

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

In the Matter of the Request of

IMI TRANSPORT INC.
Medicaid ID # 02000411

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 (NYCRR) to review a
determination to recover Medicaid overpayments.

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: **Decision After Hearing**
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: Audit #11-1011
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Before: Kimberly A. O'Brien
Administrative Law Judge

Held at: New York State Department of Health
90 Church Street
New York, New York 10007

Parties: New York State Office of the Medicaid Inspector General
217 Broadway, 8th floor
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Dates of Hearing: August 19, 2015
August 20, 2015
November 5, 2015

Briefs: February 12, 2016

JURISDICTION

The Department of Health (“Department”) acts as the single state agency to supervise the administration of the medical assistance program (“Medicaid”) in New York State. Public Health Law (“PHL”) § 201(1)(v), Social Services Law (“SSL”) § 363-a. Pursuant to PHL §§ 30, 31 and 32, the 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.

The OMIG determined to seek restitution of payments made by Medicaid to IMI Transport Inc. (“Appellant”). The Appellant requested a hearing pursuant to SSL § 22 and the former Department of Social Services (“DSS”) regulations at 18 NYCRR § 519.4 to review the determination [Ex. 1].

ISSUE

Was OMIG’s determination to recover Medicaid overpayments in the amount of \$691, 221.00 from Appellant correct?

FINDINGS OF FACT

The items appearing in brackets following the findings of fact [“FOF”] indicate exhibits in evidence [Ex.] and testimony from the transcript [Tr.], which support the finding of fact. In instances in which the cited testimony or exhibit contradicts other

testimony or exhibits from the hearing, the ALJ considered that other testimony or exhibit and rejected it.

1. At all times relevant hereto, Appellant, IMI Transport Inc. (“IMI”), was enrolled as a provider in the New York State Medicaid program [Ex. 1-A *Revised Draft Audit Report*].

2. Appellant submitted 9,210 claims for ambulette transportation services it provided to 76 Medicaid recipients paid by the Medicaid Program between January 1, 2006 and December 31, 2009 (“audit period”) [Ex. 1-A *Revised Draft Audit Report*].

3. The audit was based on a random sample of 150 paid claims (“sample claims”) [18 NYCRR 519.18(g) *Extrapolation/Statistical Sampling Methodology*; Ex. 17 *Sample and Universe CD*; Tr. 176-178].

4. The OMIG’s audit was conducted by an authorized private contractor, The Bonadio Group (“auditor”) [Tr. 23-25; Ex. 6 *Audit Notification Letter*]¹

5. On February 15, 2011, Molly Kommer, Principal, The Bonadio Group, conducted the entrance conference (“entrance conference”). She met with Michael Poliandro, IMI President, on the premises of Appellant’s business [Tr. 56; Ex.7 *Entrance Conference Outline*, Ex. 8 *Entrance Conference Questionnaire*].

6. At the entrance conference Ms. Kommer asked Mr. Poliandro how he knew which driver and vehicle provided services to a patient on any given day [Tr. 237-238]. For demonstration purposes, Mr. Poliandro gave Ms. Kommer a “bunch of trip tickets” for trips on February 15, 2011 and he asked her to read to him the name of the

¹ The auditor has a contract with Suffolk County (“County”) and through the “County Demonstration Project” it was authorized by the Department to audit Appellant. The OMIG adopted the auditor’s findings

driver on each of the trip tickets [Tr. 411-413]. He input each driver's name into the Appellant's computer billing program and the search results revealed the vehicle each driver was assigned to on February 15, 2011 [Ex. 8A *Matrix*; Tr. 410-412, 460-462]. The dispatch and billing system Appellant uses to submit its Medicaid claims was approved in 2001 by "CSC" the organization that processes Medicaid provider claims [Tr. 413-416].

7. On March 7, 2011, the auditor's data collection team conducted an onsite field audit to collect audit data [Tr. 56-58, 417-420; Ex. A *3/7/11 Field Audit Summary*; 18 NYCRR 517.5(a) *Field Audit*].

8. The OMIG's June 13, 2014 draft audit report ("draft audit report") notified Appellant that the Department had disallowed 118 of the 150 sample claims and determined to seek restitution of Medicaid overpayments in the amount of \$691,221.00. The three categories of disallowances are "Missing/Inaccurate Information on Medicaid Claim," 114 sample claims; "Missing /Incomplete Documentation," 2 sample claims; and "Driver is Not NYS DMV 19-A Certified," 2 sample claims [Ex. 1A *Draft Audit Report*; Tr. 176-178].

9. Mr. Poliandro asked Ms. Kommer for advice about how to respond to the disallowances contained in the draft audit report. She told him to write a separate "post-it note" with the claim number for each disallowance and behind each one put the documentation to support the claim. Mr. Poliandro followed this procedure in his response to the draft audit report [Tr. 463-464, 469, 474; Ex. 2 - *Appellant's Response Documentation*].

10. Appellant opened up its books and records to the auditor for inspection and submitted a timely response containing contemporaneous documentation to substantiate 114 of the 118 disallowed sample claims [Tr. 181-188, 305-306, 309, 417-420, 458, 474; Ex. 2 - *Appellant's Response Documentation*, Ex. 4 *Sample Documentation Books 1&2*, Ex 8. *Entrance Conference Outline*, Ex. A *3/7/11 Field Audit Summary*, Ex. G *Vehicle Registration Report*, Ex. H *Approved Samples With No Findings*, Ex. L - *NYS Department of Motor Vehicles ("DMV") 19 A Carrier History Report*, Ex. M *NYS DMV 19A Record Review of Appellant's Compliance*].

11. Appellant provided contemporaneous documentation to substantiate 146 of the 150 sample claims including copies of dispatch logs/trip tickets, driver licenses, vehicle registrations, and vehicle inspections for the audit period [Tr. 250-251; Ex. 2 - *Appellant's Response Documentation*, Ex. 4 *Sample Documentation Books 1&2*, Ex. H *Approved Samples With No Findings*,].

12. The OMIG's November 2014 final audit report ("final audit report") notified Appellant that the Department had disallowed 118 of the 150 sample claims and determined to seek restitution of Medicaid overpayments in the amount of \$691,221.00. The disallowances and findings contained in the final audit report are the same as those contained in the draft audit report [Ex. 3 *Final Audit Report*].²

APPLICABLE LAW

Medicaid fee-for-service providers are reimbursed by Medicaid on the basis of the information they submit in support of their claims. The information provided in relation

² The final audit report states that "additional reasons for disallowance exist regarding certain findings;" but these reasons were not incorporated by reference or included in the detailed findings contained in the body of the final audit report [Ex.3 - *Final Audit Report*]. Accordingly, these "additional reasons" were not considered by the ALJ in reaching a decision.

to any claim must be true, accurate and complete. Providers must maintain contemporaneous records demonstrating the right to receive payment and all claims for payment are subject to audit for six years, 18 NYCRR §§ 504.3(a)&(h), 517.3(b). The audit process includes a draft audit report and final audit report issued by the Department. The draft audit report “must advise the provider of the basis for and the legal authority” for the proposed action; “contain a clear statement of the action to be taken”; and “afford the provider the opportunity to respond to the proposed action,” 18 NYCRR 517.5(a)&(b). Before the Department issues a final audit report it “must consider the objections, any supporting documents and materials submitted therewith, the draft audit report, and any additional material which may become available” 18 NYCRR § 517.6(a). The final audit report “requiring the repayment of overpayments or restitution” constitutes a “final determination,” 18 NYCRR 519.3(b).

If a Department audit reveals an overpayment, the Department may require repayment of the amount determined to have been overpaid, 18 NYCRR §§ 504.8(a)(1), 518.1(b). 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). A person is entitled to a hearing to have the Department’s final determination reviewed if the Department requires repayment of an overpayment, 18 NYCRR § 519.4.

At the hearing, the Department must provide a “representative to present the audit file and summarize the case” including a “brief description of the facts, evidence and reasons for supporting the action,” 18 NYCRR §§519.17(a) & 519.17(b)(3). The Appellant has the burden of showing that the determination of the Department was

incorrect and that all claims submitted and denied were due and payable under the Medicaid program, 18 NYCRR §§517.5(b) & 519.18(d)(1). An Appellant may not raise issues regarding “any new matter not considered by the department upon submission of objections to a draft audit or notice of proposed agency action,” 18 NYCRR § 519.18(a).

DSS regulations generally pertinent to this hearing decision are at: 18 NYCRR § 505 (medical care) in particular 18 NYCRR § 505.10 (transportation for medical care and services), 18 NYCRR §517 (provider audits), 18 NYCRR §518 (recovery and withholding of payments or overpayments), 18 NYCRR § 519 (provider hearings), and 18 NYCRR § 540 (provider documentation). Ambulette drivers must be qualified under article 19-A of the Vehicle and Traffic Law, 10 NYCRR 505.10(e)(6). Provider claims submitted for ambulette transportation services “must be documented in contemporaneous records in accordance with 504.3 of this Title. Documentation must include: the recipient’s name and MA identification number; the origination of the trip, the destination of the trip; the date and time of service; and the name of the driver transporting the recipient,” 18 NYCRR 505.10(e)(8)(i)-(v). The New York State Medicaid program issues Medicaid Management Information Systems (MMIS) provider manuals, which are available to all providers and include, *inter alia*, billing policies, procedures, codes and instructions, and a monthly Medicaid Update with additional information, policy and instructions www.emedny.org [Transportation Policy Manual Guidelines Versions 2004-1 through 2009-4]. Providers are obligated to comply with these official directives, 18 NYCRR § 504.3(i); Lock v. NYS Department of Social Services, 220 A.D.2d 825, 632 N.Y.S.2d 300 (3d Dept. 1995); PSSNY v. Pataki, 58 A.D.3d 924, 870 N.Y.S.2d 633 (3d Dept. 2009).

DISCUSSION

The OMIG's representative, Molly Kommer, presented the audit file. The Appellant presented Michael Poliandro, IMI President, and Isaac Stroger, IMI Ambulette Driver.

Audit Finding 1 "Missing/Inaccurate Information on Medicaid Claim"*Driver Vehicle Assignments*

The OMIG determined to disallow 114 sample claims that contained inaccurate information in the vehicle plate number field and or contained inaccurate information in the driver license field. It is undisputed that on the day of the entrance conference, February 15, 2011, Ms. Kommer wrote down driver vehicle assignments on the back of the last page of the entrance conference survey form [FOF 6]. At the hearing the parties agreed to call it the matrix [Tr. 108-109]. The matrix contains six lines wherein each of five lines contains a driver name, vehicle number and vehicle license plate number; and one line contains only a vehicle number and vehicle license plate, "Vehicle #6 - 60214LA" ("unassigned Vehicle #6") [Ex. 8A *matrix*, Tr. 109-111]. On the basis of her discussion with Mr. Poliandro at the entrance conference, Ms. Kommer concluded that each driver vehicle line on the matrix e.g. "Isaac Stroger Vehicle #5 - 38261LA" constituted a driver vehicle assignment made by Appellant and that each of these driver vehicle assignments constituted trip documentation ("trip documentation") that applied to the entire January 1, 2006 and December 31, 2009 audit period [Tr. 109, 237-240].

At Ms. Kommer's direction, the auditor's "field data collection team" disallowed any sample claims in which the reported driver name and vehicle license plate did not match any of the driver vehicle assignments listed on the matrix. Disallowances

included instances where the driver listed on a sample claim was paired with a vehicle not listed on the matrix (“mystery vehicle plate number claims”); the driver listed on the claim was assigned to a different vehicle on the matrix; and the driver listed on the claim was not listed on the matrix and the vehicle reported on the claim was not unassigned Vehicle #6 [Ex. 8B *Sample Claims Spreadsheet*; Tr. 54-55, 97-100, 108-112, 255-256, 260].

The matrix had nothing to do with the Appellant’s documentation of the services under audit. The matrix was simply a document created by Ms. Kommer at the entrance conference, about services that were not included in this audit [FOF 6]. There are several reasons why the matrix is irrelevant to this audit. As Mr. Poliandro testified “day-to-day operations change day-to-day, everyday” [Tr. 463, 465-466]. The Appellant does not assign/ “tether” its drivers to specific vehicles because there are different drivers on duty and different vehicles in service during any given time period [Tr. 260-263, 412-413, 460].³ The driver vehicle assignments listed on the matrix pertain to February 15, 2011 not the January 1, 2006 through December 31, 2009 audit period [FOF 6]. The useful life of a vehicle is about four years, one of the vehicles listed on the matrix did not even “exist” during the audit period and some of the drivers listed on the matrix did not work for Appellant during the audit period [Tr. 444-445, 464-465].

Ms. Kommer claimed that while the matrix does not constitute contemporaneous documentation, it was all that the Appellant had to show that the services were provided to a patient on any given day and but for the matrix all 150 sample claims would have been disallowed [Tr. 240-241, 248]. However, it is undisputed that the Appellant

³ Mr. Stroger testified that he does not drive the same vehicle every shift. His vehicle assignment is based on the needs of the patients he is transporting on any given day [Tr.159-161].

submitted a response to the draft audit, that the OMIG allowed 32 of the 150 sample claims, and that these claims were substantiated by the same type of contemporaneous documentation Appellant provided to substantiate the disallowed claims [Tr. 308; FOF 10&11]. Ms. Kommer's assertion that the matrix was "all the Appellant had to show" is belied by these documents, it appears that the auditor did not look at.

The evidence supports Mr. Poliandro's testimony that "everything" the auditor asked for and needed to know was provided before or with the response to the draft audit report and that the OMIG made a "mistake" using the matrix; he beseeched the OMIG to consider the documentation and information provided by Appellant [Tr. 446-447, 458-459; FOF 10&11]. The OMIG, simply, and inexplicably, ignored the documentation submitted by the Appellant in response to the draft audit report.

The OMIG did not attach a copy of the matrix to either the draft audit report or the final audit report. Fueling the nonsense and confusion created by the OMIG's determination to disallow the vast majority of the sample claims based solely on the matrix was its failure to advise Appellant in either the draft or final audit report that the disallowances were based on the matrix, 18 NYCRR 517.5(b) & 517.6(b)(1). Mr. Poliandro testified that he had no idea that the disallowances were based on the driver vehicle assignments listed on the matrix until it was explained to him, by his attorney, in preparation for the hearing [Tr. 444].

There is nothing in the record to justify the OMIG's determination that the Appellant tethered its drivers to a specific vehicle or that the matrix represented Appellant's trip documentation for the January 1, 2006 and December 31, 2009 audit period. No reasonable or cogent explanation was provided by the OMIG for its reliance

on the matrix, its failure to advise Appellant that the disallowances were based on the matrix, or its determination to ignore the documentation provided by Appellant to substantiate the disallowed claims.

Pursuant to 18 NYCRR § 517.6 (a), before reaching a final determination the OMIG must consider documentation and information provided by Appellant in response to the proposed findings that refuted the grounds for disallowances contained in its final audit report, and it failed to do so. Appellant produced for audit contemporaneous documentation demonstrating its right to payment including valid trip, driver and vehicle documentation for each of the disallowed sample claims [FOF 10 & 11]. With this documentation, Appellant has met its burden showing that the Department's determination was incorrect and that the sample claims submitted and denied were due and payable under the program, 18 NYCRR § 519.18(d)(1).

Missing Digit

The OMIG determined that in 16 instances “2765LA” appeared in the vehicle plate field and each of these sample claims was disallowed because “it is shy one digit” (“missing digit claims”) [Tr. 112]. The OMIG does not dispute that the services were provided or that the claims containing the missing digit were filed in 2006. The OMIG also does not dispute that Appellant owned a vehicle with license plate “27657LA” (*emphasis added*). It is in fact “Vehicle 7” listed on the matrix. Ms. Kommer nevertheless claimed that the vehicle license plate was unrecognizable because “there are any number of variants that it could have been, so I can't say that they meant 27657” [Tr. 113].

Mr. Poliandro handles Appellant's billing including filling out the Medicaid claims. He conceded that in 2006 he mistakenly entered "2765LA" in the "Vehicle 7" license plate field instead of 27657LA" ("error") and Appellant's billing software repeated the error each time he inputted Vehicle 7 on a claim [Tr. 441-442, 475]. Once he noticed the error he corrected it and brought it to the attention of Bridgett Mitchell, Suffolk County Medicaid ("County") in order to find out whether he needed to "correct" the 2006 claims which contained the error; he was told it was a "non-issue" because the vehicle license plate was recognizable even with the missing digit [Tr. 441-443, 475-477].

The OMIG's contention that the license plate listed for Vehicle 7 was unrecognizable because of the missing digit is belied by the fact that the audit file contains an auditor's note acknowledging that the license plate is "probably missing a digit";⁴ the matrix lists "Vehicle 7 license plate 27657LA"; and sample claims containing license plate "27657LA" were allowed by the OMIG in other years.⁵ Mr. Poliandro identified and corrected the error, the County deemed it a non-issue and Appellant provided the OMIG with valid vehicle registration/inspection for Vehicle 7 license plate 27657LA, thereby demonstrating Appellant's right to payment, 18 NYCRR §504.3(a).

Finding 2 Missing /Incomplete Documentation

The OMIG determined to disallow two claims containing insufficient trip documentation. The Appellant produced documentation for only the second leg of the trip ("return") for each of two roundtrip ambulette service claims, claim 45, date of

⁴ A vehicle registration report contained in the audit file indicates that license plate number "2765LA" is a boat and a hand written note on the abstract states "probably missing a digit" [Ex. 4 Book 2 *Disallowed Sample Claims*].

service March 1, 2008, and claim 79, date of service July 12, 2008 [Tr. 136-139; Ex. 3 *Final Audit Report*]. The MMIS transportation manual in effect at the time the services were provided required that for each roundtrip claim “*If a different driver or vehicle returns the recipient from the medical appointment, the license number of the driver and vehicle used for the origination of the trip should be reported on the claim*” [Ex. 5 MMIS version 2007-1 at p.16 of 36; MMIS version 2008-2 at p.17 of 35]. Upon audit Appellant was required to produce documentation for the first leg of a roundtrip service not the return. Appellant failed to provide the required documentation to demonstrate its right to payment in the amount of \$136.50 for claim 45 and in the amount of \$100.00 for claim 79. Accordingly, Appellant shall reimburse the Department for the total amount it overpaid for these two claims, \$236.50.

Finding 3 Driver is Not NYS DMV 19-A Certified

The OMIG determined to disallow two claims involving missing 19-A documentation for driver “Mike Goldberg” (“driver”), claim 18 and claim 47. It is undisputed that all drivers that provide ambulette transportation services must be qualified under 19A of the Vehicle Traffic Law at the time services are provided. Appellant claimed that the driver had been “borrowed” from another ambulette company at the time the services were provided and for this reason it did not have the driver’s 19A documentation [Tr. 454-457]. The first date of service was September 21, 2009 and the second date of service was October 10, 2009. While Appellant provided documentation to show that the driver may have been 19A qualified in February 2009,⁶ approximately

⁵ After 2006, the OMIG allowed sample claims listing license plate “27657LA” [Ex. H “*Approved Samples with No Findings*,” Ex. 8A *Matrix*].

⁶ Appellant submitted the driver’s February 2009 “Application” for 19A certification [Tr. 456; Ex.4 Book 2 *Disallowed Sample Claims*].

seven months prior to the first date of service, the record shows that the driver was not 19A qualified on September 29, 2009 which was just days after the first date of service and just days before the second date of service. Regardless, Appellant failed to produce documentation to show that the driver was 19A qualified at the time the services were provided and it did not demonstrate its right to payment in the amount of \$100.00 for each of these claims. Accordingly, Appellant shall reimburse the Department for the total amount it overpaid for these two claims, \$200.00.

DECISION

The Department's determination to recover overpayments in the amount of \$691, 221.00 is affirmed in part and reversed in part consistent with this decision. The Department's determination to recover overpayments relating to claim 18, claim 45, claim 47 & claim 79 in the amount of \$436.50 ("overpayment") is affirmed.⁷ The Department's determination to recover overpayments relating to the remaining 114 claims in the amount of \$690,784.50 is reversed [Ex. 3 *Final Audit Report*]. Any recoupment that has been received by the Department that is in excess of the overpayment shall be repaid to Appellant with all deliberate speed. This decision is made by Kimberly A. O'Brien, who has been designated to make such decisions.

DATED:
July 21, 2016
Albany, New York

Kimberly A. O'Brien
Administrative Law Judge

⁷ The Department shall be reimbursed the actual amount of the overpayment as the four unsubstantiated claims constitute "too small of a sample to produce any meaningful analysis" [Ex. 3 *Final Audit Report*; ALJ Ex. 2 *Decision After Hearing, In the Matter of the Request of Christian Ambulette, Inc., Audit (#07-4175)*, by Larry G. Storch, ALJ, at p.11; See 18 NYCRR 519.18(g) *Extrapolation /Statistical Sampling Methodology*].