

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

IN THE MATTER OF) OAH No. 08-0306-DHS
LAST FRONTIER ASSISTED LIVING, LLC) 13-1295-MDA, 13-1296-MDA
) & 14-0339-MDA
)
_____)

DECISION

I. Introduction

This case is the appeal of Last Frontier ALH (Last Frontier) of an assessment for overpayments from the Medicaid program. These charges were for personal care assistance that Last Frontier provided to Medicaid recipients. The Department of Health and Social Services, Division of Health Care Services (Division) performed two separate audits of Last Frontier's billings to the Medicaid program. The first audit covered Last Frontier's Medicaid Billings from April 1, 2004 through March 31, 2005, which is referred to as the 2004 audit.¹ The second audit covered the billing of calendar year 2009. Based on these audits Division assessed \$871, 675.44 for overpayments found in the 2004 audit, and \$399,966.65 for overpayments found in the 2009 audit.

Last Frontier did not directly challenge the validity of the statistical sampling and extrapolation used in the audits. Last Frontier rather argued it should not be charged for overpayments that were made for services had been rendered, but which the Division had found could not be authorized under the Medicaid laws. These disallowed charges included charges for services where Last Frontier did not timely provide adequate documentation that the charged service had actually been rendered and disallowed charges for services that that where did not meet the requirements for payment under the Medicaid laws, such as service provided before the recipient was authorized to receive them. Last Frontier also argued that many of the overpayments were the result of malfeasance of the bookkeeper of Last Frontier, who is being sued for embezzlement.

After the 2004 and 2009 audits were in the administrative appeals process, the Division assessed Last Frontier for reimbursement for payments made for billings on services performed by an employee who was no longer authorized to perform those services. Last Frontier also appealed this new assessment and that appeal was consolidated with the appeals of the 2004 and 2009 audits. Last Frontier argued that it should not have to pay back the money it received for

¹ Last Frontier refers to this as the 2005 audit in its closing arguments.

these services because those services were provided and the employee was paid. Last Frontier also argued that it should not have to pay back the money it received for these services because Last Frontier asserted that it did not receive notice that the employee's authorization to provide those services had been rescinded. This new appeal presented a close question of disputed fact as to whether notice was timely received by Last Frontier. However, the preponderance of the evidence in the record showed that Last Frontier timely received this notice.

Because the evidence shows that Last Frontier received overpayments at least equal to the amounts assessed by the Division during the relevant time frames, and because Last Frontier is legally obligated to provide reimbursement for both charges for services that are not authorized for payment under the Medicaid program and for payments made for services for which adequate documentation was not timely provided to the Division, the Division's assessments are upheld.

II. Facts

Myers and Stauffer LC, (the Auditors) performed two audits at the Division's request. The first audit covered Last Frontier's Medicaid Billings from April 1, 2004 through March 31, 2005, which is referred to as the 2004 audit. The second audit covered the billing of calendar year 2009 (2009 audit). Based on these audits Division assessed \$871, 675.44 for overpayments found in the 2004 audit, and \$399,966.65 for overpayments found in the 2009 audit.²

Last Frontier's Bookkeeper

Last Frontier's primary defense to the Division's claim for reimbursement for the estimated overpayments found in the 2004 and 2009 audits was that the overpayments were the result of the misdeeds of Last Frontier's former bookkeeper, Johnny X. Last Frontier provided witness testimony showing that Mr. X had embezzled over \$4,000,000 from Last Frontier while he was providing bookkeeping and accounting services to Last Frontier. This testimony was not disputed by the Division.³

2004 & 2009 Audits

There were 5,375 claims submitted by Last Frontier during the period covered by the 2004 audit. The Division paid Last Frontier a total of \$3,429,712.25 for billings on these 5,375 claims.⁴ The Auditors first ran a program to review all the 5,375 for obvious duplicate billing overpayments to exclude before the sample claims were selected for extrapolation. This

² Agency Record, page 126 & 2009 Agency Record, page 60.

³ See Defendant Ex A-Case No. 3AN-11-00000CI, Affidavit of Mary L. Jones.

exclusion program found \$1470 in these duplicate billings in the 5,375 claims. The Auditors then selected 61 of the remaining claims for review and extrapolation. The Auditors estimated that there were overpayments totaling \$1,561,660.52 based on its extrapolation of the overpayments found in this sample of the 2004 audit period billings. After further review of additional information and documentation provided by Last Frontier the Auditors reduced this estimate to \$861, 675.44.⁵

For the 2009 Audit, the Auditors estimated that there were overpayments totaling \$399,966.65, based on its extrapolation of the overpayments found in a sample of the 2009 calendar year billings.⁶

Claims for Services Not Provided

In the 2004 and 2009 audit samples, the Auditors found overpayments where Last Frontier had billed for services that were not shown to have been provided. For example, a billing for more hours than the hours reflected on the timesheet submitted by the provider. This type of overpayment was not as strongly contested by Last Frontier at the hearing, which was more concerned about the Auditors' findings of overpayments where services were provided, but payment for those services was not authorized under the Medicaid Laws. Last Frontier did argue, however, that the Division should not hold Last Frontier, liable for these overpayments because Last Frontier, like the Division, is a victim of Mr. X. Last Frontier also argued that some of its problems providing documentation for these charges might be due to Mr. X's bookkeeping.

Claims for Services Provided But Not Authorized

In the 2004-2005 sample, the Auditors also found overpayments that where Last Frontier had billed for provided services that were not authorized for reimbursement under Medicaid Laws. This type of overpayments included services that were rendered before there was a service-plan in effect that had been approved by the Division. Another example of this type of overpayment was billings for more than 35 hours per week without prior approval from the Division. At the hearing, Last Frontier did not vigorously contest the accuracy of these findings, and instead argued that it was even more unfair to hold Last Frontier liable for this type of billing problem because Last Frontier had provided these needed services, had paid its employees to provided them and had money it received for providing services taken by Mr. X.

⁴ Agency Record, page 125.

⁵ Exhibit B, pages 29 & 30.

2009 Audit

In an audit process like that used for the 2004 audit the Auditors estimated that at least \$399,966.65 in overpayments had been made during the audit period.

At the hearing, the Division also showed that the Auditors had used valid statistical analysis for the 2009 audit. Last Frontier did not offer any evidence that persuasively showed that this analysis overestimated the overpayments for either audit period.

Charges for Services from Un-Authorized Provider

There was a separate case from Last Frontier's appeals of the Division's charges for overpayment found during the 2004 and 2009 audits that was consolidated with those appeals. In that case, the Division determined that \$74,891.16 had been billed by Last Frontier for services that were provided by PCA Ramona T during a time when she was not authorized to provide those services. These were considered overpayments because they were payments for charges for services provided by a PCA whose clearance to provide those services had been revoked. The Division's records showed that notice of this revocation had been sent to Last Frontier and three other companies providing Medicaid services. Last Frontier asserted that it had never received this notice. Last Frontier's argued that there was no overpayment because it was not disputed that the services charged had been provided and the Division's prior clearance of the employee was still effective until notice of the revocation was received by Last Frontier.

The preponderance of the evidence in the record, however, showed that Last Frontier did receive notice of the revocation of clearance. Last Frontier does not dispute that it continued to bill for services provided by the employee after her authorization to provide those services was revoked. The Division does not dispute that these billed services were actually provided.

The finding that Last Frontier did receive the notice the Division sent is based in part on the presumption of receipt created by the Division's records showing that the notice was mailed to Last Frontier's address.⁷ This presumption of receipt created by the records of mailing is only marginally supported by additional, but ambivalent, evidence of the Division's record that mailing receipts from three of the four providers that were sent this notice were returned. The Division provided evidence that it mailed Last Frontier and three other providers notice of the

⁶ 2009 Agency Record, page 60.

⁷ The proper mailing of a document creates a presumption of delivery. *See Hagner v. United States*, 285 U.S. 427, 430 (1932) ("The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed"); *see also Jefferson v. Spenard Builder's Supply, Inc.*, 366 P. 2d 714, 717 (Alaska 1961) and

revocation of the employee's clearance. The Division sent these notice by registered return-receipt mail. The Division provided a record indicating that receipts had been returned from three of the four providers without indicating which of those providers the receipts were returned from. The Division's witness explained that these receipts would not have been reviewed when they were received, but rather would have been put in a pile with other mailing receipts. The limited record of the receipts returns was made several months later. The actual mailing receipts were destroyed in keeping with the Division's practice after the record of their return was made.

The evidence creating a presumption that Last Frontier received the notice sent by the Division, and the additional evidence of receipt provided by the record indicating that mailing receipts for three of the four notices sent out were returned was not persuasively rebutted by the evidence provided by Last Frontier, which was the testimony of Ms. Baker that she did not receive this notice. The testimony of Ms. Baker was not persuasive because she 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.

Ms. Baker owns and manages Last Frontier. Ms. Baker testified that all of the mail received by Last Frontier is given to review by one of the two women who work for her in the office. Ms. Baker testified that she did not receive any notice of the employee's clearance being revoked until the Division sought reimbursement for overpayments due to the revocation of clearance. Once she received this notice she immediately dismissed the employee. Ms. Baker's testimony regarding the reasons she believed that she would have seen the notice had it been received was somewhat undermined by the evidence in the record of Ms. Baker's general lack of awareness and control of the details of Last Frontier's business affairs, as demonstrated by the findings of the audits and her mistaken reliance on Mr. X.

III. Discussion

The focus of Last Frontier's challenge to the Division's assessments that resulted from the two audits was that Johnny X, rather than Last Frontier or its owner, Ms. Baker, was responsible for the overpayments discovered in these audits. Last Frontier argues that Last Frontier and the Division are both victims of Johnny X, but that Last Frontier and Ms. Baker suffered even more because Last Frontier paid to provide most of the services identified as overpayments, had more than the amounts charged as overpayments stolen and taxes left unpaid,

Martens v. Metzgar, 524 P.2d 666 (Alaska 1974) (when properly addressed and properly stamped mail is deposited in the United States mail, it is presumed that this mail has been delivered).

and is now being assessed for the overpayments and does not have the resources to pay. Last Frontier argues that the Division should seeking reimbursement the real malefactor, Johnny X, rather than its fellow victim, Last Frontier.

Last Frontier does not provide persuasive authority for its argument that Last Frontier is not liable for Medicaid overpayments that may have been due to the fraudulent acts that Johnny X committed for his own benefit rather than Last Frontier's. The only Alaska case that Last Frontier cites in its closing brief is *Matanuska Valley Bank v. Arnold*.⁸ A quote from this case is offered for the proposition that Johnny X's knowledge should not be imputed to Last Frontier because he was an adverse agent concealing his fraudulent activities.

Matanuska Valley Bank is a 1953 Alaska Federal District Court decision in what was primarily a banking law and commercial paper case. The plaintiff in that case was the bank, which was trying to collect, from the defendant, Arnold, based on negotiable instruments signed by the defendant's business partner on behalf of their partnership. The portion of that case cited by Last Frontier dealt with whether the bank was a good faith "holder in due course" of the negotiable instruments at the center of this dispute. The court concluded that the bank's "good faith" depended upon whether the knowledge of the bank's manager, who actively conspired with Arnold's cheating partner, could be imputed to the bank.⁹

Last Frontier's reliance on the quote from this case does not support its position for several reasons. This is a Medicaid case not a banking case. The laws and doctrines applicable to transactions in commercial paper do not necessarily apply to liability for overpayments of Medicaid. Even in *Matanuska Valley Bank*, the court imputed the knowledge of the bank manager to the bank based on the manager being in control of the bank's affairs as they pertained to the matter in dispute. Most importantly, 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. Last Frontier received money for charges that it should not have received, whether 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.

The fact that Last Frontier may have provided services for some of the payments that were not adequately documented does not reduce Last Frontier's liability for repayment. A

⁸ *Matanuska Valley Bank v. Arnold*, 116 F. Supp. 32 (D. Alaska 1953) aff'd in part, rev'd in part, 223 F.2d 778 (9th Cir. 1955).

⁹ *Matanuska Valley Bank v. Arnold*, 116 F. Supp. 32, 35, (D. Alaska 1953) aff'd in part, rev'd in part, 223 F.2d 778 (9th Cir. 1955).

provider must timely submit adequate documentation to show that charged services were provided in order to avoid an assessment for overcharges.¹⁰

The Division is also entitled to reimbursement for charges that exceeded the maximum billing allowed of more than 35 hours per week without the required approval.¹¹ The Division is also entitled to reimbursement for charges for services provided before there an approved service-plan in effect.¹²

V. Conclusion

The Division has shown that, more likely than not, Last Frontier Services LLC received overpayments of \$871,675.44 for Medicaid billings submitted from April 1, 2004 through March 31, 2005 and \$399,966.65 in overpayments submitted in 2009. Last Frontier Services LLC also received overpayments in the amount of \$74,891.16 for services billed that were provided by PCA Ramona T, when she was not authorized to provide those services.

The Department of Health and Social Services may recoup these overpayments from Last Frontier.

DATED this 16th day of December, 2014.

By: Signed
Mark T. Handley
Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 8th day of January, 2015.

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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

¹⁰ OAH No. 10-0095-DHS at 5-6 (Commissioner Health and Soc. Servs., 2010), *Hidden Heights Assisted Living, Inc. v. State, Dep't of Health and Social Services* 222 P.3d 258, 265 (Alaska 2009).

¹¹ 7 AAC 43.790(d).

¹² 7 AAC 43.766(b).