

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

In the Matter of)
)
ALASKA YELLOW DISPATCH, LLC) OAH No. 17-0327-MDA
) Agency No. 1031355
_____)

FINAL DECISION AFTER REMAND

I. Introduction

Alaska Yellow Dispatch, LLC (AYD) is a Medicaid transportation service provider. The State of Alaska, Department of Health and Social Services, Program Integrity Unit (Program Integrity) audited AYD’s payments for Medicaid services rendered in 2012. The audit identified alleged overpayments, and Program Integrity sought repayment of the overpayment amount. AYD appealed.

Program Integrity alleges that AYD impermissibly charged Medicaid a five percent “administrative” fee for participation in the Medicaid program or charged Medicaid more than other customers for the same “unit of service” in violation of 7 AAC 145.005(h). Both AYD and Program Integrity moved for summary adjudication. Based upon the undisputed facts and the arguments of counsel, summary adjudication is granted to AYD because the 5% fee does not violate 7 AAC 145.005(h). The 5% fee is not related to participation in the Medicaid program; rather, the fee is paid by all AYD’s “charge account” customers and relates to the services AYD provides to its charge account customers, including the Medicaid program. The 5% percent is compensation for services AYD provides to its charge account customers, like the Medicaid program, and not provided to other taxi cab users who do not receive the same “unit of service” or pay a 5% fee. Accordingly, the overpayments claimed by Program Integrity are overturned.

The above conclusion was reached in a proposed decision authored by former Administrative Law Judge (ALJ) David Mayberry and forwarded to the Commissioner’s Delegate on August 18, 2017. In accordance with a Proposal for Action filed by one of the parties, and on recommendation of Judge Mayberry’s successor as the ALJ assigned to this matter, the Commissioner’s Delegate remanded the case to remove certain unnecessary material.¹ This document is the final decision of the Commissioner’s Delegate after completion of those tasks.

¹ The terms of the remand are detailed in an Order of Remand signed by Special Assistant Erin Shine on August 22, 2017.

II. Facts²

A. AYD Charge Account Customers

AYD is a taxi cab dispatch company. AYD does not own any taxi cabs, employ taxi cab drivers (operators), or receive revenue from payments made by customers to taxi cab operators. Rather, AYD provides two categories of service to taxi cab operators. First, AYD provides operators radio or computer dispatch of calls from customers to AYD seeking a taxi cab. Taxi cab operators pay AYD a flat monthly fee for this dispatch service.

Second, AYD provides “charge account” services for select businesses and entities that request it. Charge account services allow the business or entity requesting the service to use vouchers or other similar tools whereby an individual customer needing a taxi ride may present the taxi cab operator the business or other entity’s voucher to receive payment for taxi service. The taxi cab operators call the voucher into AYD, and AYD provides direct, immediate payment to the taxi cab operator for the taxi service on behalf of the business or entity issuing the voucher. AYD then charges its charge account customer the full cab fare plus 5% for the service of advancing payment to the taxi cab operator and processing the charges. Thus, under AYD’s charge account system, the individual receiving the taxi cab service pays nothing out of pocket.

Medicaid uses a transportation voucher system for Medicaid recipients and is a charge account customer of AYD. AYD treats the Medicaid program just like any other AYD charge account customer. A Medicaid recipient presents a Medicaid voucher to the operator for services rendered. The taxi cab operator then presents the Medicaid voucher to AYD for payment. After processing the necessary paperwork, AYD bills Medicaid the actual cab fare plus 5% for advancing payment to the taxi cab operator and processing the payment with Medicaid on behalf of the taxi cab operator (including carrying a large accounts receivable due from Medicaid).

AYD describes itself as playing a “critical role” in the delivery of medical care to Medicaid recipients. AYD’s description of its role in the system is undisputed by Program Integrity:

AYD enables the individual taxicab drivers to accept Medicaid patients as customers using Medicaid vouchers for transportation to and from health care provider appointments. Without AYD, it is highly doubtful that this system would work so smoothly. Individual taxicab drivers, many of whom are unsophisticated, or

² The background facts concerning AYD and its business in Sections II.A and II.B below are undisputed. At the hearing, Program Integrity agreed to AYD supplementing the record with admissible summary adjudication evidence to support such facts. On July 19, 2017, AYD submitted the Affidavit of Sloane Unwin, dated July 19, 2017, which is admissible summary adjudication evidence and hereby incorporated into the record.

marginally literate, or speak English as a second language, simply do not have the capacity to individually comply with Medicaid voucher reimbursement requirements. Additionally, few taxicab drivers are in a position to defer their compensation for services rendered for months while they wait for payment from Medicaid.[³]

If AYD did not provide charge account services to the Medicaid program, including direct, immediate compensation to drivers of Medicaid recipients, Medicaid recipients would likely experience much more difficulty obtaining taxi cab services in Anchorage. Taxi cab operators have the right to refuse a customer who “does not show an ability to pay an estimated fare.”⁴ It is reasonable to conclude that many taxi cab operators would refuse to accept Medicaid vouchers, if the operator could not process the payments through AYD and receive immediate payment from AYD.

B. AYD and the Prior Audit

AYD is the successor-in-interest to Alaska Cab and Handicap Dispatch, Inc. (collectively, AYD). Program Integrity audited AYD’s Medicaid billings for the period April 1, 2003, through March 31, 2004. Based on the audit, Program Integrity asserted AYD had improperly billed Medicaid for certain fees and sought recoupment. AYD appealed. Ultimately, the case was settled by a written settlement agreement between the parties (the 2008 Agreement).⁵

The 2008 Agreement allowed AYD to charge a 5% fee in addition to the taxi cab fares billed to Medicaid:

Any administrative fee assessed by Provider for processing the claims referenced herein will remain [overpayments], after allowance for 5% of the Provider’s billed charges per claim in accordance with the provisions of 7 AAC 43.040.[⁶]

A footnote to the text of the 2008 Agreement explained further:

7 AAC 43.040(a)(2) prohibits a provider from charging a higher rate for any unit of service provided to a Medicaid recipient than the provider charges others, except for Medicare. During the Audit Period, Provider levied a 5% fee for administering all charge accounts; however, Provider assessed Medicaid, as a charge account, a flat fee of \$1.00 or \$2.00 per claim, which in many instances exceeded the 5% fee levied against all other charge

³ AYD’s Motion for Summary Adjudication at 10 (footnote omitted).

⁴ AMC § 11.30.070(A)(3).

⁵ AR 32-40.

⁶ AR 35. Former 7 AAC 43.040(a) is now recodified as 7 AAC 145.005(h).

customers. Accordingly, Provider was allowed a 5% fee but anything in excess of 5% was deemed an overpayment.[⁷]

The 5% fee referenced in the 2008 Agreement is precisely the same 5% fee at issue in this appeal. AYD reports that since the 2008 Agreement, it continually charged a 5% fee on its Medicaid billings for transportation services without any objection from the Medicaid program, until receiving the results of this audit.

C. The 2012 Audit

Myers and Stauffer, LLC (M&S) conducted an audit of AYD on behalf of Program Integrity. It covered payments for Medicaid services rendered in calendar year 2012.⁸ AYD was paid \$792,061.70 for 40,712 claims submitted during 2012. The audit was conducted by reviewing a statistically valid sample of 69 claims for which AYD was paid \$1,335.52.⁹

M&S identified alleged overpayments in all 69 claims in the sample. The alleged overpayments in the sample totaled \$84.27 out of the \$1,335.52 in the sample. When M&S extrapolated the alleged overpayments from the sample across the entire population of claims subject to the audit, the total alleged overpayments amounted to \$49,721.74. M&S applied a ninety percent confidence interval to the alleged overpayments from the sample resulting in \$34,252.04 in alleged overpayments.¹⁰

M&S made overpayment findings for all claims due to alleged billing discrepancies. AYD's invoices documented that it billed Medicaid 5% above the fare charged to Medicaid recipients for services (*i.e.*, taxi cab rides). M&S made overpayment findings for the difference between the amount charged Medicaid recipients and the amount AYD billed to Medicaid.¹¹

AYD received notice of the final audit results and requested reconsideration. On reconsideration, Program Integrity modified its findings, but affirmed the audit findings on the 5% fee.¹² The modified findings increased the alleged overpayment total to \$35,903.99.¹³

⁷ AR 35, n.2.

⁸ AR 45.

⁹ AR 49, 63.

¹⁰ AR 49, 63. In statistics, a confidence interval is used express the degree of certainty (or uncertainty) associated with a sample statistic. The 90% confidence interval calculated here means that, if the total population of claims was randomly sampled multiple times using the same technique, there is a 90% probability that the sampling would identify \$34,252.04 or more in overpayments each time. *See* http://stattrek.com/statistics/dictionary.aspx?definition=Confidence_interval (visited 6/21/17).

¹¹ AR 47.

¹² M&S had made overpayment findings for claims with alleged insufficient documentation. On reconsideration, Program Integrity removed these findings, leaving only the 5% fee issue.

¹³ Ex. 1 at 2, 5.

III. Discussion

A. Summary Adjudication

Summary adjudication in an administrative proceeding is similar to summary judgment in court.¹⁴ The Alaska Supreme Court has advised that it “will uphold a summary judgment only if the record presents no genuine issues of material fact and ‘the moving party was entitled to judgment on the law applicable to the established facts.’”¹⁵ “When the court makes this determination, ‘[a]ll reasonable inferences of fact from proffered materials must be drawn against the moving party . . . and in favor of the non-moving party.’”¹⁶

If a motion for summary adjudication is supported by an affidavit or other documents establishing that a genuine dispute does not exist on an issue of material fact, to defeat the motion a party may not rely on mere denial but 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.^[17]

Both sides moved for summary adjudication and argued that the material facts were not in dispute. In its response to AYD’s motion, however, Program Integrity argued that there were disputed issues of material fact as to a downstream issue in the case, the issue of estoppel based on the 2008 resolution and its surrounding circumstances. Because this decision can be resolved at the threshold, without reaching estoppel, there is no need to determine whether there is a genuine factual dispute on the estoppel question. Program Integrity has correctly acknowledged that a disagreement over the proper interpretation of a regulation is not a dispute of material fact.

B. AYD’s 5% Fee Does Not Violate 7 AAC 145.005(h).

At the core of this case are 7 AAC 145.005(h) and the meaning of the terms “administrative cost related to” and “unit of service” used therein. This regulation provides:

(h) A provider may not charge

(1) for any administrative cost related to participation in the Medicaid program; or

(2) a higher rate for any unit of service provided to a Medicaid recipient than the provider charges others, except for an amount billed Medicare.

¹⁴ *Alaska Public Offices Comm’n v. Gillam*, OAH No. 11-0328-APO at 1-2 (Oct. 19, 2011) (citing *Samaniego v. City of Kodiak*, 2 P.3d 78, 82-83 (Alaska 2000)).

¹⁵ *Newton v. Magill*, 872 P.2d 1213, 1215 (Alaska 1994) (quoting *Wassink v. Hawkins*, 763 P.2d 971, 973 (Alaska 1988)).

¹⁶ *Id.* (quoting *Sea Lion Corp. v. Air Logistics of Alaska, Inc.*, 787 P.2d 109, 116 (Alaska 1990)).

¹⁷ 2 AAC 64.250(b).

Thus, the regulation proscribes two things: (1) charging an “administrative cost related to” participation in the Medicaid program; and (2) charging Medicaid a higher rate for the same “unit of service” provided to other persons. The parties have not briefed the meaning of the terms “administrative cost related to” and “unit of service.” Research by the administrative law judge originally assigned to this case did not identify meaningful guidance, but their meaning can be reasonably inferred from the regulation and the ordinary meaning of the terms.¹⁸

Turning to the latter question first, there is no dispute that AYD provides services to charge account customers it does not provide to ordinary “flag drop” taxi riders by providing immediate payment to drivers, agreeing to bill a third-party (Medicaid) for the service and carrying the account receivable at no additional expense to the taxi cab operator or taxi cab rider. The “unit of service” provided to charge account customers is different from and exceeds the “unit of service” provided to ordinary flag drop taxi cab riders. The services provided exclusively to charge account customers justifies a higher rate, and it cannot reasonably be said that AYD charges Medicaid more for the same “unit of service” by comparing AYD’s charge account billings to those of ordinary flag drop taxi riders who pay their own fares and receive no additional services from AYD.

As to the former question, there is no dispute that AYD charges a 5% fee to all its charge account customers, including Medicaid, in addition to the base fare. Medicaid regulations prohibit charging any administrative fee related to participation in the Medicaid program. Reasonably construed, “administrative cost related to” in this context refers to business expenses attributable to participation in the Medicaid program, including employee training, processing of paperwork, filing and duplicating costs, postage, application/certification expenses, licensing fees and general overhead. However, the fact that AYD charges all its charge account customers the same 5% fee is evidence that the 5% fee is not an administrative cost *related to* participation in the Medicaid program; rather, it is attributable to the additional services provided to charge account customers, the most significant of which is the direct, immediate payment to the taxi cab operators who, without which, would have little to no incentive to accept vouchers from any charge account customer, including Medicaid recipients.

Accordingly, AYD’s 5% fee does not violate 7 AAC 145.005(h).

¹⁸ *State, Dept. of Revenue v. Anchorage*, 104 P. 3d 120, 122 (Alaska 2004) (holding statutory language construed according common usage unless acquired new meaning by judicial construction or statutory definition).

C. Interest and Attorney's Fees

AYD makes a cursory request for “interest at the statutory rate for all amounts found due and owing by the State Medicaid Program” and “its reasonable attorneys’ fees and costs.”¹⁹ AYD provides neither authority for this request nor further development of the issues.

Attorney’s fees are not ordinarily available in administrative proceedings.²⁰ As to interest, this case is simply a challenge to an audit finding, and is completely resolved by overturning that finding. There will be no money judgment. If any money is owing as a result that is not paid voluntarily, it would have to be sought in a separate civil action. This decision does not resolve whether interest might be recoverable in that forum.

IV. Conclusion

Program Integrity’s Motion for Summary Adjudication is denied. AYD’s Motion for Summary Adjudication is granted. The determination that the Medicaid Program is entitled to repayment in the amount of \$35,903.99 is OVERTURNED.

RECOMMENDED: September 4, 2017.

By: Signed
Christopher Kennedy
Administrative Law Judge

ADOPTED: September 18, 2017.

By: Signed
Erin Shine, Commissioner’s Delegate
Special Assistant to the Commissioner of
Health and Social Services

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.]

¹⁹ Reply at 18. AYD also “requests that the summary adjudication state that AYD should also be paid the 5% fee for services provided, but not paid, by the Department during the pendency of this appeal.” Reply at 18. The request is beyond the scope of this appeal.

²⁰ Cf. *In re Alaska Independent Blind, Inc.*, Case No. 1-OTA-97 (Alaska Office of Tax Appeals [predecessor of OAH] 1998) (<http://aws.state.ak.us/officeofadminhearings/Documents/TAX/CAF/TAX1OTA97.htm>); *Palmer v. Beaulieu*, OAH Case No. 04-0237-RES (Alaska Real Estate Comm’n 2006), at 5 (<http://aws.state.ak.us/officeofadminhearings/Documents/RES/RES040237.pdf>).