

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

LAST FRONTIER ASSISTED LIVING,)
Appellant,)
v.)
STATE OF ALASKA, DEPARTMENT)
OF HEALTH AND SOCIAL)
SERVICES,)
Appellee.)

Case No. 3AN-15-05005CI

ORDER RE: LAST FRONTIER'S ADMINISTRATIVE APPEAL

This is an administrative appeal by Last Frontier Assisted Living, LLC ("Last Frontier") from the Department of Health and Social Services' ("the Division") final decision issued by an Administrative Law Judge (ALJ) upholding the Division's assessment against Last Frontier for overpayments from the Medicaid program. The Court has jurisdiction over this appeal pursuant to AS 44.62.560 and Alaska Appellate Rule 602.

There are two issues here: (1) assessment of liability as a result of a 2004 audit and 2009 audit, and (2) liability due to billings made after any employee's background check clearance was revoked. The Court's upholds the ALJ's finding that Last Frontier is liable for the 2004 and 2009 audit overpayments because Last Frontier admits receiving the payments and fault is irrelevant under the applicable state and federal statutes. The Court also upholds the ALJ's determination of liability for the employee's billings because a reasonable mind could conclude that Last Frontier timely received the notice of the background

check revocation. Therefore, the Court AFFIRMS the ALJ's decision finding Last Frontier liable for a total of \$1,336,533.25 in Medicaid overpayments.

Introduction

Medicaid is “a cooperative federal-state partnership under which participating states provide federally-funded medical services to needy individuals.”¹ Medicaid beneficiaries receive authorized services from care providers, who then bill the Division and are reimbursed with state and federal funds.² Last Frontier is one such personal care attendant (“PCA”) agency.³ A Medicaid recipient who needs a PCA can arrange for one through a PCA agency, which will pay the attendant and bill Medicaid.⁴

Federal law requires that states receiving Medicaid funds audit their payments to Medicaid providers,⁵ and state law further specifies that the Division contract with an external auditing firm for this purpose.⁶ The Division has contracted with the accounting firm Myers and Stauffer LC, which specializes in providing auditing services for state Medicaid agencies.⁷

¹ *Hidden Heights Assisted Living, Inc. v. State, Dep't of Health & Soc. Servs.*, 222 P.3d 258, 261 (Alaska 2009) (quoting *Garner v. State, Dep't of Health & Soc. Servs., Div. of Med. Assistance*, 63 P.3d 264, 268 (Alaska 2003)).

² Tr. 289-91.

³ Tr. 26.

⁴ R. 192; LJ Exc. 337.

⁵ See 42 U.S.C. § 1396(a)(42).

⁶ AS 47.05.200.

⁷ Tr. 118-19.

The Division's audits resulted in three distinct overpayments to Last Frontier: \$862,675.44 from the 2004 audit; \$399,966.65 from the 2009 audit, and \$74,891.16 for services performed by a non-licensed employee. In response to these allegations, Last Frontier asserts first that it is not liable for the overpayments in the 2004 and 2009 audits because of fraudulent activity by an employee; and second, it is not liable for the services performed by the non-licensed employee because Last Frontier did not receive notice of the employee's failed background check from the Division.

ALJ Mark Handley concluded that the Division "may recoup these overpayments from Last Frontier" because "more likely than not, Last Frontier Services LLC received overpayments" totaling \$1,336,533.25 from the 2004 audit, the 2009 audit, and the services performed by Ms. T when she was not authorized to provide those services.⁸ The Division adopted this decision as the final agency decision, and this appeal followed.

Factual and Procedural History

Last Frontier is a PCA agency.⁹ Violet Baker is the owner and administrator of Last Frontier.¹⁰ Johnny X was the general manager at Last Frontier from 2004 to 2010,¹¹ "authorized to pay any bills that the company incurred."¹²

⁸ ALJ Decision, 7-8.

⁹ Tr. 26.

¹⁰ Tr. 60, 371-72.

¹¹ Tr. 320.

¹² Tr. 319, 383.

I. 2004 & 2009 Audits

The Division employs Myers and Stauffer, independent auditors, to perform audits. Last Frontier appeals two audits Myers and Stauffer's performed of Last Frontier's billings. The first audit covers Medicaid billings submitted between April 1, 2004 and March 31, 2005 ("the 2004 audit"),¹³ and the second audit ("the 2009 audit") covers billings during the 2009 calendar year.¹⁴ To perform said audits, Myers and Stauffer conducted onsite reviews at Last Frontier's office and requested Last Frontier to provide documentation to support its Medicaid billings.¹⁵

Both audits exposed several types of Medicaid overpayments to Last Frontier. These overpayments included: duplicate billings,¹⁶ claims not adequately supported by PCA service plan documentation,¹⁷ discrepancies between timesheets and hours billed,¹⁸ and billing more hours in a week than was approved.¹⁹

¹³ Division Exc. 2; 225.

¹⁴ Division Exc. 15; Tr. 122.

¹⁵ Tr. 124, 208, 266.

¹⁶ Tr. 127-29.

¹⁷ Tr. 133-53, 246-47.

¹⁸ Tr. 153-65, 228-34.

¹⁹ Tr. 234-41.

In accordance with procedure, Myers and Stauffer extrapolated from the statistically sampled billings to arrive at an overpayment total of \$861,675.44 in the 2004 audit and \$399,721.57 in the 2009 audit.²⁰

II. Ms. T's Background Check Revocation Notices

Ramoa T worked as a PCA for Last Frontier and other PCA providers for several years. In order to be a PCA, one must pass a background check. Ms. T applied for a background check to work for Last Frontier on March 24, 2008.²¹ She was issued a "provisional authorization" the following day, pending a final clearance after the fingerprint results came in.²² Upon receiving her final clearance, Ms. T was cleared to work for Last Frontier for six years assuming the clearance was not revoked.²³

In early 2011, the Division received an application for Ms. T to work for a new entity. Following procedures, a new background check was performed. At that time, "a barrier" was discovered to perform PCA work, so all previous PCA clearances were revoked (including Last Frontier's).²⁴

At the time of the revocation, Ms. T was working for four facilities: C Care Services, Progressive Personal Care, Last Frontier, and Compassionate and

²⁰ Tr. 175, 254-55.

²¹ Tr. 28-29.

²² Tr. 29.

²³ Tr. 30.

²⁴ Tr. 30-31.

Effective Care.²⁵ On April 20, 2011, the Division sent all four facilities a notice of Ms. T's background check revocation by registered mail. The Division's records show return receipts for three facilities, but does not delineate for which facility the Division did not receive a return receipt.²⁶ The Division also sent Ms. T notice of the background check revocation. There were two addresses for Ms. T on file, so the Division sent two notices.²⁷ One was returned as undeliverable, which was noted in the file.²⁸

In addition to the mailed notices, information regarding the status of applications and background clearances are available on the Division's "facility status page," the same page where a provider would go to submit an application request.²⁹ At any time, a provider is able to access "[f]inal clearances, bar status terminat[i]ons, [and] withdrawn applications."³⁰

On December 23, 2013, the Division sent Last Frontier a letter assessing Last Frontier for \$74,891.16 in overpayments associated with services Ms. T performed after the April 20, 2011 revocation notice.³¹

²⁵ Tr. 48.

²⁶ Tr. 48.

²⁷ Tr. 34-35.

²⁸ Tr. 34-35.

²⁹ Tr. 36.

³⁰ Tr. 36.

³¹ LF Exc. 1760-61.

III. Last Frontier’s Administrative Appeals of Audits

In response to the 2004 audit and overpayment assessment of \$861,675.44, Last Frontier sent a letter in September 2007 explaining that the problems identified in the audit were due to confusion over how to use the billing software program.³² After the Division provided this letter and its attachments to Myers and Stauffer, the auditors declined to change their findings.³³ In response to the letter and the auditors’ response, the Division construed Last Frontier’s response as an appeal and thus the Division referred the matter to the Office of Administrative Hearings.³⁴

In August 2013, during the 2004 audit appeal, Last Frontier appealed the \$399,721.57 in liability from the 2009 audit stating that it had been “the victim of an embezzlement scheme” by Mr. X and that it needed more time to assemble its documentation in support of its Medicaid billings.³⁵ It also mentioned the ongoing lawsuit by Ms. Baker against Mr. X.³⁶

In January 2014, during the pending appeals of the 2004 and 2009 audits, Last Frontier appealed the overpayments associated with Ms. T’s services after

³² Division Exc. 8.

³³ Division Exc. 9-12.

³⁴ R. 1-3, 31.

³⁵ LF Exc. 1657-58.

³⁶ See *Baker v. X*, 3AN-11-00000CI (Alaska Super. Ct. 2011).

the revocation of her background check clearance.³⁷ This appeal was consolidated with the existing appeals.³⁸

IV. The Administrative Hearing

The 2014 administrative hearing in front of ALJ Handley included all three appeals by Last Frontier. First, evidence was presented about overpayments related to Ms. T's services. Last Frontier objected on evidentiary grounds. Second, evidence was presented by the Division about the 2004 and 2009 audits, and Last Frontier's response to said audits. The parties then submitted written closing arguments.

A. Testimony Related to Ms. T's Services

Karen Darby, a Social Services Program Officer with the Certification and Licensing Program under the Division, testified to the background check procedures in place currently and in 2011 (the date of the revocation notice). When a barrier is discovered, the Division "vet[s]" the barrier, and if confirmed sends "a hard copy certified letter to the agency explaining the individual has been revoked" and a certified letter to the individual informing them of the revocation.³⁹ The Division receives return receipts, makes note of it in the relevant cases, and then shreds the receipts.⁴⁰ If the letter is not received by the

³⁷ LF Exc. 1760-61.

³⁸ R. 1593; Tr. 4-443.

³⁹ Tr. 31.

⁴⁰ Tr. 31.

recipient, the post office will return the letter 30-60 days later, the Division notes it in the file, and subsequently shreds the letter.⁴¹

In this case, Ms. Darby testified that a notice was sent on April 20, 2011 to “404 E. Fireweed Ln, Ste 101 Anchorage, AK 99503” (Last Frontier’s address) and three other facilities by certified mail that Ms. T’s background check had been revoked, and that there were no indications in the file that the notice was returned as undeliverable.⁴² In the file, there are notations that three of the four return receipts were received by the Division, however following Division procedure, there is no indication which return receipt was not received.⁴³

Renee Stangle, a Division employee in the Program Integrity Department, testified about the procedures taken by the Division to recoup overpayments. In September 2013, her department received a referral from the Senior Disability Services Division that Ms. T’s background check “was not on record.”⁴⁴ The department contacted the Background Check Unit to confirm that her background check clearance had been revoked.⁴⁵ In response to this confirmation, the department calculated the payments Last Frontier submitted for Ms. T’s services from the time the background check was revoked (April 20, 2011 – September

⁴¹ Tr. 31.

⁴² Tr. 35-36.

⁴³ Tr. 45-48.

⁴⁴ Tr. 16.

⁴⁵ Tr. 17.

2013) and “total[ed] them as an overpayment.”⁴⁶ The Division then sent Last Frontier a notice on December 23, 2013 with the overpayment assessment.⁴⁷

Violet Baker, the “owner/administrator,” testified that she never saw the April 20th notice of Ms. T’s background check clearance revocation.⁴⁸ Ms. Baker testified that Ms. T’s initial background check was valid from June 15, 2010 to June 15, 2016, and that she “did not receive” the April 20, 2011 revocation letter addressed to “404 E. Fireweed Ln, Ste 101 Anchorage, AK 99503.”⁴⁹ However, Ms. Baker testified that she did receive both the December 13, 2013 notice that Ms. T’s background check clearance had been revoked and the December 23, 2013 overpayment assessment, both addressed to “404 E Fireweed Lane, Suite 101 Anchorage, AK 99503-2800.”⁵⁰

Ms. Baker testified that following Last Frontier’s “usual practice,” she immediately called Ms. T in December 2013 to let her know that she was “no longer able to work” for Last Frontier as a PCA.⁵¹ She also testified that it is her “usual policy to keep any and all correspondence from the State regarding background checks” for “seven years,” and that she had no records in Ms. T’s file

⁴⁶ Tr. 16.

⁴⁷ LF Exc. 1760.

⁴⁸ Tr. 59-70.

⁴⁹ Tr. 62-65.

⁵⁰ Tr. 66-67.

⁵¹ Tr. 66.

that her background check had been revoked prior to the December 13, 2013 notice.⁵²

B. Testimony Related to the 2004 and 2009 Audits

The Division presented testimony from Allan Hanson, a Myers and Stauffer auditor, to explain the various types of overpayments discovered during the 2004 and 2009 audits, including duplicate billings, claims not adequately supported by PCA service plan documentation, discrepancies between timesheets and hours billed, and billing more hours in a week than was approved.⁵³ The Division also presented testimony from Doug Jones, the manager for the Medicaid Program Integrity Section, to explain that fault behind Medicaid overpayments is irrelevant.⁵⁴

Last Frontier then presented two witnesses. Mary Jones, Last Frontier's accountant since 2010, testified about reviewing Last Frontier's accounts, noting payments made to Mr. X, his wife, his company, and unknown recipients.⁵⁵ Based on "conversation with Ms. Baker," Ms. Jones testified that Mr. X was responsible for embezzling \$4,296,978.⁵⁶ Next, Ms. Baker testified about the audit process from her perspective and her belief that generally the audits were

⁵² Tr. 70.

⁵³ Tr. 118-284.

⁵⁴ Tr. 296-97.

⁵⁵ Tr. 319-24.

⁵⁶ Tr. 319-24.

not “overpayments.”⁵⁷ She never testified that the overpayments were due to fraud; instead she stated that she did not know what portion of the money Last Frontier paid to Mr. X was legitimately owed to him.⁵⁸

V. The ALJ’s Decision

The ALJ ultimately determined that the Division could recoup all of the identified overpayments from Last Frontier: \$871,675.44 for the 2004 audit, \$399,966.65 for the 2009 audit, and \$74,891.16 in billings for services provided by Ms. T. In regards to the 2004 and 2009 audits, the ALJ concluded that “Last Frontier received money for charges that it should not have received,” and that “[w]hether Last Frontier knew it was making these billings for charges that could not be reimbursed or not, it must pay the money it received for those billings back.”⁵⁹ As for billings attributed to Ms. T, the ALJ held Last Frontier liable because there was “a preponderance of evidence” sufficient to support a finding that Last Frontier did receive the April 20, 2011 letter.⁶⁰

VI. The Division’s Final Decision

The Division adopted the ALJ’s Decision as the final agency decision, and this appeal followed.⁶¹

The Court held oral argument on April 15, 2016.

⁵⁷ Tr. 420, 426-34.

⁵⁸ Tr. 391.

⁵⁹ ALJ Decision, 7.

⁶⁰ ALJ Decision, 4-6.

⁶¹ ALJ Decision, 4 [R. 1950].

Standard of Review

Alaska courts apply one of four standards of review when deciding an administrative appeal:

(1) the “substantial evidence” test applies to questions of fact; (2) the “reasonable basis” test applies to questions of law involving agency expertise; (3) the “substitution of judgment” test applies to questions of law where no expertise is involved; and (4) the “reasonable and not arbitrary” test applies to questions about agency regulations and the agency's interpretation of those regulations.⁶²

Here, the Court is reviewing the ALJ's application of Medicaid law and factual findings regarding Last Frontier's receiving notice of its employee's background check revocation. The ALJ's resolution of questions of law not involving agency expertise is subject to the independent judgment or substitution of judgment standard.⁶³ The ALJ's findings of fact are reviewed under the substantial evidence test.⁶⁴ Therefore, the Court will apply independent substitution and substantial evidence standards as necessary.

Discussion

Last Frontier is appealing the Division's determination that Last Frontier is liable to the State of Alaska for Medicaid overpayments. Because the Division adopted the ALJ's Decision as its Final Decision, the Court reviews the ALJ's decision. The first issue on appeal is whether the ALJ erred in ruling Last Frontier

⁶² *Lakloey, Inc. v. Univ. of Alaska*, 157 P.3d 1041, 1045 (Alaska 2007) (citing *Handley v. State*, 838 P.2d 1231, 1233 (Alaska 1992)).

⁶³ *Id.*

⁶⁴ *Williams v. State, Dep't of Revenue*, 938 P.2d 1065, 1069 (Alaska 1997).

liable for \$1,261,642.09 in billing as a result of the 2004 and 2009 audits.⁶⁵ The second issue on appeal is whether the ALJ erred in finding Last Frontier liable for \$74,891.16 due to its employee's revoked background check.⁶⁶

Each issue requires a distinct standard of review. The Court applies the appropriate standard to each of these issues, as further elaborated below.

I. Last Frontier is Liable for the 2004 and 2009 Overpayments

The first issue on appeal is whether the ALJ erred in holding Last Frontier liable for \$1,261,642.09 in alleged Medicaid overpayments discovered as a result of the 2004 and 2009 audits. Last Frontier does not dispute the payments, but rather argues that it should not be held liable because the overpayments were received as a result of their general manager's, Mr. X, fraudulent actions. Ultimately, the Court finds this argument unpersuasive and AFFIRMS the ALJ's decision because Medicaid payment recipients are liable for repaying overpayments regardless of fault.

The Court reviews the ALJ's application of state and federal Medicaid laws under the independent judgment or substitution of judgment standard because the ALJ's resolution of these questions of law does not involve agency expertise.⁶⁷

⁶⁵ The combined amount due as a result of the 2004 and 2009 audits (\$861,675.44 and \$399,966.65, respectively).

⁶⁶ The amount attributed to Ms. T's services after her employee background check was revoked.

⁶⁷ *Williams*, 938 P.2d at 1069.

In both the administrative hearing and this appeal, Last Frontier’s position remains the same: it is not liable for the overpayments because it did not knowingly or intentionally submit overpayments. Instead, Last Frontier argues that the Division should seek reimbursement from Mr. X, Last Frontier’s general manager, who “undisputedly acted in an adverse manner to Last Frontier” and allegedly fraudulently requested said overpayments.⁶⁸ In support of this argument, Last Frontier offers general theories of agency and adverse interests,⁶⁹ however admittedly none within the context of Medicaid payments.⁷⁰

In 2003, the Alaska Legislature passed AS 47.05.200 making post-payment audits mandatory. Under the statute, the Division must annually contract for independent audits of all medical assistance providers to identify overpayments; compliance with these audits is a condition of receiving payment for medical services.⁷¹

Under both state and federal statutes, the term “overpayment” in the Medicaid context is defined without regard to fault. Federally, overpayment is: “the amount paid by a Medicaid agency to a provider which is in excess of the amount that is allowable for services furnished...and which is required to be

⁶⁸ Last Frontier’s Brief, 20.

⁶⁹ Cited cases include: forfeiture proceedings, False Claims Act cases, embezzlement and money laundering, UCC violations, and contract law. Last Frontier’s Brief, 17.

⁷⁰ “Our research has not disclosed an Alaska Supreme Court case directly on point.” Last Frontier’s Brief, 17.

⁷¹ AS 47.05.200.

refunded.”⁷² In Alaska, 7 A.A.C. 43.081(a) outlines fourteen specific categorizations of Medicaid overpayment, including reimbursement “in excess of the amount due because of the billing practices of the provider,” however not one subsection includes a criminal mens rea or fault element.⁷³

Last Frontier cites *Smith* in its Reply to support its contention that “[i]t is unclear whether Medicaid overpayment incurs strict liability under Alaska law.”⁷⁴ However, *Smith* is a due process case holding that the appellant’s due process was violated because she was not properly informed “that she would be responsible for an extrapolated rather than overpayment amount.”⁷⁵ Last Frontier argues that it received audit notices during the same time period as *Smith*, so the Division violated Last Frontier’s due process, and that therefore strict liability should not apply in this case.⁷⁶ But Last Frontier provides no explanation in its briefing that any violation of due process occurred here except for trying to argue that strict liability is not applicable in Medicaid overpayments.⁷⁷ More importantly, due process violations were not addressed in the administrative proceedings before the ALJ or in his decision. As the appellate court reviewing the ALJ’s decision, this due process argument is outside of this Court’s scope of review.

⁷² 42 C.F.R. §433.304.

⁷³ The Court cites 7 A.A.C. 43.081 (repealed in 2010 and replaced by 7 A.A.C.105.260) because it was in place during both the 2004 and 2009 audits of Last Frontier.

⁷⁴ Last Frontier’s Reply, 2 (citing *Smith v. State, Dep’t of Health and Social Servs.*, 237 P.3d 1010 (Alaska 2010)).

⁷⁵ *Smith*, 237 P.3d at 1016.

⁷⁶ Last Frontier’s Reply, 2.

⁷⁷ Last Frontier’s Reply, 2-3.

“As a general matter, scienter is not required to impose civil penalties for regulatory violations when the regulation is silent to state of mind.”⁷⁸ In support of this proposition, Mr. Jones, the Division’s manager for the Medicaid Program Integrity Section, testified that fault is irrelevant in Medicaid overpayments.⁷⁹ For example, he explained that even if Medicaid’s system “hiccupped...and spit out a bunch of money it shouldn’t have, those are overpayments regardless of...whose fault it is.”⁸⁰ Similarly, in its briefing, the Division cites *Allen* to support the fact that Medicaid overpayments must be reimbursed regardless of fault.⁸¹ Although a food stamp case, the Court in *Allen* held that Mr. Jones’s example, the Division can recover overpayments even in cases of agency error.⁸²

The ALJ determined that Last Frontier is liable for the overpayments it received as a result of the 2006 and 2009 audits because “Last Frontier received money for charges that it should not have received.”⁸³ Moreover, the ALJ explained that “whether or not Johnny X’s *knowledge* is imputed to Last Frontier would not change Last Frontier’s *liability* for the Medicaid overpayments that the Division has assessed.”^{84 85}

⁷⁸ *Northern Wind, Inc. v. Daley*, 200 F.3d 13 (1st Cir. 1999).

⁷⁹ Tr. 296-97.

⁸⁰ Tr. 296.

⁸¹ *Allen v. Dep’t of Health & Soc. Servs.*, 203 P.3d 1155, 1160-1165 (Alaska 2009).

⁸² *See id.*

⁸³ ALJ Decision, 7.

⁸⁴ ALJ Decision, 7.

Therefore, the Court's upholds the ALJ's finding of Last Frontier liable for the overpayments found in the audits under the substitution of judgment standard because Last Frontier admits receiving the payments and fails to raise a relevant defense to the faultless state and federal statutes. Therefore, the ALJ's ruling on this matter is AFFIRMED.

II. The ALJ Did Not Err in Finding Last Frontier Liable for \$74,891.16 Because Last Frontier Had Adequate Notice of Ms. T's Background Check Revocation

The second issue on appeal is whether there was enough evidence for the ALJ to determine that Last Frontier had adequate notice of the revocation of its employee's background check, thus making Last Frontier liable for an additional \$74,891.16 in Medicaid overpayments. This is a question of fact. The Court reviews the ALJ's decision under the substantial evidence test.⁸⁶ "In applying this standard, [the Court] will not re-weigh evidence or re-evaluate the [ALJ]'s credibility determinations."⁸⁷

The mailbox rules states that once mail is sent, it is presumed to be received.⁸⁸ "Evidence as to the proper mailing of a letter has been held to create

⁸⁵ Even if Last Frontier's affirmative adverse agent defense was possible, Last Frontier has failed to connect Mr. X' alleged fraud to the specific overpayments discovered in the 2006 and 2009 audits. Last Frontier states that it is "undisputed" that Mr. X embezzled over \$4.2 million, however it fails to establish how the range of billing problems were due to his fraud. Moreover, Ms. Baker herself testified that she did not know what portion of the money Last Frontier paid to Mr. X was legitimately owed to him. She also never actually testified that the overbilling was due to Mr. X' fraud.

⁸⁶ *Handley*, 838 P.2d at 1233.

⁸⁷ *Tesoro*, 312 P.3d at 837.

⁸⁸ *Martens*, 524 P.2d at 677 ("Evidence as to the proper mailing of a letter has been held to create a presumption the letter was received by the addressee.").

a presumption the letter was received by the addressee.”⁸⁹ Once the rebuttable presumption is established, the burden shifts to the opposing party to “prov[e] that the nonexistence of the presumed fact is more probable than its existence.”⁹⁰

Relying on the “presumption of receipt,” the ALJ held that “[t]he preponderance of the evidence in the record...showed that Last Frontier did receive notice of the revocation of clearance.”⁹¹ The evidence at the hearing showed that the Division sent four providers (including Last Frontier) by registered return-receipt mail notices of Ms. T’s revocation of clearance to perform certain PCA activities. The Division’s procedures state that return receipts and returned notices are indicated in the file and subsequently shredded.⁹² The Division’s records show that while none of the four notices were returned, only three of the four receipts were returned.⁹³ In keeping with Division practice, there is no record of which return receipts were received and which receipt was not received.⁹⁴ The ALJ determined that the evidence was sufficient to establish a rebuttable presumption of notice under the mailbox rule.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ ALJ Decision, 4.

⁹² Tr. 31.

⁹³ Tr. 48. The Division also sent notice of the background check revocation to Ms. T. There were two addresses on file for Ms. T, so two notices were mailed. One of the notices was returned to the Division as undeliverable. Tr. 34-35.

⁹⁴ Tr. 48.

Next, the ALJ held that the presumption was not rebutted. The ALJ reasoned that Ms. Baker's testimony did not persuasively rebut the record receipts of three of the four notices sent and no mail returned because her testimony "failed to show that Last Frontier had a system in place that would have prevented received mail from being lost or not brought to her attention."⁹⁵ Therefore, the ALJ ruled that because the presumption was not rebutted, Last Frontier did have adequate notice, and thus was liable for the \$74,891.16 in overpayments for Ms. T's services.

Last Frontier presents two main arguments against the ALJ's finding of liability: first, that the Division's records were improperly authenticated and thus inadmissible hearsay; and second, that the mailbox rule presumption was never established. The Court finds both arguments unpersuasive.

A. The Evidence the ALJ Relied Upon is Not Inadmissible Hearsay

First, the records relied upon by the ALJ are admissible because the rules of evidence are less formal in an administrative hearing than judicial proceedings.⁹⁶ "The strict rules of evidence governing admissibility of hearsay in judicial proceedings do not apply to administrative hearings."⁹⁷ Instead, evidence in an administrative hearing "is admissible if it is the sort that responsible persons

⁹⁵ ALJ Decision, 5.

⁹⁶ See *Racine v. State, Dep't of Transp. & Pub. Facilities*, 663 P.2d 555, 557 (Alaska 1983).

⁹⁷ *Button v. Haines Borough*, 208 P.3d 194, 201 (Alaska 2009).

would rely on.”⁹⁸ The Court “will not reverse an administrative judgment based on hearsay unless the hearsay was inherently unreliable or jeopardized the fairness of the proceedings.”⁹⁹

The Court does not find the April 20 letter or testimony about the Division’s procedures regarding return receipts and background checks to be inadmissible in an administrative hearing. First, as an administrative hearing, strict rules of evidence are not required. Therefore, the admission of the disputed letter addressed to Last Frontier and the Division’s usual procedures for dealing with these types of mailings are not “inherently unreliable” or “jeopardize...the fairness of the proceedings.”¹⁰⁰

Moreover, even if stricter evidence rules were required, both forms of evidence would be admissible. The April 20 letter was admitted not for the truth of the matter asserted, but rather to support a finding that the letter was in fact sent.¹⁰¹ The April 20 letter is addressed to “404 E. Fireweed Ln, Ste 101 Anchorage, AK 99503,”¹⁰² the same address as the December 23, 2013 overpayment assessment which Ms. Baker testifies she did in fact receive.¹⁰³

⁹⁸ *Sather v. State Div. of Motor Vehicles, Dep’t of Pub. Safety*, 776 P.2d 1055, 1057 (Alaska 1989).

⁹⁹ *Button*, 208 P.3d at 201.

¹⁰⁰ *Id.*

¹⁰¹ See Alaska R. Evidence 801(c).

¹⁰² LF Exc. 1789.

¹⁰³ Tr. 67.

Likewise, the testimony from the two Division employees regarding the Division's procedures for mailing notices for deficient background checks is admissible under the business record exception to the hearsay rule.¹⁰⁴ Last Frontier argues that neither employee had personal knowledge of the April 20 letter being sent, because neither Teresa Narvaez (whose name is on the letter) nor Kathy Williams (whose signature is on the letter for Ms. Narvaez) testified at the hearing.¹⁰⁵ However, Ms. Darby has worked in the Certification and Licensing Program (where the April 20 letter was sent from) since 2006. Although she does not recall sending this specific letter, she testified to the procedures in place during the time the letter was sent.¹⁰⁶

Similarly, Ms. Stangle testified as to the process of checking and verifying that background checks are current for the PCAs based on her employment in that department of the Division at the time the 2013 letter was sent. The purpose of her testimony was to explain the December 2013 overpayment notice and to generally describe the procedures for retrieving this specific type of overpayment from providers, not the mailing of the April 20 revocation notice.

Both employees' testimony explain the relevant procedures in place while they were employed at the time said notices were mailed, thus making both Ms. Darby and Ms. Stangle qualified witnesses under the regularly conducted business activity hearsay exception.

¹⁰⁴ Alaska R. Evidence 803(6).

¹⁰⁵ Tr. 42-43.

¹⁰⁶ Tr. 24-56.

The Court does not find the April 20 letter or testimony about the return receipts or background check procedures to be “inherently unreliable” or jeopardizing “the fairness of the proceedings.”¹⁰⁷ Therefore, the Court finds that the ALJ’s reliance on such evidence in his determination does not merit invalidation of his finding of liability against Last Frontier.

B. Presumption of Notice Was Established and Not Rebutted

Last Frontier’s second argument against liability is that the evidence presented to the ALJ was not sufficient to establish a presumption of notice under the mailbox rule.

Under the substantial evidence test, the Court finds there is sufficient evidence to support the ALJ’s finding of liability. Under this standard, the Court does not “re-weigh evidence or re-evaluate the [ALJ]’s credibility determinations;”¹⁰⁸ instead, the Court is assessing whether there is “such relevant evidence as a reasonable mind might accept as adequate to support [the agency’s] conclusion.”¹⁰⁹

Even though there may have been evidence supporting both parties’ arguments, ultimately the ALJ ruled that the evidence weighed in favor of the Division such that “the preponderance of the evidence in the record showed the Last Frontier timely received this notice.”¹¹⁰ To support his determination, the

¹⁰⁷ See *Button*, 208 P.3d at 201.

¹⁰⁸ *Id.*; *Tesoro*, 312 P.3d at 837.

¹⁰⁹ *Hidden Heights*, 222 P.3d at 267.

¹¹⁰ ALJ Decision, 2.

ALJ relied on (1) the notice dated April 20 addressed to Last Frontier, (2) the return receipts of said notice by three of the four providers it was mailed to, and (3) testimony from the Division's employees and Ms. Baker.

The ALJ found that Ms. Baker's testimony was "undermined" by her "general lack of awareness and control of the details of Last Frontier's business affairs."¹¹¹ She testified that she does not accept the mail for Last Frontier; instead the office girls do; and that no one logs mail as it arrives at the office.¹¹² Similarly, the auditors testified that Last Frontier's files were disorganized.¹¹³ Based on this, the ALJ determined that Ms. Baker "failed to show that Last Frontier has a system in place that would have prevented received mail from being lost or not brought to her attention."¹¹⁴

Furthermore, Ms. Darby testified that in addition to the mailed notices, information regarding the status of background check clearances is available on the Division's "facility status page."¹¹⁵ This is the same website where a provider (like Last Frontier) would have to go to submit an application request for an employee's background check (like Ms. T). At any time, a provider is able to

¹¹¹ LF Exc. 1947.

¹¹² Tr. 89-91.

¹¹³ LF Exc. 338.

¹¹⁴ LF Exc. 1946.

¹¹⁵ Tr. 36.

access “[f]inal clearances, bar status terminat[ions], [and] withdrawn applications.”¹¹⁶

Under the substantial evidence test, the Court does not re-weigh the testimony or documents in the record.¹¹⁷ Both sides presented evidence in support of their argument that the notice was sent or not sent. It was the job of the ALJ to determine which evidence was stronger. The Court finds that based on the evidence in the record, a reasonable mind could conclude that Last Frontier received the April 20 notice. The Court AFFIRMS the ALJ’s decision in this matter holding Last Frontier liable for overpayments related to Ms. T’s services.

Conclusion

The Court’s upholds the ALJ’s finding of Last Frontier liable for the 2004 and 2009 audit overpayments because fault is irrelevant under the applicable state and federal statutes, and Last Frontier admits receiving the payments. The Court upholds the ALJ’s determination of liability for Ms. T’s billings because a reasonable mind could conclude that Last Frontier received the April 20, 2011 notice. Therefore, the Court AFFIRMS the ALJ’s decision finding Last Frontier liable for a total of \$1,336,533.25 in Medicaid overpayments.

DATED at Anchorage, Alaska, this 19th day of April 2016.

Signed

MARK RINDNER
Superior Court Judge

¹¹⁶ Tr. 36.

¹¹⁷ See *Tesoro*, 312 P.3d at 837.

[This document has been modified to conform to the technical standards for publication.]