

Jurisdiction and Relevant Statutes and Regulations

The New York State Department of Health (Department or DOH) 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 (DOT) and Motor Vehicles (DMV). 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 or a censure. 18 NYCRR 515.3(a)(1) and (2). 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. 18 NYCRR 519.4. 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 censure Every Boro Ambulette Inc. (Provider) and Jaycynth V. Blackman (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] pages 1-385 of the hearing was made, and exhibits [Ex] were admitted into evidence as OMIG's 1-22 and Appellant's B and G¹.

Findings of Fact

Citations reflect evidence found persuasive; conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. At all times relevant hereto Appellant Every Boro Ambulette Service Inc. (Every Boro) was an ambulette and transportation service enrolled as a provider in the New York State Medicaid Program. Every Boro, located in St. Albans, New York, and owned by Jaycynth V. Blackman since September 7, 1988, operates in the metropolitan New York City region. [Ex 2; T 223, 334]

2. Every Boro was paid \$202,377 by the Medicaid Program on 2,982 claims for transportation services provided to Medicaid recipients during the period November 25, 2014 through March 30, 2015. [Ex 1; Ex 2; T 131-132]

3. By notice of proposed agency action (NOPAA) dated August 26, 2016, OMIG notified Appellant that it had determined to exclude Every Boro and Jaycynth V.

¹ Seven exhibits were marked for identification as Appellant's A-G. Appellant's exhibits A and C through F were marked for identification and remained with Appellant.

Blackman from the Medicaid Program for a period of three years 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 \$202,377, plus interest. [Ex 1; T 129-130; 134-136]

4. On October 30, 2016, Appellant, through its then attorneys, Blackman & Melville, P.C., submitted a written response (Response) to the NOPAA. On January 18, 2017, OMIG issued its notice of agency action (NOAA). The NOAA reduced the sanction to a censure but did not change the amount of the joint and several restitution being sought, \$202,377, plus interest. [Ex 2; Ex 3; T 140, 178-180]

5. OMIG's determinations were based upon Appellant's engaging in unacceptable practices in the Medicaid Program primarily attributable to having transported Medicaid patients during the period November 25, 2014 through March 30, 2015 (the relevant period) under the following circumstances:

5. OMIG was notified by the New York State Department of Transportation ("NYS DOT") that Every Boro had its NYS DOT operating authority suspended on November 25, 2014, for not being in compliance with Liability Insurance. On February 23, 2015, the NYS DOT revoked Every Boro's operating authority for not being in compliance with Liability Insurance... (Exhibit 2, page 2, number 5)

and OMIG is seeking payment for those transportation services. [Ex 1; Ex 2; T 182-184]

6. During the relevant period, the NYS DOT notified Appellant, by letter dated February 23, 2015, served February 27, 2015, that its operating authority to engage in transportation was revoked due to non-compliance with liability insurance. [Ex 6; T 348-349]

7. Appellant's operating authority was restored on March 31, 2015. During the period February 28, 2015 to March 30, 2015, Appellant operated and transported Medicaid recipients without operating authority. [Ex 7; T 212-213, 243-246]

8. By letter dated February 13, 2017, Appellant requested an administrative hearing to challenge OMIG's determination, and a hearing was held on June 26, 2017, and August 14, 2017. [Ex 4]

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 \$202,377, plus interest, correct?

Discussion

OMIG presented the audit file and summarized the case at hearing. OMIG presented Exhibits 1-22 and one witness, Christopher Bedell, an OMIG supervising investigator. John J. Rivas, Esq., represented Appellant and presented two witnesses, [REDACTED], an assistant manager for Hereford Insurance Company, and [REDACTED], Every Boro's operational manager, and Exhibits A-G, of which B and G were accepted into evidence. OMIG submitted a post-hearing brief and Appellant submitted a post-hearing brief and a reply brief.

OMIG censured Appellant on the grounds that for the period November 25, 2014 to March 30, 2015, Appellant transported Medicaid recipients in Appellant's ambulettes when it was not authorized to do so due to its liability insurance having been suspended

Every Boro/Blackman / OMIG

on November 25, 2014 (Ex 5), then revoked on February 23, 2015 (Ex 6). Appellant submitted 2,982 claims, totaling \$202,377, for services provided in Appellant's ambulettes in that time period, and Appellant received the full amount it claimed. The Department is now seeking to have that censure determination confirmed and to recoup \$202,377, plus interest.

Every Boro, whose business is "100% Medicaid," has been enrolled as a Medicaid Provider since 1988, and has no negative history with NYS DOT or DOH. Every Boro maintains liability insurance with Pearland Brokerage/Hereford Insurance Company (Hereford); the Broker is Green Dart.

Following receipt of a March 6, 2015 email from DOH (Ex 13), OMIG commenced an investigation of Every Boro. The email read

Attached is information concerning revocation by the NYS [DOT] on the licensure of Every Boro ... Only lawfully authorized ambulette services may receive reimbursement for the provision of ambulette transportation. Ambulettes must be in compliance with all ... NYSDOT licensure, inspection and operational requirements, including those identified at Title 17 NYCRR §720.3(A).

The attachment (which is also in evidence as Ex 6) is the Notice of Revocation from NYSDOT to Every Boro, dated February 23, 2015, with a stamp that reads "SERVED Feb 27, 2015." It is important to note from the outset that DOT's Notice of Revocation to Every Boro (Ex 6 and Ex 13) includes a "SERVED" stamp but the DOT's Notice of Suspension to Every Boro (Ex 5) does not include a stamp which reads "SERVED." The stamp on the Notice of Suspension reads "ORIGINAL." Those stamps are believed to have been placed on the Notices of Suspension and Revocation by DOT (T 348-350).

Appellant claims it never received the November 25, 2014 Notice of Suspension. OMIG contends that Appellant's October 16, 2016 Response (Ex 3) acknowledges

receipt of the Notice of Suspension. In support of this contention, OMIG relies particularly on the following “FACTS” recited by Appellant’s then attorneys:

9. The [Appellants] on or about October 30, 2014 remitted payment to the insurance company. Prior to the insurance company receiving the payment and crediting the account of the [Appellants] it sent NYDOT “Notice of Cancellation” or “Form K” without prior notification to the [Appellants].

10. It was based upon this that NYDOT then issued the Notice of Suspension; however, ... [Ms.] Blackman then immediately began to rectify the matter by contacting the insurance company and indicating that payment had been issued to the insurance company for any premiums due and owing and that this matter has caused a suspension to be issued. (Ex 3, first three pages)

As part of its investigation, OMIG subpoenaed and received documents pertaining to Every Boro from Hereford (Ex 15 and 16). The subpoenaed records show that Appellant received several notices of cancellation and reinstatement during (as well as prior and subsequent to) the relevant period. Appellant’s witness, [REDACTED], an assistant manager for Hereford, addressed this. [REDACTED] testified that despite these cancellation and reinstatement notices, he is “200 percent confident” (T 285) that there was never any lapse in coverage. [REDACTED] explained that cancellation notices are sent to insureds 30 days prior to the stated date of cancellation, usually due to a missed payment, but if the issue is resolved in that timeframe, the insured is reinstated (T 280-285).

[REDACTED] further explained that a Form E is the official document that insurance carriers such as Hereford prepare and submit to NYSDOT to notify DOT that a company such as Every Boro has insurance coverage; the insured, *e.g.*, Every Boro, cannot submit an official Form E to DOT. Both [REDACTED] and [REDACTED] confirmed that the carrier (Hereford) submits the Form E (T 193-194, 256-257). In November 2014, a Form E was

sent to DOT via facsimile (fax) to a fax number designated by DOT for submission of the Form E. [REDACTED] testified that a Form E was faxed to DOT on November 10, 2014, notifying DOT that Every Boro was insured. [REDACTED] further testified that the DOT-designated fax number was eventually changed by DOT due to numerous instances of problems with that fax number (T 255-262)². [REDACTED] testified as follows:

Q: In your experience, have there ever been incidents where faxes have been sent by your company to [DOT], and in fact, you received fax confirmation sheets like this one [in Exhibit B] where later on they didn't receive it or they said they didn't get it?

A: Yes. It did happen before.

Q: Was that common? Frequent? Infrequent?

A: It was actually very common. More than I'd like. Because we got it from many other insureds who said, look, we have a problem, and we would reach out to DOT, and eventually they changed the fax number.

.....

Q: Do you know why they changed the fax number?

A: They said the fax was broken. The fax that we were using was broken. (T 261-262)

It appears that DOT did not receive the Form E that [REDACTED] faxed on November 10, 2014, as evidenced by DOT's November 25, 2014 Notice of Suspension. I find, however, that Every Boro did not receive that Notice. [REDACTED], Appellant's operational manager vehemently denied that Every Boro received that Notice of Suspension. The fact that such Notice was stamped "ORIGINAL" (not stamped "SERVED" as was the Notice of Revocation) corroborates [REDACTED] testimony³.

² As a result of the unreliability of faxes being received by DOT for Every Boro and other insureds, so that the insureds were revoked despite [REDACTED] having sent the Form E, [REDACTED] subsequently arranged with Brian Tracy at DOT to email, instead of faxing, the Form E to DOT (T 277-279).

³ I gave far more weight to [REDACTED] sworn testimony than I gave the statements of Appellant's then attorneys in Exhibit 3.

OMIG is seeking a censure of Appellant and restitution in the amount of \$202,377 (the amount Appellant was paid for claims submitted in the relevant period, which began on the date of NYS DOT's Notice of Suspension, November 25, 2014), plus interest. In its brief and reply brief, Appellant seeks a dismissal of this case in its entirety or, alternatively, an order that Appellants repay claims submitted between February 28, 2015⁴ and March 30, 2015⁵. Appellant's calculation of the number of claims paid (766) in the revocation period is \$49,935.75. (Appellant's brief, pages 8 and 10; Appellant's reply brief, page 6).

Having found that Appellant did not receive the Notice of Suspension, the restitution cannot include claims denied by OMIG for the entire relevant period. Restitution must be calculated not from the date of the Notice of Suspension, but from the date Appellant knew it should not and could not transport Medicaid recipients in its ambulettes due to its operating authority having been revoked. That date is February 28, 2015. NYS DOT's Notice of Revocation is stamped "SERVED February 27, 2015" (Ex 6). Once "SERVED" with that Notice, Appellant should have ceased transporting Medicaid recipients the very next day, February 28, 2015, and should not have resumed transporting Medicaid recipients until Appellant once again had operating authority to do so, March 31, 2015, the date its liability insurance was restored. The revocation period, therefore, is February 28, 2015 to March 30, 2015, inclusive.

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 two hundred thousand dollars in Medicaid reimbursement was paid in

⁴ the first day following the "SERVED" date of the Notice of Revocation (Ex 6)

⁵ the last day of the Revocation

the relevant period, approximately fifty thousand of which was paid in the revocation period; 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. All the claims/violations in this case are entirely attributable to lack of operating authority. Whether the nature of the violation is more akin to one ongoing violation that applied to multiple claims or to separately committed violations is irrelevant because the nature of the violation was 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 operating authority, the purpose of requiring that Medicaid recipients are transported in vehicles with operating authority is to protect program integrity and public health and safety. To protect Medicaid recipients and the general public on the road with those ambulettes in the event of an accident, providers must have insurance at all times (T 126). Transporting Medicaid recipients in vehicles with no operating authority for one month creates an 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 Appellant provided in its vehicles that were in violation of NYS DOT and DOH regulations.
- (4) Mitigating circumstances. Appellant has described itself as "an honest and legitimate provider, who is not itself at fault ... unfortunate victims" (Appellant's brief, pages 8 and 9). Appellant has not established mitigating circumstances. Whether Every Boro and Ms. Blackman were "unfortunate victims" or not, Appellant continued to transport Medicaid recipients in its vehicles during the time its operating authority was revoked.
- (5) Other facts related to the nature and seriousness of the violations. Transporting Medicaid recipients when there was no operating authority to do so created a serious situation.
- (6) The previous record of the person under the Medicare, Medicaid and social services programs. Since its enrollment as a Provider in the Medicaid program in 1988, Appellant has not had any negative history with the Medicaid program or NYS DOT and DOH. (T 222-223, 331).

There is no question that Every Boro and Jaycynth V. Blackman 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 censure is an appropriate sanction for both Every Boro and Blackman. Appellant transported Medicaid recipients during the revocation period 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 during the revocation period (February 28 to March 30, 2015) which are under review are overpayments within the meaning of this regulation. The amount of time (one month) and the number of claims (approximately 766 claims totaling approximately \$50,000) that constituted the unacceptable practice of transporting Medicaid patients in violation of regulations and laws warrant recouping the overpayments from Every Boro and Jaycynth V. Blackman, jointly and severally. 18 NYCRR 515.9 and 518.3.

Decision

OMIG's determination that Appellant, Every Boro Transit Services Inc. and Jaycynth V. Blackman, engaged in unacceptable practices in the Medicaid Program is affirmed.

OMIG's determination to censure Appellant, Every Boro Transit Services Inc. and Jaycynth V. Blackman, as affiliates, is affirmed.

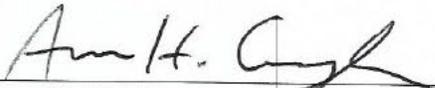
OMIG's determination to recover Medicaid Program overpayments from Appellant, Every Boro Transit Services Inc. and Jaycynth V. Blackman, jointly and severally, is affirmed. An accounting of the exact number of claims and payment amount

Every Boro/Blackman / OMIG

for the revocation period, February 28, 2015 to March 30, 2015, inclusive, shall be determined by OMIG. The overpayment recovery shall be this amount, plus interest.

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

DATED: New York, New York
February 5, 2018


Ann H. Gayle
Administrative Law Judge

TO:

Mara Pandolfo, Esq.
Office of the Medicaid Inspector General
217 Broadway, 8th Floor
New York, New York 10007

John J. Rivas, Esq.
Rivas Goldstein, LLP
405 Lexington Avenue, 26th Floor
New York, New York 10174

Every Boro Ambulette Service Inc.
172-29 Brocher Road
St. Albans, New York 11434

Jaycynth V. Blackman
