

STATE OF NEW YORK: DEPARTMENT OF HEALTH

In the Matter of the Appeal of

TAMAR TRANSPORTATION, CORP.
Provider # 02321997,
ALEKSANDR BEREZOVSKIY, and EDUARD
BOROVSKOY, Owners,
Appellants,

DECISION
Case # 13-F-3262

for a hearing pursuant to Title 18 of the Official
Compilation of Codes, Rules and Regulations
of the State of New York (18 NYCRR Part 519) from charges
of unacceptable practices and a determination
to recover Medicaid Program overpayments.

Before: Jean T. Carney
Administrative Law Judge

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

Hearing Date: September 12, 2018
Record closed on November 9, 2018

Parties: Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204
By: Dionne Wheatley, Esq.

Tamar Transportation
Aleksandr Berezovskiy
Eduard Borovskoy
601 Brighton Beach Avenue
Brooklyn, New York 11235
By: Erik Ikhilov, Esq.
Ikhilov & Associates
2357 Coney Island Avenue
Brooklyn, New York 11223

JURISDICTION

Pursuant to Public Health Law (PHL) § 201(1)(v) and Social Services Law (SSL) § 363-a, 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. The Office of the Medicaid Inspector General (OMIG), an independent office within the Department, has the authority pursuant to PHL §§ 30, 31 and 32, 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payments made for transportation services, and censure the Appellants for providing such services while their license was revoked by the Department of Transportation (DOT). The Appellants requested a hearing pursuant to 18 NYCRR 519.4 to have the OMIG's determination reviewed.

APPLICABLE LAW

Medicaid Program participation is a voluntary, contractual relationship between the provider of services and the state. (Social Services Law §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]). Medicaid providers agree to comply with all program requirements as a prerequisite to payment and continued participation in the program. (18 NYCRR 504, 515, 517, and 518). Based on these contractual obligations, the Medicaid Program employs a pay-first-audit-later system to ensure compliance, and enable prompt payment to providers. (18 NYCRR 504.3, and 540.7[a][8]). Medicaid providers are required to prepare, maintain, and furnish to the Department on request, contemporaneous records demonstrating their right to receive payment from the Medicaid Program; fully disclosing the nature and extent of the care,

services, and supplies they provide. All information regarding claims for payment is subject to audit for six years. (18 NYCRR 504.3).

In order to receive payment for transportation 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 DOT, and the Department of Motor Vehicles (DMV). An ambulette service operating in New York City must also be licensed by the NYC Taxi and Limousine Commission. (18 NYCRR 505.10[e][6]).

Conduct that is contrary to the official rules and regulations governing the Medicaid Program constitute unacceptable practices. Upon a determination that an entity has engaged in an unacceptable practice, the Department may impose one or more sanctions, including censure or exclusion from the program. Sanctions may also be imposed upon affiliates of the entity determined to have engaged in unacceptable practices, such as individuals with an ownership or controlling interest in a provider. (18 NYCRR 504.1, 515.2, and 515.3).

When the OMIG has determined that claims for medical services or supplies have been submitted for which payment should not have been made due to unacceptable practices, it may require repayment of the amount determined to have been overpaid. (18 NYCRR 518.1, and 518.3). If the Department imposes a sanction, or seeks to impose a penalty, or requires repayment of an overpayment or restitution; a person or entity is entitled to a hearing to have the OMIG's final determination reviewed. (18 NYCRR 519.4[a]).

At the hearing, the Appellants bear the burden of proof of showing by substantial evidence that the OMIG's determination is incorrect, and of proving any mitigating factors affecting the severity of any sanctions imposed. (18 NYCRR 519.18[d] and 18 NYCRR 519.18[h]; New York State Administrative Act (SAPA) §306[1]). Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or fact; less than 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 [3rd Dept. 1984], *appeal dismissed* 63 N.Y.2d 649 [1984]).

HEARING RECORD

In support of its determination, the OMIG presented documents (OMIG Exhibits A-L); and the testimony of Christopher Bedell, Supervising Investigator. The Appellants presented documents (Appellant Exhibits 1-6); and the testimony of Alexander Borovskoy, Office Manager for Tamar Transportation. A stenographic transcript of the proceedings was made, and the record closed on November 9, 2018, upon receipt of post-hearing memoranda.

ISSUES

Was OMIG's determination that Appellants engaged in unacceptable practices in the Medicaid Program correct?

Did OMIG properly determine to impose Medicaid sanctions?

Was OMIG's determination to recover Medicaid Program overpayments in the amount of \$328,446.00, plus interest, correct?

FACTS

1. Tamar Transportation, Corp. (Tamar), a corporation owned by Eduard Borovskoy and Alexander Berezovskiy, is an ambulette and transportation service enrolled as a provider in the New York State Medicaid Program since 2002; operating in the metropolitan New York City region. (OMIG Exhibit G).

2. On March 18, 2013, the New York State Department of Transportation issued a Notice suspending Tamar's operating authority to engage in transportation, stating that "THE CARRIER IS NOT IN COMPLIANCE WITH: Liability Insurance (Form E) [and] Disability Benefits Insurance". (OMIG Exhibit C2; Appellant Exhibit 1).

3. On June 14, 2013, the New York State Department of Transportation issued a notice of Revocation to Tamar, stating that “THE CARRIER IS NOT IN COMPLIANCE WITH: Disability Benefits Insurance”. (OMIG Exhibit C3; Appellant Exhibit 2).

4. On July 16, 2013, the OMIG was notified of Tamar’s revocation, and on August 7, 2013, the Division of Medicaid Investigations (DMI) commenced an investigation. (OMIG Exhibit F; Testimony of Christopher Bedell).

5. On August 13, 2013, the New York State Department of Transportation issued a notice of Restoration to Tamar, stating that “the Carrier has submitted evidence of Liability Insurance, Form E, effective 3/1/13 and Disability Benefits Insurance, DB120.1, effective 6/1/13”. (OMIG Exhibit C5; Appellant Exhibit 3).

6. By Notice of Proposed Agency Action (NOPAA) dated January 9, 2014, the OMIG determined that the Appellants had engaged in unacceptable practices, and should be excluded from the Medicaid Program for three years. The OMIG also sought restitution for overpayments to the Appellants for transports made during the time of suspension and revocation of March 18, 2013 through August 12, 2013. (OMIG Exhibit A).

7. Appellants, through their attorneys, responded to the NOPAA on February 7, 2014, and on February 13, 2017, the OMIG issued a Notice of Agency Action (NOAA) reducing the sanction to a censure, but maintaining the amount of the restitution being sought. (OMIG Exhibit C).

8. Proof of insurance is electronically filed with the Department of Transportation by the insurance carrier, Hereford Insurance Company (Hereford). There was no lapse in Tamar’s Liability Insurance, but Hereford was unable to file proof of insurance with the Department of Transportation because the fax number given to Hereford was not working properly. (Appellant Exhibit 4; Testimony of Alexander Borovskoy).

DISCUSSION

The Appellants¹ failed to show that the OMIG erred in determining that the Appellants had engaged in unacceptable practices, and that the imposition of sanctions was improper. The Appellants did show that the OMIG's determination to recover overpayments in the amount of \$328,446.00 was incorrect.

The OMIG determined that the Appellants had engaged in unacceptable practices by continuing to provide transportation services after having their operating authority suspended, and then revoked by the DOT. The Appellants argued that they did not receive the notices from DOT, and that their insurance had not lapsed, but that their insurance provider had been unable to transmit proof of insurance to the DOT due to an issue with the fax number provided by the DOT.

In support of their arguments, the Appellants provided correspondence from their insurance provider, as well as two Certificates of Liability Insurance. (Appellants Exhibits 4 and 5; OMIG Exhibit B3). Hereford confirmed that they had been unable to submit proof of insurance to the DOT because of an issue with the fax number. DOT gave Hereford a different fax number, and the proof was submitted, resulting in the DOT issuing a Notice of restoration on August 13, 2013. (Appellant Exhibit 3; OMIG Exhibit C4). The Appellants had no control over whether their proof of insurance was submitted to the DOT, and therefore, they should not be held liable for Hereford's inability to submit proof of insurance in a timely manner to the DOT.

The Certificates of Liability Insurance submitted by the parties also indicate a two-month lapse in disability insurance coverage during the relevant period. (Appellants Exhibit 5; OMIG Exhibit B). At the hearing, the Appellants admitted that they did not have disability insurance for April and May 2013. (Hearing testimony of Mr. Borovskoy at page 99). However, there is no evidence in the record to indicate that the Appellants knew of this lapse prior to the OMIG investigation. It is notable that

¹ There was no issue raised as to whether the owners of Tamar Transportation, Aleksandr Berezovskiy and Eduard Borovskoy, were affiliates as defined in 18 NYCRR 504.1(d)(1).

the Appellants hired a new compliance manager shortly after these issues were brought to their attention.

The OMIG did not base its determination on any lapse of coverage. Rather, the NOAA is based upon the suspension and revocation of operating authority by the DOT. (OMIG Exhibit C). Further, the OMIG subpoenaed “All open and closed accounts from January 1, 2010 to present [for] Tamar Transportation Corp.” including “A listing of all policies...including policy numbers, effective dates and changes in status...[s]pecifically seeking any lapses in coverage...”. (OMIG Exhibit J). A portion of the subpoenaed documents were submitted by the OMIG; but nothing indicating that there was a lapse in coverage of disability insurance for the relevant period of March 18, 2013 through August 12, 2013. (OMIG Exhibit K). It is well settled that due process requires notice of the charges, and that even in administrative proceedings, “no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged.” (*Mayo v Personnel Review Bd. Of the Health & Hosps. Corp*, 65 A.D.3d 470 [1st Dept. 2009] quoting *Matter of Murray v Murphy*, 24 NY2d 150, 157 [1969]). Consequently, any submissions for payment by the Appellants for transportation services performed during that that time will not be disallowed based on a lapse of disability insurance because the Appellants were not so charged.

The Appellants assert that they were unaware of any issue with their operating authority until the OMIG investigator came to their office on August 12, 2013 and informed them of the DOT revocation. However, the DOT Notice of Revocation is stamped “SERVED Jun 21, 2013”. (Appellant Exhibit 2; OMIG Exhibit C3). Therefore, the Appellants either knew or should have known on or about June 21, 2018 that their operating authority had been revoked due to issues with their disability insurance.

The Appellants were not lawfully authorized to provide transportation services on the dates the services were rendered. Consequently, they were not in compliance with Department regulations

under 18 NYCRR 505(e)(6). This constitutes an unacceptable practice for which censure is an appropriate sanction under the guidelines set forth at 18 NYCRR 505.4. Mr. Borovskoy testified credibly that Appellants often receive mail for other tenants in the building, and that other tenants receive their mail. However, there is no requirement for the DOT to send notices by means other than regular mail. Service of papers may be effected by sending to the last known address by mail, and service is completed upon mailing. (Civil Practice Law and Rules §2103[b][2]). Here, the Notice was sent to the Appellants' last known address, which was also its correct, current address, and therefore may be deemed served. Therefore, it is reasonable and plausible that the Appellants had been noticed. Because the Appellants' operating authority was revoked, they should have ceased transporting Medicaid patients, and ceased submitting requests for payments until their operating authority was restored on August 13, 2013.

In evaluating the factors to determine whether sanctions should be imposed, I note that this violation had no negative impact on Medicaid recipients, and that the Appellants have no previous record of such violations. On the other hand, the Appellants failed to implement adequate internal controls that could have prevented this incident, and as a result, the Program was harmed. The Appellants should not have provided transportation services from June 21, 2013 until August 13, 2013, and any payments they received for transports made on those dates should be refunded to the OMIG.

DECISION

OMIG's determination that the Appellants engaged in unacceptable practices in the Medicaid Program is affirmed.

OMIG's determination to censure the Appellants is affirmed.

OMIG's determination to recover overpayments from the Appellants is affirmed in part. An accounting of the exact number of claims and payment amounts for the period of June 21, 2013 to August 12, 2013, inclusive, shall be determined by OMIG.

This Decision is made 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: January 16, 2019
Albany, New York

JEAN T. CARNEY
Administrative Law Judge