporting the destruction of the hard copy prescriptions dated before March 6, 2006. At Mr. Mokhiber’s request, [REDACTED] also sent a copy of the September 18, 2006 notice letter to Michael Moffeti at New York Drug Control [Ex G].
20. Following Rite Aid’s self-disclosure of the destruction of the records, the Board of Pharmacy and the Office of Professional Discipline audited the store and negotiated a settlement of the matter for a \$10,000 fine. The application for a consent order was approved by Board of Pharmacy Executive Director Mokhiber; Louis Catone, Director of the Office of Professional Discipline; and members of the Board of Pharmacy and the Board of Regents. The full Board of Regents approved the application on July 28, 2009 [Ex G].
21. Both Mr. Lopez and Mr. Munoz were disciplined as a result of this incident. Mr. Lopez was reprimanded and directed to get approval of a district manager or a pharmacy district manager before throwing away, removing or destroying any company records [Ex G].
22. The OMIG is not charging Rite Aid with a failure to comply with HIPAA regulations or laws in connection with the destruction of the pharmacy records at Store 1852 [Ex G].
23. The disposal included 54,726 prescriptions for the time period January 1, 2004 until December 31, 2005 [T 57].
24. These prescriptions related to claims for which Medicaid paid \$3,967,205.64 in reimbursement to the Appellant [T 58].
25. In paying a pharmacy claim for dispensing a prescription, OMIG pays the cost of the drug, with a slight profit and a dispensing fee [T 146].
26. The dispensing fee covers labor and the intangible aspects of dispensing a prescription [T 107].
27. The average dispensing fee is \$4.00 [T 107].

28. Westchester County opened an audit on Store 1852 in December 2007 and requested a sample of 200 prescriptions [Ex J].
29. The Appellant advised Westchester County that all paper prescriptions covering January 1, 2004 to March 15 2006 had been destroyed [Ex J].
30. In lieu of the original prescriptions, the Appellant was requested to provide electronic copies of 100 of the original 200 prescriptions requested [Ex J].
31. During the OMIG investigation, the OMIG received none of the 54,726 original prescriptions from the period between January 1, 2004 and December 31, 2005 [T 9, 56-57].

#### Controlling Statutes and Regulations

Title 18 NYCRR § 518.1(c) defines overpayment as any amount not authorized to be paid under the medical assistance program, whether paid as a result of improper claiming, unacceptable practices, fraud, abuse or mistake. Title 18 NYCRR § 515.2 defines unacceptable practices to include conduct contrary to rules, rates or fees, fraud or abuse, false claims, false statements, failure to disclose, unacceptable record keeping, client deception and failure to meet recognized standards. Title 18 NYCRR § 515.2(a)(1)-(3) defines unacceptable practice to include conduct which is contrary to the rules and regulations of the Departments of Health, Education and Mental Hygiene. Under EL § 6810(5) pharmacies must retain prescription records for five years and shall maintain prescription records pertaining to controlled substances pursuant to the requirements under PHL Article 33. Title 18 NYCRR § 515.2(b)(6) defines unacceptable practices as failing to maintain or to make available for purposes of audit or investigation records necessary to fully disclose the medical necessity for and the nature and extent of the

medical care, services or supplies furnished, or to comply with other requirements of this Title. Under Title 18 NYCRR §504.3(e), by enrolling in the Medicaid Program, a provider agrees to submit claims for payment only for services actually furnished and which are medically necessary or otherwise authorized. Title 18 NYCRR § 504.3(h) states that a provider agrees to provide true, accurate and complete information in relation to any claim. Title 18 NYCRR §504.3(i) provides that by enrolling, a provider agrees to comply with the rules, regulations and official directives of the Department.

### Discussion and Conclusions

The ALJ concludes that the Appellant received legally sufficient notice concerning the issues in the hearing and that the Appellant received the opportunity to present a defense to the actions to disqualify and /or to recoup payment. The ALJ concludes further that no bar exists to this hearing as the Appellant argued in Points 1 and 2 in the Response. The ALJ rules that the issues the Appellant raised at the Response's Point 3 and 4 became moot when the OMIG withdrew the request for Censure and Reprimand and the allegations concerning HIPAA, which the OMIG first raised in the Amended Notice of Proposed Agency Action. Contrary to the arguments the Appellant raised in Point 5 in the Response, the ALJ finds that testimony and documentary evidence in the record proved by substantial evidence that the Appellant engaged in unacceptable practices under the Medicaid Program. The ALJ finds recoupment totaling \$216,904.00 provides the appropriate remedy in this matter.

Testimony: The OMIG presented as hearing witnesses Senior Medicaid Investigator Pedro Contrares and Pharmacy Consultant and Licensed Pharmacist Ian Weitz. The Appellant presented Ride Aide [REDACTED] [REDACTED]. [REDACTED] testified about the Appellant discovering the prescription destruction, self-reporting the discovery to the Board of Pharmacy and then entering into the Consent Decree. [REDACTED] testimony in no way contradicted or challenged any testimony by Mr. Contrares or Mr. Weitz.

Mr. Contrares testified about the OMIG investigation upon learning from Westchester County of the prescription destruction. Mr. Weitz testified about a memorandum that he prepared after reviewing certain data that the Appellant presented to Westchester County in lieu of original prescriptions [Ex G]. In lieu of providing 200 actual prescriptions or 100 electronic prescriptions to Westchester County, the Appellant provided: an Excel spreadsheet listing the 100 prescriptions with information pertaining to each one; hard copies of consumer/patient signed receipt for 99 of the 100 and computer generated copies of the prescription labels for 63 of 100 dispensed medications. The Weitz memorandum found the data insufficient to substantiate whether information a pharmacist entered into a computer reflected what had been prescribed. Mr. Weitz concluded that to conduct a review, the reviewer must see what the dispensing pharmacist saw when the pharmacist filled the prescription. Mr. Weitz also testified about the dispensing fee. Although the Appellant's counsel challenged Mr. Weitz's conclusions on cross-examination, the Appellant offered no testimony to counter the testimony by Mr. Weitz.

The ALJ finds Mr. Wietz credible in that testimony. Mr. Weitz is a licensed pharmacist who worked in a private pharmacy, in a pharmacy at a State psychiatric hospital, as an investigator with the Board of Pharmacy and then as a pharmacy consultant for the State Department of Social Services. Mr. Weitz testified in a straightforward manner that revealed extensive experience and knowledge in his field.

Point 1: The Appellant argued that the OMIG should have terminated the audit in this case due to unreasonable delay in concluding the audit. To support that argument, the Appellant cited to four court decisions: Matter of Blossom View Nursing Home v. Novello, 4 N.Y.3d 581 (1980); Ostrow v. Bane, 213 A.D.2d 651, 624 N.Y.S.2d 220 (2<sup>nd</sup> Dept. 1995); Signature Health Center, LLC v. NYS Dept. of Health, 29 Misc. 3d 769, 910 N.Y.S.2d 841 (Nassau Co. Sup. Ct. 2010); DMN Mgmt. Servs. LLC v. Daines, 30 Misc. 3d. 1205(A) (N. Y. Co. Sup. Ct. 2010). None of those cases, however, dealt with unreasonable delays in administrative litigation. Blossom and DMN dealt with audits to set reimbursement rates and Signature and Ostrow dealt with payment of pending claims.

Under SAPA 301(1), all parties must be offered the opportunity for hearing within reasonable time. To demonstrate unreasonable delay in administrative adjudication, a party must show, among other factors, that a delay has caused the party actual prejudice in attempting to present a case, Cortland Nursing Home v. Axelrod, 66 N.Y.2d 169 (1985). The mere passage of time is insufficient to show actual prejudice, Coderre v. DeBuono, 247 A.D.2d 793, 669 N.Y.S.2d 440 (3<sup>rd</sup> Dept. 1998), but courts have found actual prejudice in which a delay resulted in the unavailability of documentary evidence or impaired the ability of a witness to testify Sharma v. Sobol, 188 A.D.2d 833, 591 N.Y.S.2d 572 (3<sup>rd</sup> Dept. 1992); Gold v. Chassin, 215 A.D.2d 18, 632

N.Y.S.2d 276 (3<sup>rd</sup> Dept. 1995). In Sharma, the New York Supreme Court Appellate Division for the Third Department annulled a disciplinary determination against a physician because a four year delay from the time of alleged misconduct to hearing had deprived a witness at the hearing of the ability to testify with reasonable certainty. In Gold, the Third Department dismissed two misconduct charges against a physician due to the unavailability of patient records involving treatment that occurred twenty years prior to the disciplinary hearing.

In this hearing, the Appellant has neither shown nor alleged actual prejudice in being able to present a defense. There was a destruction of records, but that destruction occurred before investigation in this case and that destruction is the subject of the hearing. Further, the Appellant conceded at hearing that the facts are not really in dispute [Ex 236].

Point 2: The Appellant faulted the OMIG for attempting to retry a matter that the Consent settled. The Appellant noted that a number of lower courts have invalidated OMIG decisions to exclude physicians from the Medicaid Program based upon consent orders between the physicians and Office for Professional Medical Conduct (OPMC): Mihailescu v. Sheehan, 25 Misc. 2d 258, 885 N.Y.S.2d (2009); Haluska v. Office of the Medicaid Inspector General and James Sheehan, Index #2009-2774 (Chemung Co. Sup. Ct. April 7, 2010); Pearl, M.D. v. Office of the Medicaid Inspector General, 2009 N. Y. Slip Op. 32492(U) (Albany Co. Sup. Ct. October 26, 2009). Under PHL § 230, OPMC is the authority within the Department charged with investigating claims of physician misconduct, conducting hearings to determine if misconduct occurred and imposing sanctions if misconduct occurred.

The Appellant's brief made no mention of the New York Court of Appeals decision on the same issue in Koch. v. Sheehan, 21 N.Y.3d 697 (2013). In Koch, a physician entered into a consent decree with OPMC to settle misconduct charges and the physician agreed to practice under probation for 36 months. The OMIG then excluded Dr. Koch from the Medicaid Program, based solely on the OPMC consent decree. The Court of Appeals noted that an OMIG nurse auditor who reviewed the consent order recommended exclusion but without providing a reason. Four additional reviewers approved the recommendation without comment. After a challenge of the exclusion, State Supreme Court annulled. The Appellate Division affirmed and held that it was arbitrary and capricious for the OMIG to exclude Dr. Koch without an independent investigation after OPMC permitted the Appellant to continue practicing. In Koch, the Court of Appeals ruled that OMIG could exclude a physician from the Medicaid Program based solely on a consent order and without an independent investigation, but the Court ruled that the OMIG must provide a reason for the exclusion.

The ALJ finds that neither Pearl, Haluska, nor Mihailescu bar the OMIG from seeking a return of overpayment against the Appellant. The OMIG is seeking no exclusion in this case and the OMIG is not relying on the Consent, as the Appellant has admitted to the prescription destruction. Further, the OMIG has provided the reasons for its actions in the testimony by Mr. Weitz.

The Appellant argued further that the Consent Decree with the Board of Pharmacy barred this proceeding under the judicial economy doctrine of *res judicata*. That doctrine provides that a disposition on the merits bars litigation between the same parties or those in privity with them on a cause of action arising out of the same

transactions or series of transactions that was either raised or that could have been raised in prior litigation, Sandhu v. Mercy Med. Ctr., 54 A.D.3d 928, 864 N.Y.S.2d 124 (2<sup>nd</sup> Dept. 2008). *Res judicata* is applicable to give conclusive effect to quasi-judicial judgments rendered in administrative proceedings, although the issue precluded must have been material to the first action or proceeding and essential to the decisions rendered therein, Ryan v. New York Tel. Co., 62 N.Y.2d 494 (1984). The Appellant contends that privity exists between state agencies if there is a unity of interests and a common source to two matters, 37-01 31<sup>st</sup> Ave. Realty Corp. v. SAFED, 20 Misc.3d 762, 861 N.Y.S. 2d 561 (Queens Civ. Ct. 2008). The Appellant argued that privity existed between OMIG and the Board of Pharmacy where the Board of Pharmacy decided a matter identical to that being investigated by OMIG in every way – “facts, evidence, witnesses and law”.

The ALJ finds no privity in this matter. First, the Board of Pharmacy issued a Consent Decree without a hearing, so there were no witnesses. Further, the Appellant made no showing that the Board of Pharmacy considered evidence concerning the efforts by Westchester County or the OMIG to obtain copies of prescriptions to review to determine if fraud occurred. In addition, the law differed between the two proceedings.

In Koch, the Court of Appeals noted that OPMC and OMIG, two agencies within the Department, performed different legal functions. The Court found that OPMC investigates complaints concerning physician misconduct and imposes sanctions if misconduct occurred. The Court found that OMIG has a responsibility to insure that scarce Medicaid dollars are spent only on quality medical care for Medicaid recipients. The Court stated that, under PHL § 32(6), the Legislature provided the OMIG with extensive responsibilities to pursue civil and administrative enforcement actions against



individuals or entities that engage in fraud, abuse, or legal or improper acts or unacceptable practices. In discussing the differing responsibilities between OMIG and other agencies, Mr. Weitz, a former Board of Pharmacy employee, testified that OPMC and the Board of Pharmacy perform similar functions [T 164]. Finally, the Appellant presented no evidence to show that the Board of Pharmacy holds any authority to recoup overpayments from Medicaid providers.

The issue in this proceeding is whether the OMIG can recover overpayments because the Appellant engaged in an unacceptable practice by failing to maintain or to make available for purposes of audit or investigation records necessary to fully disclose the medical necessity for and the nature and extent of the medical care, services or supplies furnished. That issue was never jurisdictionally before the Board of Pharmacy and was, therefore, never material to the Board's deliberations or essential to the Board's decision. The ALJ finds that the Consent Decree provides no bar to OMIG in seeking overpayment recovery in this case. To accept the Appellant's argument, would mean that any licensed provider could preclude recovery of overpayments, even those obtained through fraud, by entering into a consent decree with that provider's licensing and or disciplinary board.

Point 5: The Appellant argued that the OMIG was acting in an arbitrary and capricious manner and abusing discretion by making a blanket claim to recover the full value of 63,664 claims submitted to Medicaid and by ignoring other Appellant records relevant to this claim. As noted above, the OMIG has reduced the recoupment request to seeking to recover the dispensing fee for 54,726 claims that the Appellant submitted between January 1, 2004 and January 31, 2005. At hearing, the Appellant still argued that

the OMIG is seeking to recoup too much money. The ALJ will discuss that argument below in the discussion on Recoupment.

The Appellant contended that no violations occurred under the SSL or Title 18, because nothing in the statute or regulations requires a pharmacy to retain copies of prescriptions. The Appellant conceded that the MMIS Manual for Pharmacies does require a pharmacy to keep on file the signed prescription or fiscal order from the prescribing physician, but the Appellant argued that the Manual was only a reference tool that lacks the force of law: Christensen v. Harris County, 529 U.S. 576 (2000); Reno v. Koray, 515 U.S. 50 (1995); Matter of Rubin v. Campbell, 64 A.D.2d 827 N.Y.S.2d (4<sup>th</sup> Dept. 1978). The Appellant argued that the Appellant offered to provide the OMIG with other documentation for the underlying claims that included pharmacy dispensing data, customer pick-up date, signature logs and medication labels for each claim.

The ALJ finds that the hearing testimony by Mr. Weitz and written report by Mr. Weitz in evidence as Hearing Exhibit J establishes that original prescriptions are necessary on an audit or investigation to assure that no fraud occurred in dispensing, because the data the Appellant offered only showed what the Appellant dispensed rather than what the prescribing physician wrote. Although the Appellant's counsel challenged the testimony by Mr. Weitz and the conclusions in Exhibit J, the Appellant presented no testimony to contradict the opinion from Mr. Weitz.

The un-contradicted testimony by Mr. Weitz established that the Appellant committed unacceptable practices under Title 18 NYCRR § 515.2(b)(6) by failing to maintain or to make available for purposes of audit or investigation records necessary to fully disclose the medical necessity for and the nature and extent of the medical care,

services or supplies furnished. Under Title 18 NYCRR §§ 518.1(c) and 515.3(b), the OMIG may recoup any overpayments that resulted from unacceptable practices.

Recoupment: The OMIG requested that the ALJ set the recoupment in this case at \$246,267.00, which would represent a \$4.50 dispensing fee for the 54,726 claims now at issue. Mr. Weitz testified, however, that the average prescription dispensing fee was \$4.00 [T 106-107] and on cross-examination he testified that \$3.00 would be a “fair” price. The Appellant argued in the alternative that, if the ALJ does approve recoupment, the ALJ should award no more than \$3.00 per destroyed prescription, although the Appellant requested that ALJ actually limit the recoupment to \$18,000. The Appellant stated that dozens of other audits concerning Rite Aid pharmacies have resulted in settlements that have averaged \$18,000.00. The Appellant provided documentation concerning those other audits at Hearing Exhibit I. The Appellant argued that if the original prescriptions had been available in this case, there would have likely been a resolution in an amount comparable to the \$18,000.00 resolution in the other cases.

The ALJ finds it appropriate to base the recoupment amount on the average dispensing fee in this case in which the prescription destruction prevented any reviewer from being able to verify that the Appellant dispensed the medication that the prescribing physician ordered. The testimony by Mr. Weitz indicated that the average dispensing fee that OMIG allows is \$4.00 [Tr 107]. In testifying that \$3.00 would be a fair price, Mr. Weitz failed to explain what made that figure a fair price and neither counsel asked for an explanation. Mr. Weitz testified that he arrived at the figure by “just picking a number off the top of my head”. The OMIG may recoup \$ 218,904.00, or \$4.00 per prescription, for Appellant’s unacceptable practices in destroying the prescriptions.

The Appellant's Response stated that the OMIG began the recoupment prior to the hearing pursuant to 18 NYCRR 518.8 by withholding money owing to the provider under other claims. The Respondent indicated that the OMIG withheld over \$425,000.00 from money due to the Appellant on other Medicaid claims. The ALJ directs the OMIG to act with all deliberate speed to release any withheld funds over the \$ 218,904.00 recoupment.

Administrative Law Judge James F. Horan renders this decision pursuant to the designation by the Commissioner of Health of the State of New York to render final decisions in hearings involving Medicaid provider audits.

Dated: May 27, 2016  
Menands, New York

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James F. Horan  
Administrative Law Judge