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

In the Matter of:	)	
	)	
MANIILAQ ASSOCIATION	)	OAH No. 12-0218-MDA
	)	

FINAL ADMINISTRATIVE DECISION ON SUMMARY ADJUDICATION

I. Introduction

The Medicaid Program Integrity Unit of the Commissioner's Office, (Program Integrity) conducted an audit of Maniilaq Association's outpatient hospital (Hospital). The auditors concluded that the Maniilaq had been overpaid, and Program Integrity sought recoupment of the overpayment. Maniilaq appealed.

Prior to the scheduled hearing date, both parties moved for summary adjudication. Briefing was completed, and oral argument was held on October 3, 2013. A question was raised by the administrative law judge (ALJ) as to which version of the Department's Billing Manual was applicable, and the parties were given additional time to address that question. The ALJ's proposed decision found that the same result would be reached under either version of the billing manual. This final decision agrees with that conclusion, and since the discussion as to which version should have been applied does not change the result, that portion of the ALJ's proposed decision has been removed. Any reference to the billing manual will refer to the 2005 Billing Manual.

Upon review of the proposed decision, as well as the arguments raised by both parties, the ALJ's proposed decision is not adopted, and this decision is adopted instead.[1] This final decision revises the ALJ's interpretation of the billing manual, and concludes that the audit correctly identified overpayments. Accordingly, the overpayment amount discussed below is upheld.

II. Facts

The material facts are not in dispute. Maniilaq Association operates the Maniilaq Health Center in Kotzebue, which houses several health related facilities including both the Hospital and a tribal health clinic (Clinic). The Hospital has applied for and been issued Medicaid provider

[1] *See* AS 44.64.060(e) (provisions for adopting or revising proposed decision).

number HS19OP. The Clinic has applied for and been issued Medicaid provider number CL1461.

The audit found five categories of errors, two of which resulted in alleged overpayments.[2] Only the first alleged error is at issue here. That alleged error relates to how the Maniilaq billed for patients who had been seen on the same day at both the Hospital and the Clinic.

Both the Clinic and the Hospital are paid by Medicaid on a patient encounter basis. A flat rate is paid per patient, per day, per facility. Patients who visited the Clinic were, at times, referred to the Hospital for x-rays since the Clinic does not have its own x-ray equipment. The audit revealed that the Hospital billed an encounter rate for patients who received x-ray services on the same day that the Clinic had billed an encounter rate for the same patients. The auditors concluded that this represented double billing as, in the auditor's view, Maniilaq Association should only receive one payment per patient, per day.

III. Discussion

A. Summary Adjudication

Summary adjudication is appropriate if there is no genuine dispute between the parties on an issue of material fact, and one party is entitled to judgment as a matter of law.[3] Where a motion for summary adjudication is supported by affidavits or other evidence, the opposing party must show "by affidavit or other evidence, that a genuine dispute exists on an issue of material fact for which an evidentiary hearing is required."[4] Where there is room for differing interpretations of factual matters, all facts are to be viewed, and inferences drawn, in the light most favorable to the nonmoving party.[5]

B. Whether Manillaq Can Bill an Encounter Rate for Both the Clinic and Hospital

The parties reach diametrically opposed conclusions from the same language. Program Integrity argues that the Billing Manual clearly informs Maniilaq that it cannot bill twice for providing services to the same patient on the same day when the patient is seen at both the Hospital and the Clinic. Maniilaq argues that the Billing Manual clearly states that the Hospital and Clinic are separate providers and that each *can* bill for services separately.

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2 Exhibit A, pages 5 – 7.
3 2 AAC 64.250(a).
4 2 AAC 64.250(b).
5 *Samaniego v. City of Kodiak,* 2 P.3d 78, 82-83 (Alaska 2000).

Program Integrity looks to the payments Maniilaq receives, and argues that it makes no sense that it would receive two encounter rate payments when a patient first visits the Clinic, and then is referred to the Hospital for additional services, while Maniilaq would only receive one encounter rate payment if the patient received the same set of services from only the Hospital.

However, a similar question arises when looked at from the point of view of the paying organization. Program Integrity agreed at oral argument that if a patient visited a physician or clinic not affiliated with Maniilaq, and was then referred to the Hospital for x-rays, both providers would be paid. Why should the Department pay only one encounter rate when the two providers are owned and operated by a single entity but pay two encounter rates when a patient visits a clinic and a hospital owned and operated by two separate entities?

Ultimately, it is the language of the Billing Manual that expresses the Department's policy, and guides the decision in this case.[6] The Billing Manual is divided into sections, with each provider type having its own section. Tribal Outpatient Hospitals are covered in section D of the 2005 Billing Manual. In describing how Outpatient Hospitals are paid, the Billing Manual says:

> Outpatient hospital services are reimbursed on an encounter rate, which is published in the Federal Register. The encounter rate is payment for all outpatient-hospital services (including physician services) provided to one recipient on one day at one Tribal outpatient hospital (except as mentioned below).[7]

Under this provision, the Hospital receives the same payment regardless of whether the patient comes for a simple office visit, an x-ray, outpatient surgery, or any combination of services.

Tribal clinics are also paid based on a flat rate per patient per day. The 2005 Billing Manual says:

> The services listed above can be billed under the Tribal Clinic Provider ID number and will be paid at the most current outpatient visit rate (encounter rate) published by the Indian Health Service. The encounter rate is paid per

[6] Program Integrity suggests that the Commissioner should defer to its interpretation of the Billing Manual as long as that interpretation has a reasonable basis. The Commissioner may, but is not required to follow the interpretations of a subordinate unit within the Department. *See, e.g., Quality Food Service v. Dept of Corrections*, OAH No. 06-0400-PRO (Commissioner of Administration 2006); *In re Rockstad*, OAH No. 08-0282-DEC (Commissioner of Env. Conservation 2008); *In re Providence Health & Services*, OAH No. 11-0045-DHS (Commissioner of Health & Soc. Serv. 2011). *See also, Austin v. Office of Public Advocacy*, OAH No. 11-035-PRO (Commissioner of Administration 2012), page 3 ("The Commissioner is not limited to simply correcting an abuse of discretion.").

[7] Exhibit D, page 9. The exception "mentioned below" applies to hospitals that elect to bill for ambulatory surgical care at the surgical care facility rate or who elect to bill physicians separately, and receive a reduced encounter rate for other services. Exhibit D, page 9.

> patient, per day, per facility and is payment for all services received at the clinic, including laboratory and x-ray services that are provided at the clinic and drugs and medical supplies provided on the day of the patient's visit.[8]

The policy expressed in both sections of the Billing Manual is that when a patient is treated at Maniilaq's facility, Maniilaq receives one encounter rate payment regardless of the number of different services provided. Under this policy, it is irrelevant that Maniilaq has chosen to provide some of those services through its Clinic, and other services through its Hospital. The audit identified payments made for patients who were provided services at the Clinic. When those same patients were provided x-ray services the same day, that service was included in the encounter rate for the Clinic, and should not have been separately billed through Maniilaq's Hospital provider number.

IV. Conclusion

The Program Integrity Unit correctly applied the Billing Manual when it conducted the audit in this case. The Hospital was not entitled to bill for providing services to patients who had also received services from Maniilaq's Clinic on the same day. Accordingly, the amount of the overpayment in the audit is upheld.

DATED this 20th day of December, 2013.

Signed
William J. Streur, Commissioner
Department of Health and Social Services

This is a final decision. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

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

[8] Exhibit B, page 1.

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In the Matter of:	)	
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MANIILAQ ASSOCIATION	)	OAH No. 12-0218-MDA
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[*REJECTED PROPOSED*] DECISION ON SUMMARY ADJUDICATION

I. Introduction

The Medicaid Program Integrity Unit of the Commissioner's Office, (Program Integrity) conducted an audit of Maniilaq Association's outpatient hospital (Hospital). The auditors concluded that the Hospital had been overpaid, and Program Integrity sought recoupment of the overpayment. The hospital appealed.

Prior to the scheduled hearing date, both parties moved for summary adjudication. Briefing was completed, and oral argument was held on October 3, 2013. A question was raised by the administrative law judge as to which version of the Department's Billing Manual was applicable, and the parties were given additional time to address that question.[1]

Regardless of which Billing Manual is relied on, the audit applied an incorrect interpretation in concluding that an overpayment had been made. Accordingly, the overpayment amount found by that audit is incorrect and must be recalculated.

II. Facts

The material facts are not in dispute. Maniilaq Association operates the Maniilaq Health Center in Kotzebue, which houses several health related facilities including both the Hospital and a tribal health clinic (Clinic). The Hospital has applied for and been issued Medicaid provider number HS19OP. The Clinic has applied for and been issued Medicaid provider number CL1461.

The audit found five categories of errors, two of which resulted in alleged overpayments.[2] Only the first alleged error is at issue here. That alleged error relates to how the Hospital billed for patients who had been seen on the same day at both the Hospital and the Clinic.

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[1] Program Integrity subsequently submitted the prior version of this manual. Program Integrity identified this as the 1999 Billing Manual, but confirmed that there were only minor changes between 1999 and 2001. It is referred to here as the 2000 Billing Manual.

[2] Exhibit A, pages 5 – 7.

Both the Clinic and the Hospital are paid by Medicaid on a patient encounter basis. A flat rate is paid per patient, per day, per facility. Patients who visited the Clinic were, at times, referred to the Hospital for x-rays since the Clinic does not have its own x-ray equipment. The audit revealed that the Hospital billed for patients who received x-ray services on the same day that the Clinic had billed an encounter rate for the same patients. The auditors concluded that this represented double billing as, in the auditor's view, Maniilaq Association should only receive one payment per patient, per day.

III. Discussion

A. Summary Adjudication

Summary adjudication is appropriate if there is no genuine dispute between the parties on an issue of material fact, and one party is entitled to judgment as a matter of law.[3] Where a motion for summary adjudication is supported by affidavits or other evidence, the opposing party must show "by affidavit or other evidence, that a genuine dispute exists on an issue of material fact for which an evidentiary hearing is required."[4] Where there is room for differing interpretations of factual matters, all facts are to be viewed, and inferences drawn, in the light most favorable to the nonmoving party.[5]

B. The Provider Billing Manual

Any individual or entity wishing to be an eligible Medicaid provider must agree to certain conditions. Those conditions are summarized by regulation. The relevant portion of the 2008 version of that regulation states:

> (b) Providing medical or medically-related services to recipients or billing the division for those services constitutes agreement by the provider
>
> > (1) to follow procedures that are consistent with guidance in the applicable Alaska Medicaid Provider Billing Manual as of July 14, 2000[.[6]]

Although this regulation refers to the 2000 Provider Billing Manual, that manual had been subsequently revised. In 2008, the most recent version of the manual was the 2005 version, which both parties relied on to support their motions.[7]

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3 2 AAC 64.250(a).

4 2 AAC 64.250(b).

5 *Samaniego v. City of Kodiak*, 2 P.3d 78, 82-83 (Alaska 2000).

6 Former 7 AAC 43.065.

7 The current applicable regulation, 7 AAC 105.210(b)(5) simply says that a provider must agree to submit claims in the form or format required by the Department. In addition, specific pages of the January 2003, April 15, 2005, and March 2006 versions of the Billing Manual remain adopted by reference. 7 AAC 160.900(d)(15) – (17).

The Administrative Procedures Act allows adoption of other materials by reference, but at least as of the dates at issue here, the 2005 Billing Manual had not been adopted by reference. When an agency wishes to adopt future changes to material adopted by reference, the adopting regulation must use language that would inform a reader that future versions may be applicable such as "as may be amended" or "as amended from time to time."[8] In addition, adoption of future changes may only be done for another agency's regulation or when explicitly authorized by statute.[9] The Billing Manual is not a regulation, and Program Integrity has not referred to any statute explicitly authorizing it to adopt future changes in advance. In enacting 7 AAC 43.065, the Department could not and did not adopt by reference any future changes to the Billing Manual.

Although the law is clear that the July 14, 2000 version of the Billing Manual was the version in effect during 2008, Program Integrity asserts that the 2005 manual was in effect:

> There are significant legal differences between a statute and a billing manual, but they operate the same in terms of succession. When a statue is repealed and replaced, once the replacement statute becomes effective, the preceding statute fails to exist. The same is true with the billing manuals, [one] succeeds the other and once the successor manual becomes effective, the preceding manual becomes void.[10]

The main problem with Program Integrity's argument is that it ignores the fact that the 2000 manual was adopted by a regulation. As of 2008, that regulation had not been repealed. An agency is not permitted to ignore a valid regulation simply because it concludes the regulation is outdated. If an agency wishes to change a regulation, it must follow the statutory procedures for doing so. The regulation at issue here had not been changed as of 2008. Thus, it appears that the 2000 version of the Billing Manual remained in effect.

Although it appears that the 2000 version was the applicable version that should have been followed, both parties thought it was appropriate to follow the 2005 Billing Manual for bills

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8 AS 44.62.245(a). *See also* Legislative Drafting Manual (Department of Law 2013), Chapter 11. When an agency does properly adopt future changes, there are strict procedures that must be followed when future versions become available. It must (1) make the document available for public review; (2) post a notice on the Online Public Notice System and publish the notice in a newspaper of general circulation or trade journal; (3) send a copy of the notice to people who have requested notice; and (4) send a notice to the Department of Law regulations attorney along with an affidavit verifying that the notice provisions have been complied with. The regulations attorney then inserts an editor's note after the regulation stating the effective date of the amended version of the material. Legislative Drafting Manual, pages 95 – 97. There is no evidence in the record that these requirements were complied with.

9 *Id.*

10 Reply to Maniilaq's Notice regarding the billing manual, page 2.

submitted in 2008. As discussed in more detail below, the relevant language in both versions of the Billing Manual is similar, and the same result would be reached under either version.

C. Whether Each Provider Can Bill an Encounter Rate

The parties reach diametrically opposed conclusions from the same language. Program Integrity argues that the Billing Manual clearly informs the Hospital that it cannot bill for providing services to a patient when the Clinic has billed for providing services to that client on the same day. The Hospital argues that the Billing Manual clearly states that it *can* bill for those services.

Program Integrity looks to the payments Maniilaq receives, and argues that it makes no sense that it would receive two encounter rate payments when a patient first visits the Clinic, and then is referred to the Hospital for additional services, while Maniilaq would only receive one encounter rate payment if the patient received the same set of services from only the Hospital.

However, a similar question arises when looked at from the point of view of the paying organization. Program Integrity agreed at oral argument that if a patient visited a physician or clinic not affiliated with Maniilaq, and was then referred to the Hospital for x-rays, both providers would be paid. Why should the Department pay only one encounter rate when the two providers are owned and operated by a single entity but pay two encounter rates when a patient visits a clinic and a hospital owned and operated by two separate entities?

Ultimately, it is the language of the Billing Manual that determines whether both the Clinic and the Hospital could bill an encounter rate for the same patient seen on the same day. The plain language of that manual says that both providers may bill for their respective patient encounters.[11]

Both versions of the Billing Manual are divided into sections, with each provider type having its own section. Tribal Outpatient Hospitals are covered in section D of the 2005 Billing Manual and Section III of the 2000 Billing Manual. In describing how Outpatient Hospitals are paid, the 2005 Billing Manual says:

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[11] Program Integrity suggests that the Commissioner should defer to its interpretation of the Billing Manual as long as that interpretation has a reasonable basis. The Commissioner may, but is not required to follow the interpretations of a subordinate unit within the Department. *See, e.g., Quality Food Service v. Dept of Corrections*, OAH No. 06-0400-PRO (Commissioner of Administration 2006); *In re Rockstad*, OAH No. 08-0282-DEC (Commissioner of Env. Conservation 2008); *In re Providence Health & Services*, OAH No. 11-0045-DHS (Commissioner of Health & Soc. Serv. 2011). *See also, Austin v. Office of Public Advocacy*, OAH No. 11-035-PRO (Commissioner of Administration 2012), page 3 ("The Commissioner is not limited to simply correcting an abuse of discretion.").

> Outpatient hospital services are reimbursed on an encounter rate, which is published in the Federal Register. The encounter rate is payment for all outpatient-hospital services (including physician services) provided to one recipient on one day at one Tribal outpatient hospital (except as mentioned below).[12]

The 2000 version of the manual is similar. It states:

> Claims for Medicaid IHS/Tribal outpatient hospital services are reimbursed according to the most current encounter rate (also called the per diem rate) for IHS facilities published by the U.S. Department of Health and Human Services, Indian Health Service. The outpatient encounter rate represents payment for all outpatient hospital services delivered to one Medicaid recipient during one day at one IHS or tribal outpatient hospital.[13]

Under either provision, the Hospital receives the same payment regardless of whether the patient comes for a simple office visit, an x-ray, outpatient surgery, or any combination of services.

Tribal clinics are also paid based on a flat rate per patient per day. The 2005 Billing Manual says:

> The services listed above can be billed under the Tribal Clinic *Provider ID number* and will be paid at the most current outpatient visit rate (encounter rate) published by the Indian Health Service. The encounter rate is paid per patient, per day, per facility and is payment for all services received at the clinic, including laboratory and x-ray services that are provided at the clinic and drugs and medical supplies provided on the day of the patient's visit.[14]

The 2000 version of the Billing Manual says:

> All covered IHS/Tribal Clinic services are reimbursed at the current IHS/Tribal Clinic published outpatient encounter rate, which represents payment for all services delivered to one Medicaid recipient during one day at one IHS or tribal clinic.[15]

Neither version of the Billing Manual says that related providers are treated as a single provider and may only bill for one encounter per patient per day regardless of the number of facilities visited. If this had been the intent, it would have been relatively easy to say so in the manual. Instead, both manuals say that billing is per patient per day *for each facility*. An inpatient hospital may bill for one recipient visit per day regardless of the services provided. Similarly, a clinic may bill for one recipient visit per day. Nothing in either manual states or

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12 Exhibit D, page 9 (emphasis added). The exception "mentioned below" applies to hospitals that elect to bill for ambulatory surgical care at the surgical care facility rate or who elect to bill physicians separately, and receive a reduced encounter rate for other services. Exhibit D, page 9.

13 Exhibit 3 to Maniilaq's Notice re the 2001 IHS Provider Billing Manual (emphasis added).

14 Exhibit B, page 1 (emphasis added).

15 Exhibit 2 to Maniilaq's Notice re the 2001 IHS Provider Billing Manual (emphasis added).

implies that if a recipient visits both a clinic and an inpatient hospital on the same day, only one of those providers may bill an encounter rate.

In this case, patients received services at the Clinic, and the Clinic properly billed an encounter rate. Those patients did not receive x-ray services at the Clinic. Instead, the patients were referred to the Hospital for x-ray services. The Hospital was also entitled to bill an encounter rate for the services provided to the patient at the Hospital. The Hospital can bill an encounter rate for x-rays regardless of whether the x-rays were ordered by a physician not associated with Maniilaq in any way, or by a physician working in the Clinic.

IV. Conclusion

The Program Integrity Unit applied an incorrect interpretation of the Billing Manual when it conducted the audit in this case. The Hospital was entitled to bill for providing services to patients who had previously received services from a different provider on the same day. Accordingly, the amount of the overpayment in the audit must be recalculated in accordance with the correct interpretation of the Billing Manual discussed above.

DATED this 6th day of November, 2013.

Signed
Jeffrey A. Friedman
Administrative Law Judge

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