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

In the Matter of:	)	
	)	OAH No. 17-1236-MDA
U-CARE SERVICES	)	Agency No. PCG314
	)	

DECISION

I. Introduction

U-Care Services, LLC ("U-Care") is a Medicaid provider that provides personal care assistance services ("PCA services") to disabled Medicaid recipients. The Department of Health and Social Services, Medicaid Program Integrity Unit ("Program Integrity") had an audit conducted of U-Care's billings for calendar year 2012. The purpose of the audit was to determine the accuracy of Medicaid payments made to U-Care for 2012. The audit was performed by Meyers & Stauffer, LC ("M & S").[1]

The audit was conducted by reviewing a random sample of U-Care's billing claims to determine compliance with regulations. Where auditors made overpayment findings, they statistically extrapolated the findings to total billings to arrive at a total overpayment figure. Most of the overpayment findings fell into two categories: 1) claims in which U-Care time-sheets contained the phrase "live in" or "live with" in lieu of a start and stop time for personal care assistants ("PCAs"); and 2) claims in which the timesheets did not contain a stop time. The figure was reported to Program Integrity. After reviewing objections and follow up documentation from U-Care, Program Integrity adopted the final audit report and issued U-Care a demand for repayment of $2,245,266.85.[2]

U-Care appealed the final audit findings and requested a hearing to challenge most of the disallowed claims. U-Care put forth two legal arguments in support of its request to overturn the overpayment findings: 1) the Department is estopped from seeking repayment based on the

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[1] In its cover letter to its report, M & S states that it did not conduct an audit (AR 61). However, throughout the record, and at the hearing, the parties referred to the M & S report as an audit. Therefore, this decision will use that term.

[2] Letter of October 30, 2017, from Program Integrity to U-Care with overpayment request. AR 9-10.

overpayment findings related to "live in" or "live with"[3] timesheets because representatives of the Department of Health and Social Services told U-Care that this method was allowable; and 2) regardless of the estoppel claim, U-Care's timesheets substantially complied with regulatory requirements so that the failure to meet strict compliance with the regulatory requirements concerning start and stop times should be deemed a non-monetary error.

This decision finds that equitable estoppel indeed precludes Program Integrity from seeking repayment for billings based on the "live in" timesheets, as U-Care sought and received oral advice from a representative of the Department's Division of Senior and Disabilities Services ("DSDS") that this method of documentation was allowable. U-Care relied on that advice to their detriment. Program Integrity's findings based on these timesheets are reversed.

The audit findings based on failure to enter stop times on timesheets, and the consequent demand for repayment based on these findings, are upheld. The timesheets violate the applicable regulation, and the equitable legal theories raised by U-Care are insufficiently applicable to overturn the findings.

II. Facts

A. Background

U-Care is a Medicaid provider that provides personal care assistant services to qualified individuals who need assistance with various tasks. The PCAs provide help with various daily activities inside the home, such as preparing meals, shopping, toileting, dressing, attending medical appointments and other similar tasks.[4] U-Care receives payments for services provided based on the services and times set forth on the PCAs' timesheets, which provide the basis for billings. Medicaid, through its regulations implemented by the Department of Health and Social Services, pays for PCA services based on units billed, which in turn are based on times for each service provided. Services are authorized on a service plan providing a set amount of time per week to cover a range of approved tasks that an assessment has shown the patient to need.[5] U-Care began providing PCA services as an enrolled Medicaid provider in 2010.[6]

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[3] For ease of reference, these timesheets will be referred to as the "live in" timesheets, as the issue presented does not turn on the exact phrase used.

[4] See Standard timesheet, example at AR 22.

[5] 7 AAC 125.020-030.

[6] Testimony of Mr. Yang.

7 AAC 125.120 addresses required recordkeeping for PCAs. It states that there must be a "contemporaneous service record" which includes "a time sheet recording the date, time, and length of each visit."[7] The PCA program began in 2002. By 2010 it had grown exponentially.[8] In 2010, Medicaid regulation 7 AAC 105.230(d)(5) was adopted and became effective on February 1 of that year.[9] That regulation provides:

> (d) A provider shall maintain a clinical record, including a record of therapeutic services, in accordance with professional standards applicable to the provider, for each recipient. The clinical record must include:
>
> (5) stop and start times for time-based billing codes;

At least part of the purpose of the change in regulations was to deal with increased concerns about fraud.[10] Consequently, according to the regulations applicable to the 2012 calendar year at issue in this appeal, a timesheet for a PCA was required to include not only the date, time, and length of each visit, but also a start and stop time for services.

B. The Audit

For the 2012 calendar year, U-Care submitted a total of 5,395 claims for PCA services. Medicaid paid U-Care $3,171,345.73 in payment of those claims.[11] On January 3, 2016, M & S, acting on behalf of Program Integrity, notified U-Care that it had been selected for a desk review. After receiving a packet of documents, M & S notified U-Care that they would be conducting an on-site examination. As part of the audit process, M & S requested U-Care's records for a designated sample of its Medicaid claims submitted for calendar year 2012. The sample consisted of 90 claims that were selected using a random sample process. Based upon its audit of those 90 claims, M & S found overpayments of 78 claims and then extrapolated the findings to the total number of claims submitted to make its preliminary determination of $2,341,643.40 in overpayments.[12]

The audit findings that resulted in the overpayment determination fell into three main categories: 1) claims based on lack of start and/or stop times where PCAs lived with the clients and the timesheets reflected "live in" in lieu of start and/or stop times (50 claims); 2) claims based on other timesheet deficiencies – mostly timesheets that contained a start time and duration

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7 7 AAC 125.120(a) and (a)(4).
8 Testimony of Mr. Jones, 3/6/18, 1:53 p.m.
9 Testimony of Mr. Jones, 3/6/18, 1:50 p.m.
10 Testimony of Mr. Jones, 3/6/18, 1:53 p.m.
11 Preliminary Statistical Report of Alaska Medicaid Claims Desk Review, AR 19.
12 Excerpts of Prelim. Stat. Report, AR 5-8.

of services but no stop time (23 claims); and 3) claims based on unapproved or unsupported services and other miscellaneous issues, including claims in which the timesheets did not support units billed (5 claims).[13]

U-Care did not dispute the audit methodology or the findings concerning timesheets that did not support the number of units billed.[14] U-Care responded to the preliminary audit with objections and further documentation, disputing all other findings. M & S did not change its overall determination regarding the 73 claims in the first two categories. However, M&S did modify individual findings as follows:

- U-Care disputed the finding related to claim D267032 in which M & S found that the entry "11/12" was improperly billed as having no start and stop time. As to this claim, M & S agreed to interpret the entry as a start time of 11 and stop time of 12, but continued its overpayment finding for the subsequent entry of 4 pm, rejecting U-Care's claim that this was a start time of 4 pm and stop time of the end of the day. Thus, M & S allowed only four 15-minute units of the 32 claimed.
- U-Care disputed claim D267072 relating to M & S's finding that the PCA was not an enrolled provider at the time of the billing. M & S refused to overturn this finding because of a discrepancy in the name used on the paperwork provided by U-Care.[15]
- M & S overturned the overpayment findings on two other claims (D267034—illegible timesheet; D267040—ineligible PCA) based on U-Care's response and further documentation.

Based on these adjusted findings, M & S adjusted its preliminary audit findings and modified its overpayment calculation to find overpayments of $2,245,937.44 based on 75 claims.[16] Program Integrity accepted M & S's final report, and, by letter dated October 30, 2017, demanded repayment of $2,245,266.85.[17] U-Care appealed, requesting a formal hearing.[18] At the hearing, the audit findings that remained in dispute were as follows:

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13 AR 12-13.
14 Id.
15 Id.
16 AR 20.
17 There is a discrepancy of approximately $671 between the M & S final report and Program Integrity's demand that does not appear explained. However, in light of this decision, that discrepancy is not of significant relevance.
18 AR 1-4.

C. Issues in Dispute at the Hearing

1. The "Live In" Timesheets

This category covers 50 out of the 90 audited claims.[19] These weekly timesheets are on a standardized form. The form indicates the name of the recipient, the name of the PCA, and the dates of service. They also contain a list of the services the recipient receives with an "x" or checkmark marking the services provided each day. For each day there is a column captioned "IN/OUT" followed by three rows captioned "TIME". For each of the 50 claims under this category, the PCA appears to have written some version of "live with" "living with" or "live in" across the time rows under the IN/OUT columns. These timesheets contain a total number of minutes provided at the bottom of the daily columns.

M & S found that all 50 claims should be disallowed in their entirety. The overpayment findings were based primarily upon the interpretation that none of the 50 timesheets supporting the claims complied with the regulatory requirement that the timesheet completed by the PCA must contain both a start time and a stop time.[21]

2. Timesheets That Did Not Include a Stop Time

This category covered a total of 23 of the 90 audited claims. For 22 claims under this category, the timesheets listed a start time and a duration of service, but no stop time.[22] Claim D267032 is also included in this category, as M & S determined that the second entry of 4 pm did not include a stop time, and therefore found overpayment for services listed after 4 pm.

3. Other Miscellaneous Disputed Claims for Which Overpayments Were Found

By the time of the hearing, the only other remaining disputed claim was claim D267072, relating to an individual that M & S had determined was not an enrolled Medicaid Provider. U-Care provided further documentation at the hearing on this claim and Program Integrity agreed at the hearing to remove the overpayment finding as to this claim.

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[19] Summary of M & S final audit, AR 11-20.

[21] Mr. Hansen's testimony; AR 13. See 7 AAC 105.230(d)(5). M & S also made reference to speculation that the timesheets did not reflect a contemporaneous record of services provided. See 7 AAC 105.120. However, Program Integrity provided no evidence to support this argument at the hearing. Therefore, any suggestion that this regulation would support an overpayment finding is rejected as not established.

[22] AR 11-20. Claim D267036 included line items that fit under both categories 1 and 2.

D. U-Care's Arguments

In its appeal, U-Care made the following arguments: As to the "live in" timesheets, U-Care stated that U-Care's owner consulted with Beverly Churchill, a member of the Division of Senior and Disabilities Services – first in 2010 as part of U-Care's initial certification, and again in 2012. U-Care stated that Ms. Churchill specifically told the owner that they could use the words "live in" when the PCA was living in the home. Thus, U-Care argued, Program Integrity is equitably estopped from making overpayment findings on this ground.

As to the second category of claims, U-Care argued that timesheets which list start times and duration of services reflect sufficient information to support the billings and should be regarded as substantial compliance with the regulations resulting in, at most, non-monetary findings.[24] They further argued that M & S had made inconsistent findings with regard to this practice in other audits, and that this inconsistent practice should require overturning the overpayment findings.[25]

III. The Hearing

A hearing in this matter took place over two days, on March 6 and 7, 2018. The agency record was admitted without objection and both parties called witnesses and admitted a number of supplemental exhibits.[26]

A. *The "Live In" Timesheets*

1. U-Care's Witnesses

U-Care called three witnesses who testified concerning guidance provided by DSDS regarding the use of "live in" timesheets. Mr. Fue Yang, the owner of U-Care, testified as to how he came to permit use of this term in lieu of start and stop times. He also testified that he opened U-Care in 2010. He stated that he trains PCAs to understand the regulations, including how to fill out timesheets. Concerning the "live in" notations, Mr. Yang gave the following explanation.

At the beginning of the business, PCAs did not write "live in" on their timesheets. However, starting in approximately 2011, his business began to grow, and many of his PCAs came from other agencies, including some of the larger PCA service providers. Some of these

[24] U-Care's briefing also extends this argument to the "live in" timesheets.

[25] U-Care Appeal of M & S Audit, AR 1-4.

[26] The Division did object to U-Care's exhibit containing a sample of claims from a Medicaid audit of another company. After further proof of relevance, the documents were admitted.

PCAs had been using "live in" on timesheets at their previous agencies. Mr. Yang testified that he consulted with DSDS regularly about regulations and compliance. He testified that he had two discussions about this issue with Ms. Churchill, who worked in the quality assurance and certification unit of DSDS and was his regular contact. Mr. Yang testified that he brought a timesheet example of the "live in" entry to Ms. Churchill and that he was aware that another large agency was writing their timesheets this way. Mr. Yang said that Ms. Churchill told him it was okay to fill the timesheets out this way when the PCA was living with the client. He said he consulted with her twice about this timesheet issue and she gave him this same advice both times. Mr. Yang also stated that he did not begin to use the "live in" phrase on the timesheets until Ms. Churchill reviewed it and told him it was okay.[27] Mr. Yang later testified that he stopped allowing the use of the "live in" term after he received the M & S report.[28]

Two other witnesses, owners of other agencies that provide PCA services, corroborated Mr. Yang's testimony concerning guidance from DSDS. Ms. Kisha Smaw, the owner for Hearts and Hands of Care, Inc., also testified concerning similar guidance from DSDS. Hearts and Hands also provides PCA services. It was subject to an audit by Program Integrity in 2011. Ms. Smaw, similar to Mr. Yang, testified that she consulted with the quality assurance and certification unit of DSDS regularly concerning regulatory issues and to get clarification on numerous matters. Ms. Smaw stated that when the regulation changed in 2010, she received a few calls from other providers concerning the issue of using "live in" on PCA timesheets. Sometime around the end of 2010 and beginning of 2011, the issue came up because another agency was using the "live in" term. Ms. Smaw testified that she contacted Ms. Churchill and that Ms. Churchill told her that PCAs could write "live in" as long as they lived in the household. She stopped permitting this practice sometime around 2013 because other providers were saying that it was not permitted.[29]

Finally, Ms. Smaw testified that, in the M & S audit of her company, there were three timesheets with "live in" written on them under the block for start time. She testified that, in the audit of her company, M & S made findings that the timesheets did not have a stop time, but **did**

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[27] Testimony of Mr. Yang, 3/6/18, approximately 2:07 p.m.

[28] On cross examination, Mr. Yang acknowledged that he had testified in another hearing that he thought he had stopped using "live in" in or around 2013. However, when he reviewed the documents for this hearing he realized that it was not until he received the M & S report that he stopped the practice. Test. of Mr. Yang, 3/6/18, approximately 3:11 p.m.

[29] Test. of Ms. Smaw, 3/6/18, 4:05 p.m.

not make any finding concerning the use of the term "live in". U-Care corroborated this testimony with the audit sheets from that audit. These timesheets contained no stop time. The M & S findings in the audit corresponding to each of the timesheets used identical language finding that the timesheets reflected a start time but no stop time. There was no reference to the use of "live in" as the start time.[30]

Mr. Steve Ulofoshio, the Administrator of Consumer Care Network, Inc., was also called as a witness by U-Care. Consumer Care Network is another provider of PCA services. Consumer Care was also audited by M & S for calendar year 2012. That audit also found overpayments for use of the "live in" term in lieu of start and stop times on timesheets. Mr. Ulofoshio testified that he was aware of the regulation change in 2010, and he called DSDS and spoke to Ms. Churchill. Mr. Ulofoshio testified, consistent with Mr. Yang and Ms. Smaw, that Ms. Churchill told him that it was okay to put "live in" on the timesheet if the person lived with the client.[31]

Further corroboration for Mr. Yang's testimony on this issue was provided by Program Integrity witness Cory Steufer. Mr. Steufer is a staff auditor for M & S. Mr. Steufer testified that he conducted an exit interview with Mr. Yang to provide him a brief overview of the preliminary findings from the audit. He stated that he did discuss the "live in" issue on the timesheets and that Mr. Yang seemed to be taken by surprise by the finding. Mr. Steufer also recalled Mr. Yang saying that he was following what other agencies were doing.[32]

An additional factor bolstering the credibility of the testimony regarding Ms. Churchill's advice on the handling of "live-in" timesheets is the common-sense plausibility of such advice in the unique context of a live-in PCA. For a PCA who comes from outside for a specified shift (typically, these shifts are a few hours each day), an arrival and departure time can readily be recorded, and specific times are needed so that the time records can be cross-checked against evidence that the PCA was somewhere else during the specified time frame. With a live-in, this is much more difficult, as the person does not "arrive" or "leave," but instead may perform services in many small increments, as needed, during a 24-hour span. A practically-minded

30 U-Care Exh. R. Test. of Mr. Hansen, 3/7/18, 11:19 a.m.
31 Test. of Mr. Ulofoshio, 3/6/18, 4:10 p.m.
32 Test. of Mr. Steufer, 3/7/18, 11:03 a.m and 11:16 a.m.

person could well have concluded that requiring start and stop times in this context was not workable or worthwhile.

2. Program Integrity's Evidence

Allan Hansen, Manager of M & S, was called as a witness by Program Integrity. Mr. Hansen testified concerning how the audit was conducted. He also provided testimony concerning the overpayment findings for use of "live in" in lieu of start and stop times. Mr. Hansen noted that the applicable regulation, 7 AAC 105.230(d)(5), makes no distinction between PCAs who live with the clients and those who do not. He acknowledged that this issue had come up in other audits. He did not have an exact number, but stated that in the 30-40 audits he had been engaged in since 2010, he had seen the issue in possibly 10-15 audits. He later testified that he had seen it in maybe 5 audits.[33]

Mr. Hansen further testified to the purpose for the start and stop time regulation and that using "live in" is not an adequate substitute. Mr. Hansen testified that in the audits that he had done he had consistently made overpayment findings for use of the term "live in". When it was pointed out that in the Hearts and Hands audit M & S had not made any finding concerning the use of "live in" as a start time on three timesheets, Mr. Hansen testified that this was a clerical error and that the overpayment finding was correct even if the language in support of the finding was just copied from other places.[34]

Mr. Hansen acknowledged that M & S did not make overpayment findings for failure to list start and stop times in one behavioral health audit, because, he stated, in that case he learned that the Division of Behavioral Health had told community health clinics that they did not have to enter start and stop times on certain codes.[35]

Mr. Douglas Jones, the manager of the Program Integrity Unit for the Department of Health and Social Services, was called as a witness for Program Integrity. Mr. Jones noted that the PCA program began in 2002 and had expanded exponentially by 2010. He explained the need for specific hours and the need to have start and stop times in order to combat fraud.

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33 Test. of Mr. Hansen, 3/6/18, 9:48 a.m., 10:46 a.m.

34 The statement that this was a clerical error does not seem accurate, as it appears that the auditor simply copied language from other findings on these claims. However, even if these few claims reflected sloppy audit work in the Hearts and Hands case, it does not establish that M & S found "live in" to be an appropriate substitute for actual time entries in other audits.

35 Id and at 11:43 a.m.

Mr. Jones testified that the "live in" issue first came up possibly in 2008 to 2010. After 7 AAC 105.230(d)(5) came into effect on February 1, 2010, he contended that use of that term on the timesheets was treated as an overpayment.[36] Mr. Jones further testified that Program Integrity did have meetings with other members of the Department of Health and Social Services regarding timesheet issues. He recalled a large meeting with members of the Medicaid Fraud Unit and other state agencies. He stated that the "live in" issue was one of the topics at that meeting, although the main issue was whether to standardize the timesheet.

Mr. Jones testified that he had never spoken to Ms. Churchill and that he was unaware that anyone had told providers that they could write "live in" on timesheets. He testified that it was always *his* position that this was an unacceptable practice. In response to the question of whether providers could rely on verbal guidance, Mr. Jones stated that if the issue involved important questions, providers should follow up seeking written guidance.[37]

Mr. Jones stated Program Integrity's position that the regulation is clear on the point that start and stop times are required. He further opined that the regulation provides the only controlling guidance that providers should rely on. Mr. Jones acknowledged that Program Integrity never sent out written guidance on this issue, such as an e-alert or memorandum, to alert providers to the problem of writing "live in" on timesheets, and acknowledged, on cross examination, that they had done so with other regulatory changes.[38] No explanation was offered as to why no guidance was given to prevent providers from making the plausible, common-sense assumption that time in and time out might not be necessary for someone already living in the home. Program Integrity did not produce Beverly Churchill, its former employee, as a witness, nor provide any indication that she was unavailable.

I find, as a matter of fact, that Mr. Yang's testimony concerning guidance he received from Ms. Churchill is credible and well-corroborated. Therefore, it is established that Ms. Churchill told Mr. Yang that U-Care could use the term "live in" on its timesheets.

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36 Test. of Mr. Jones, 3/6/18 1:50 p.m.

37 Test. of Mr. Jones, 3/6/18 2:00 pm.

38 Test. of Mr. Jones 3/6/18 2:01 pm.

3. Discussion: Audit Finding is Overturned

U-Care argues that equitable estoppel bars Program Integrity from making overpayment findings based on the use of "live in" in lieu of a start and stop time. To successfully invoke estoppel against a governmental agency, four elements must be established:

1. the assertion of a governmental position by either conduct or words;
2. an act which reasonably relied upon the governmental position;
3. resulting prejudice; and
4. estoppel serves the interest of justice so as to limit public injury.[39]

U-Care clearly established the first element based on the testimony at the hearing. Three witnesses testified that Ms. Churchill, a member of the quality assurance and certification staff at DSDS, provided guidance prior to the 2012 calendar year that providers could use the term "live in" on timesheets where the PCA lived with the client. Those statements were credible. Mr. Yang's testimony to that effect was further corroborated by the testimony of M & S staff auditor Steufer who noted that Mr. Yang seemed surprised when he was told at the exit interview that "live in" was not permitted.

U-Care's reliance on that guidance was clearly reasonable. According to all three witnesses, Ms. Churchill was the person whom providers commonly spoke with when they had questions about regulations and other compliance issues. Moreover, despite the fact that the agency had knowledge that a number of providers were using the "live in" method of timesheet entry and actually discussed the issue, the agency took no action to apprise the providers that this would not be accepted.

U-Care has also shown that it was substantially prejudiced by its reliance on the governmental position – the third element of estoppel. If it had been advised that its timesheets did not comport with regulatory requirements at any time during the 2012 calendar year, or when Mr. Yang asked DSDS for specific advice on this issue, it could have rectified the alleged deficiency, and avoided findings in an audit conducted four years later that resulted in a disallowance of over 60% of its billings.

The fourth element is also satisfied. Regulated businesses should be able to rely upon the statements of the governmental official in the agency overseeing their certification and quality assurance when they ask a specific question about how to fill out timesheets – the essential

[39] *Wassink v. Hawkins*, 763 P.3d 971, 975 (Alaska 1988).

document to support their billings. This is especially true in this case, where the government agency apparently gave a number of providers the same advice; the agency was aware that providers were using a method that did not comply with the wording of the government regulations, and the agency took no action to notify the providers that their method of filling out the timesheets would not be accepted.

Program Integrity's response, in testimony and argument, on this issue is legally flawed. At the hearing, Program Integrity relied on testimony that 7 AAC 105.230(d)(5) is clear and there was no need for further guidance. Mr. Jones also testified that providers should have obtained such guidance in writing before relying on the statements of Ms. Churchill. As noted above, words provided by a government official with authority and reasonably relied on may form the basis of an estoppel claim.[40] 7 AAC 105.230(d)(5) is far from self-explanatory in a situation where the PCA is already in the home when the day begins, and still there when it ends. Ms. Churchill's advice, therefore, was not unreasonable.

In its closing argument, Program Integrity argues that Mr. Yang's testimony is hearsay and therefore should not be relied upon to find estoppel. That argument too is wrong as a matter of law. Statements are only hearsay if they are offered "for the truth of the matter asserted."[41] U-Care offered the statements of Mr. Yang, Ms. Smaw and Mr. Ulofosio as to what Ms. Churchill had said, not to prove that the use of "live in" was proper under the regulations, but simply to establish that she had made the statement. This is not hearsay.[42]

Moreover, even if this were not the case, the statements are considered sufficiently reliable to be admissible under the Alaska Rules of Evidence. The testimony concerning the statements of Ms. Churchill, if the evidence rules applied, would be non-hearsay and admissible as an admission by a party-opponent under Ak. R. Ev. 801(d)(2)(A)(C) and (D). Notwithstanding the above, the rules of evidence do not apply to the hearing in this case. More importantly, the statements of Mr. Yang on this point were credible and supported by other corroborating statements and evidence.

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40 Id.

41 Alaska Rules of Evidence 801(c).

42 Id.

Based on the above discussion, Program Integrity's finding of overpayment for the 50 claims based on the use of "live in" or "live with" on the timesheets is overturned. The revised overpayment claim must be reduced by all calculations related to these 50 claims.

B. Claims with Start Times and No Stop Times

1. Factual Issues

The audit identified 23 claims for which the timesheets showed a start time and no stop time.[43] For these claims, Program Integrity made findings of overpayment based on the failure to have a stop time as required by 7 AAC 105.230(d)(5). The timesheets that are the subject of these findings are similar: all list a start time, a list of services provided each day and a total duration listed in minutes. U-Care's argument with respect to the findings on these claims is that the timesheets constitute substantial compliance with the regulatory scheme, and, therefore, any finding should be considered non-monetary. There was only one area of disputed fact addressed at the hearing somewhat relevant to this issue.

On the day of the hearing, U-Care provided and sought to introduce a compilation of Weekly Schedules that Mr. Yang testified were signed by each PCA and client. The schedules reflect the time to be worked each day of the week and the total time and minutes to be worked each day. Mr. Yang testified that he required these to be signed so that the PCA would know what hours and work schedule was allowed. These schedules were not provided to the auditors either in response to any requests for documents or at the field audit. Mr. Yang provided them to his counsel the day before the hearing.[44] Program Integrity called witnesses to point out that these documents would have been considered if they had been provided at any point in the process. Mr. Yang testified that he had offered them to the auditors at the end of the audit, but they said they were too busy to take them. Program Integrity offered witness testimony that directly contradicted Mr. Yang on this point, noting that the auditors would have taken the documents if offered at the field audit and, further, would have accepted them at any time later during the review and appeal process.[45]

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[43] This finding also applies to claim D267032. In that claim, the preliminary audit report made a finding concerning the entry of 11/12. In the final report, the audit accepted U-Care's explanation that 11/12 referred to a start time of 11 and stop time of 12. However, the overpayment finding remained because the timesheet reflected a second entry listing 4 pm. The auditors assumed this referred to a return time of 4 pm and rejected the claim that 4 pm to the end of the day complied with the regulatory requirement for stop times.

[44] Statement of Counsel for U-Care.

[45] Testimony of Mr. Hansen, Mr. Steufer and Mr. Jones.

The testimony establishes that Mr. Yang's statement that he offered these documents to the auditors is not credible. However, looking at the documents themselves, they do not appear to have been newly created. Each has obviously differing signatures that appear to be written by different people at different times. Moreover, the dates aligned with the signatures are different and do not appear to reflect constructed documents. Therefore, based on facial characteristics and context alone, the documents appear to be genuine. However, the fact that they were provided for the first time at the hearing suggests that they should not be relied on to establish any issue of significance to this decision, because there has not been an adequate opportunity for the opposing party to fully test their veracity.

2. Discussion: Audit Finding Upheld

It is undisputed that U-Care's individual PCA timesheets contained the date, time, and length of each visit. It is also undisputed that they contained a start time, but did not contain a stop time. The timesheets, while compliant with regulatory requirements prior to February 1, 2010, did not comply with the change instituted effective February 1, 2010, requiring a stop time. U-Care argues that its timesheets, that include a start time and duration of services rendered, supply a reasonable basis from which to infer the stop time of the PCA services on a particular day. However, this argument is not persuasive. When the specific PCA regulation, 7 AAC 125.120, is read in conjunction with the general Medicaid regulation for time-based billing units, 7 AAC 105.230(d)(5), the Medicaid program requires that a PCA's timesheet must contain a start time, a stop time, and a duration. U-Care's timesheets, that only contain two of those elements, the start time and the duration, do not satisfy the regulatory requirements.

U-Care makes three interrelated arguments in support of overturning these findings. First, it argues that Program Integrity has inconsistently applied its approach to lack of compliance with this regulation in other audits. Second, U-Care argues that these claims were supported with documentation that substantially complied with regulatory requirements and that, consistent with previous agency practice, the findings should be considered non-monetary.[46] Finally, U-Care argues that permitting the overpayment findings to stand would result in unjust enrichment to the Department of Health and Social Services by permitting the Department to obtain repayment for services that had clearly been provided on behalf of qualifying individuals.

[46] U-Care Closing Arg. at 8-14.

a. Failure to Treat Like Entities Consistently

U-Care's first claim in based on testimony at the hearing that M & S had previously made non-monetary findings in audits of behavioral health providers who failed to list start and stop times on timesheets. Mr. Hansen acknowledged that 7 AAC 105.230(d)(5) applies equally to behavioral health providers providing Medicaid services. He further agreed that he was familiar with audits of certain entities in which the failure to list start and stop times had been deemed non-monetary. He testified that the reason M & S did not make an overpayment finding in those cases was that M & S was told by the Division of Behavioral Health that they provided guidance to community health clinics that the requirement for start and stop times was limited to certain procedure codes. The audit findings were made in accordance with the guidance he was given by the division.[47] No other evidence was introduced on this point.

Citing *State Dep't of Health and Social Services v. North Star Hospital*,[48] U-Care argues that Program Integrity's decision to find failures to list start and stop times non-monetary in behavioral health provider audits, while finding the same failure to be a monetary finding for PCA service providers, is arbitrary and an impermissible exercise of discretion. The problem with this argument is twofold. First, Program Integrity appears to have treated all PCA service providers similarly with regard to the failure to provide stop times and/or start and stop times, and there is insufficient evidence in the record to show that the circumstances with regard to unnamed behavioral health audits are similar in nature and time. Second, while the Court's decision in *North Star* cited to the different treatment of different hospitals by the applicable government agency with regard to rate setting, the ultimate reversal of the Department's decision did not turn on that disparate treatment.

In *North Star*, the Court found that the Department of Health and Social Services abused its discretion in refusing to grant a temporary rate under the Medicaid reimbursement statute based on a number of factors. The Court found that DHSS was aware that it was relying on outdated data that was detrimental to the hospital, its reliance on the outdated data was due to delays in auditing that were not the fault of the hospital, DHSS had the interim data necessary to grant a temporary rate, and was authorized under the statute to grant a rate based on this data. The Court also noted that DHSS had appeared to treat different hospitals differently and this

47 Test. of Mr. Hansen, 3/6/18, 10:46 p.m.
48 280 P.3d 575 (Alaska 2012)

undercut DHSS' argument that they were following their regulations to the letter in their treatment of *North Star*.

In this case Program Integrity's reliance on the requirement of start and stop times is not analogous to the agency's knowing reliance on outdated data applicable in *North Star*. U-Care cites to no statute that authorizes Program Integrity to use criteria other than the regulatory requirements for timesheet review. Nor is there sufficient evidence that Program Integrity has arbitrarily treated similarly-situated entities differently so as to preclude application of the regulation.

Garner v. State Dep't of Health and Soc. Services,[49] cited by U-Care, does not aid U-Care on this point. *Garner* involved an appeal of the denial of dental care to an individual who was over the age of 21. The Court overturned the denial finding the agency abused its discretion because it applied one regulation supporting denial and completely ignored the regulation permitting an exception for undue hardship. The situation is not analogous as there is no regulation permitting an exception to 7 AAC 105.230(d)(5) and no argument that Program Integrity has ignored any applicable regulations.

b. Substantial Compliance

U-Care also argues that the documentation provided met all of the requirements necessary to accomplish the stated intent of the regulatory scheme.[50] They note the timesheets at issue contain all of the requirements of 7 AAC 105.230(b) including:

(1) name of the recipient receiving treatment;

(2) specific services provided;

(3) extent of each service provided;

(4) date on which each service was provided; and

(5) individual who provided each service.

Thus, they argue, any failure to list stop times should be, at most, a non-monetary finding.

In support of this claim, U-Care relies on *Adamson v. Municipality of Anchorage.*[51] *Adamson* involved a claim by a firefighter who developed prostate cancer. The individual filed a worker's compensation claim under a then recently enacted statute creating a presumption that

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49 63 P.3d 264 (Alaska 2003).
50 U-Care Closing Arg. at 9.
51 333 P.3d 5 (Alaska 2014).

certain diseases contracted by firefighters, including prostate cancer, were to be deemed work related when specific conditions were met. In *Adamson*, the Municipality argued that the individual did not qualify for the presumption of compensability because he had not strictly complied with the regulatory requirements. The Court noted: "in applying the substantial compliance doctrine, we consider the purpose served by the statutory requirements because 'substantial compliance involves conduct which falls short of strict compliance…but which affords the public the same protection that strict compliance would offer.'"[52] In addition, the doctrine of substantial compliance applies "to carry out legislative intent and give meaning to all parts of a statute 'without producing harsh and unrealistic results.'"[53]

Applying these principles, the Court found for the firefighter, on the facts of that case, because the clear intent of the statute was to increase coverage for firefighters who contracted certain diseases and who were exposed to toxic materials as part of their job. The court noted that requiring a firefighter to comply with strict regulatory requirements that did not exist when he was hired or exposed to the toxins would circumvent the clear intent of the statute and lead to harsh and unrealistic results.

The failure to list a stop time on timesheets – a failure to comply with 7 AAC 105.230(d)(5) – does not present a similar situation. First, the regulation is clear and unambiguous in its requirement that the timesheet reflect both a start and stop time in this context. Second, listing a start time and duration of service does not accomplish all of the purposes for the regulatory requirement of entering both a start and stop time. Mr. Jones noted in his testimony that between when the PCA program began in 2002 and 2010, the program had grown exponentially. Standards of documentation were necessary to combat fraud. Requiring specifics for hours worked and other requirements aids the agency's ability to make sure that payments are made in accordance with services provided. He gave examples, such as being able to determine if services are being billed at a time when PCAs are not in the home or are working other jobs or are providing PCA services for other clients.[54] For example, non-live-in PCAs often work a split shift. They may be in for a few hours in the morning and return later in the day. In those circumstances, start and stop times are necessary to be able to verify when the

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52 Id. at 13.
53 Id. quoting *Jones v. Short*, 696 P.2d 665, 667 (Alaska 1985).
54 Test. of Mr. Jones, 3/6/18, 1:35 p.m.

PCA is in the home. Simply adding the total time to a start time listed on the timesheet would not provide the same information.

Moreover, requiring start and stop times is not "in tension" with the underlying purposes of the regulatory scheme setting forth required documentation to support billing for PCA services. The State of Alaska is required to set forth a scheme to ensure that billing is only for services rendered and to combat fraud. Requiring providers to strictly comply with the documentation listed in the regulations allows Program Integrity to made sure that billings properly account for actual services rendered.[55]

c. Unjust Enrichment

Finally, U-Care argues that seeking recoupment of over $2.2 million in payments violates the principle of unjust enrichment, where as here, there is no argument that services were not provided or that the provider engaged in fraud of any kind. This argument, however, has no legal applicability to the regulatory scheme at issue in this matter. Program Integrity's obligation to seek recoupment is clearly set forth in statutory and regulatory requirements. The requirement to conduct audits and seek recoupment based on findings of documentary irregularities does not turn on proof that the provider is actually committing fraud – that is, billing for services not provided.[56]

Unjust enrichment is akin to restitution and provides a basis, where a claim for recovery exists, to recover money or property unjustly received, retained or appropriated.[57] It is not clear that unjust enrichment could ever stand as a basis for a claim against a government program seeking recoupment for payments made in violation of regulations. However, even if a viable theory, it clearly does not preclude a government agency from seeking specifically authorized repayment of money provided in violation of regulations.

Unlike the "live in" timesheet issue, no one in the Department of Health and Social Services or the underlying divisions advised U-Care that it could ignore the stop time requirement for PCA timesheets. None of the legal attacks put forth by U-Care are sufficiently analogous to bar Program Integrity from finding overpayment for failure to comply with the

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55 *Adamson*, 333 P.3d at 13.
56 See 7 AAC 105.260.
57 *Old Harbor Native Corp. v. Afognak Joint Venture*, 30 P.3d 101, 107 (Alaska 2001).

regulations that govern what must be contained in timesheets used for billing. For this reason, the audit findings concerning the 23 timesheets with failures to list stop times are upheld.

IV. Conclusion

Program Integrity's disallowance of the 50 claims concerning the "live in" timesheets is reversed under the doctrine of equitable estoppel. The disallowance of the 23 claims for failure to list stop times is upheld. The claim regarding the PCA originally found not to be an enrolled provider is reversed based on Program Integrity's acknowledgement at the hearing that sufficient documentation was provided to prove the provider was enrolled at the time services were provided. Program Integrity is to recalculate the overpayment, based upon this decision. Jurisdiction is not retained. If U-Care disputes the statistical or mathematical accuracy of the recalculation, it will have new appeal rights confined to that issue alone.[58]

DATED this 6th day of April 2018.

By: *Signed*
Karen L. Loeffler
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision under the authority of AS 44.64.060(e)(1) as the final administrative determination in this matter.

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.

DATED this 21st day of May, 2018.

By: *Signed*
Name: Erin E. Shine
Title: Special Assistant to the Commissioner
Agency: Office of the Commissioner, DHSS

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

[58] The appeal time for the matters resolved by this decision will run from the date of its adoption in final form.