

**5BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of)	
)	
EMPLOYER A)	OAH No. 18-0638-CCA
)	Agency No. 10015765
_____)	

DECISION

I. Introduction

Employer A appeals the Division of Public Assistance Child Care Assistance Program’s decision to deny a request for payment for child care provided to four children during March 2018. The program denied the request as untimely, because the request for payment was faxed on May 9, 2018, more than a month after the care was provided. Employer A had faxed an earlier request for payment, on April 29, 2018, but inadvertently attached the wrong form. The division denied the April 29, 2018 request rather than returning it for correction.

The April 29, 2018 request was timely. Because the April request was a timely request for payment for the children at the home day care in March 2018, the May 9, 2018 submission should be treated as a timely corrected version of the April 29, 2018 request for payment. The division’s denial of the April 29, 2018 and May 9, 2018 requests for payment are reversed. The division should pay Employer A the child care assistance for care provided to the four children in March 2018.

II. Facts

F L owns Employer A, and two other child care facilities. B T is the administrator of the business. He handles the billing.¹ The Division of Public Assistance’s Child Care Assistance Program denied payment for day care provided at Employer A home day care for B F, B X, B X, and U S (the four children) during the month of March 2018. Ms. L requested a hearing.

According to Ms. L, she dropped a request for payment for the four children’s care for the month of March in the drop box at the program office on April 6, 2018.² The division does not have a record of receiving this request for payment in April 2018 in its file for Employer A home day care, or in the file for either of Ms. L’s other two child care facilities.³

¹ Testimony of T.
² Div. Ex. 4.1; Employer A Ex. A at 1.
³ Testimony of C.

Mr. T did not see a deposit corresponding to the request for payment for the four children's care on April 26, 2018 as expected, so he attempted to contact Employer B.⁴ Employer B administers the child care program in the City A area for the division.⁵ Mr. T did not succeed in reaching Employer B's billing person by phone, so he decided to resubmit the request for payment for the four children.

On April 29, 2018, Mr. T faxed Employer B.⁶ The subject line on his fax cover sheet said "home day care march CCA." However, instead of attaching a copy of the payment request form for the four children attending the home day care in March 2018, Mr. T inadvertently faxed Employer B a different form, dated May 1, 2017, for a different child, B J.⁷

Employer B first responded to the submission of the erroneous form by calling Ms. L at Employer A, and informing her that the form submitted for B J was incorrect.⁸ Mr. T was on duty with the military at the time. When he arrived home, Ms. L told him about Employer B's call and that he needed to resubmit the form for B J.⁹ Then, on May 2, 2018, Employer B sent Employer A a notice denying the request for payment received on April 29, 2018 for the month of April 2017. The notice gave the program's "ICCIS" case number associated with Employer A, 10015765. The notice gave two reasons for denying payment. First, "the request for payment [form] CC78 contained errors or had omission needing correction. The needed corrections . . . were not received by the due date . . ." The second reason was "you used the incorrect form."¹⁰

Mr. T then faxed Employer B a request for payment for the four children for care provided at Employer A, ICCIS number 10015765, during the month of March 2018. The fax cover sheet is dated May 9, 2018. The subject line says "March 2018 CCA" and the cover message says "see attached as requested." The form received by the division is date stamped as received on May 8, 2018.¹¹

⁴ Employer A Ex. A at 8. Mr. T testified at the hearing that he wrote this statement.

⁵ The child care program office in Anchorage is the oversight agency for Employer B, and all documents submitted to Employer B are forwarded to the program office. Testimony of C.

⁶ Testimony of T; Employer A Ex. A at 8.

⁷ *Id.*, Employer A Ex. A 2, 3, 8.

⁸ Div. Ex. 4.1; Employer A Ex. A at 1, 8. It is not clear when Employer B called Ms. L; the written statement signed by Ms. L places the date at May 2 or 3; the written position statement from Mr. T gives the date as April 30, 2018.

⁹ Testimony of T.

¹⁰ Employer A Ex. B at 1.

¹¹ Employer A Ex. A at 6 - 7; Div. Ex. 2.1.

On May 9, 2018, Employer B denied this request, because it was received after the deadline of April 30, 2018.¹² Ms. L requested a hearing.¹³

A telephonic hearing convened on July 17, 2018 and concluded on July 19, 2018. Ms. L and Mr. T participated, Ms. L with the assistance of interpreters from Language Link, the Office of Administrative Hearings' provider of language interpretation services. Sally Dial, Fair Hearing Representative with the Division of Public Assistance, represented the division. Public Assistance Analyst S C testified for the division.

III. Discussion

A. Burden of Proof

The administrative hearing in this matter was requested under 7 AAC 41.443. Under the regulations governing hearings before the Office of Administrative Hearings, the burden of proof and of going forward with evidence is on the party who requested the hearing, unless otherwise provided in statute or regulation. Here, because 7 AAC 41.443 does not address the issue of burden of proof, the burden is on the party requesting the hearing and seeking relief, Employer A. The standard of proof is preponderance of the evidence. To prove a fact by a preponderance of evidence, a party "must show that the fact more likely than not is true."¹⁴

B. Request for payment due date and corrections

When a parent or guardian receives assistance from the child care assistance program, they do not receive assistance directly. Instead, the program pays the child care provider. The regulations governing the child care assistance program require child care providers to submit a request for payment no later than the last day of the month immediately following the month in which child care services were provided.¹⁵ Therefore, requests for payment for care rendered in March 2018 were due no later than April 30, 2018.

The process for handling incorrect or incomplete requests is also specified in regulation: "[i]f the department determines that a request for payment includes information that is incorrect or incomplete, the department may obtain the correct or missing information or will return the request to the provider. Thus, the division has the discretion to seek out missing information

¹² Div. Ex. 2 - 2.1 and 3.

¹³ Div. Ex. 4.

¹⁴ 2 AAC 64.290(e).

¹⁵ 7 AAC 41.250(a).

itself. If it does not, however, the division is obligated to return the request to the provider as incomplete.

The regulation goes on to state that the department will not make payment for a request for payment that has been returned as incorrect or incomplete unless the department receives the correct or missing information on or before the last day of the month following the month in which the department returned the request.”¹⁶

C. The drop box

Employer A argues that “the payment request for March 2018 was submitted in time and twice.”¹⁷ Mr. T dated the request for payment form for the four children April 5, 2018.¹⁸ According to Employer A, the form was submitted the first time by Ms. L to the drop box on April 6, 2018. Employer A argues that the program must have misplaced the form, stating that the program has lost or misplaced forms submitted by Employer A approximately five times in the past.¹⁹ Mr. T testified that because of this experience, he keeps a scanned copy when he submits a request for payment.

It is inevitable that a form will occasionally be lost or misplaced, but that does not appear to be the most likely explanation here. The program looked for a misplaced form in the most obvious places – the files for Ms. L’s other two child care facilities – and found nothing.

Ms. L’s testimony and written statement on this point were not entirely credible. The program has no record of receiving the request for payment form in April. Mr. T testified that he normally faxes all the requests for payment, but that month, Ms. L wanted to hand deliver the request for payment. Ms. L testified that she did not ordinarily handle requests for payment, but wanted to learn more about the business and also just wanted to get out. She said she offered to help Mr. T by dropping off the form. When asked how she knew where to go, Ms. L testified that the office was in the same place as the food program, and that if she needs directions to a place she can always use her cell phone to get directions.

It is possible that Ms. L dropped off the payment request form and the division misplaced it. However, Employer A did not provide proof of delivery other than Ms. L’s testimony. The explanation of why the form was dropped in the drop box rather than faxed according to Mr. T’s

¹⁶ 7 AAC 41.250(a).

¹⁷ Div. Ex. 4.1; Employer A Ex. A at 1.

¹⁸ Div. Ex. 2.1.

¹⁹ Div. Ex. 4.1; Employer A Ex. A at 1.

usual practice was not persuasive. Employer A did not meet its burden of proving it is more likely than not that a request for payment was submitted on April 5, 2018. However, Mr. T submitted another request for payment on April 29, 2018.

D. The April 29, 2018 and May 9, 2018 faxes

Mr. T attempted to submit a request for payment for the four children on April 29, 2018 by fax. But, instead of attaching the request for payment for the care rendered to the four children at the home day care in March 2018 that he intended to transmit, he accidentally attached an old billing report form for a different child to the fax cover sheet.²⁰ Mr. T admits that he attached the wrong form.²¹ He testified persuasively that he had no reason to resubmit the old billing report form for B J. The parties agreed that child care assistance for care provided at the home day care for B J in April 2017 had already been paid. The form Mr. T faxed was the wrong form and referred to the wrong child, and it was for care rendered in a previous year that had already been paid for -- in other words, it was obviously wrong. Still, the form had the ICCIS number for the home day care, the facility referred to on the fax cover sheet. The fax cover sheet, the ICCIS number, and the timing are all clues as to what Employer A intended to submit on April 29, 2018.

The division did not dispute that this fax was transmitted before the end of April 2018, that Mr. T intended to fax a request for payment, or that Mr. T inadvertently attached the wrong form to the fax cover sheet. Employer B called Ms. L to tell her an incorrect form had been filed.

Employer B responded to Mr. T's fax on May 2, 2018, with a form denial notice. Two boxes on the form were checked. The first indicated that "the Request for Payment CC78 contained errors or had omission needing correction" and the needed corrections (which were not specified) were not received by the due date (also not specified).²² The second box explained "[y]ou used the incorrect form." The denial form letter referred to the "Request for Payment CC78" in numerous places, even though the form attached to Mr. T's fax was not a CC78 form. Despite its imperfections, this notice clearly conveyed that 1) Employer B understood the fax as a request for payment, and 2) Employer B was denying the request. The notice did not offer an opportunity to correct the submission. It did include the form necessary to request a hearing.

Mr. T testified that after he received the denial notice he realized that he had attached the wrong form to his April 29, 2018 fax. So, on May 9, 2018 Mr. T faxed in the correct CC78 form

²⁰ Employer A Ex. A at 2 - 3; Testimony of T.

²¹ Employer A Ex. A at 9.

²² Employer A Ex. B at 1.

for care provided in March 2018 listing the four children, with a note on the cover sheet saying “see attached as requested.”²³ Employer B issued another denial letter, this time stating that it received the form after the deadline.²⁴

F. Was the program correct to deny the request?

Employer A first attempt to submit a request for payment, Ms. L’s hand delivery to the drop box, was not received by the program. Employer A second attempt, Mr. T’s fax on April 29, 2018, did not include the right form. The program did not receive a complete request for payment form for the four children’s care in March 2018 until May 9, 2018.

The question is whether the program should have considered Mr. T’s April 29 fax a timely submission of a request for payment and returned the request to Mr. T to allow him an opportunity to correct his error by submitting the right form (which he did on May 9, 2018). Mr. T testified that he informed the child care program when he recognized the error. He wrote “as requested” note on the May 9, 2018 fax cover sheet. Employer A views the May 9, 2018 fax as a corrected version of the April 29, 2018 request for payment.

The regulation provides: “If the department determines that a request for payment includes information that is incorrect or incomplete, the department may obtain the correct or missing information *or will return the request to the provider*. The department will not make payment for a request for payment that has been returned as incorrect or incomplete unless the department receives the correct or missing information on or before the last day of the month following the month in which the department returned the request.”²⁵ The language “or will return the request to the provider” is not discretionary. The word “will” is used “to state what the adopting state agency will do under specified circumstances. The ‘will’ language commits the agency to a particular procedure or action.”²⁶

In this case, Employer B determined that Mr. T’s April 29, 2018 fax was a request for payment, and that the request for payment contained errors or omissions needing correction. However, instead of returning the request with a request for corrections and a deadline for

²³ Employer A Ex. A at 6 - 7. This form was submitted on May 9, 2018, according to Mr. T’s fax cover sheet, Employer A Ex. A at 6, as well as the fax time stamp on the copy received by the program, Div. Ex. 2.1. However, it was date stamped “May 8, 2018 Child Care Assistance.”

²⁴ Div. Ex. 3, Employer A Ex. B at 3.

²⁵ 7 AAC 41.250(a) (emphasis added).

²⁶ Department of Law, Drafting Manual for Administrative Regulations (August 2015) at 52.

submitting those corrections, Employer B denied the request.²⁷ This is not consistent with the requirements of 7 AAC 41.250. Because Employer B did not choose to obtain the correct or missing information itself, and because it identified the fax as a request for payment, Employer B was obligated to return the request to Employer A for correction. Employer A should then have been given until the last day of the month following the return of the request to supply the correct information.

The division views the April 29, 2018 request and the May 9, 2018 request as two separate requests for payment. The division argued that Employer A May 9, 2018 fax was not a corrected submittal, but rather a new request for payment, because it did not refer to the same children as the April 29, 2018 fax. The program representative testified that there was not enough information submitted with the April 29, 2018 fax to determine that Employer A was requesting payment for the four children at the home day care, because the only child name on the form was B J. However, the division has not explained what the purpose of the April 29, 2018 request could have been, if not to request payment for the four children at the home day care in March 2018. The program's argument that it did not have enough information to make sense of the April 29, 2018 request is not persuasive.

Furthermore, the division argued that it would have been against policy to consider the May 9, 2018 fax a corrected request for payment rather than a new request for payment. Specifically, the division cited a policy on returning a request for payment unpaid for corrections requiring staff to include in a case note "information explaining why the *Request for Payment* CC78 is returned unpaid *for the specific child(ren)*."²⁸ The program argued, in essence, that it was only able to return a request for payment for correction if the original request identified the specific children the corrected submission was anticipated to address. The form Mr. T submitted related to B J, and not the four children actually at the home day care in March 2018. Based on the policy language about specific children, the division argued that it was compelled to treat the May 9, 2018 fax as a new request for payment rather than a corrected version of the April 29, 2018 request for payment. However, the policy does not appear to anticipate the precise scenario presented here, and, unlike the regulation, it does not have the force of law. The April 29, 2018 fax cover sheet note said "home day care march cca," The form submitted includes the correct

²⁷ Employer A Ex. B at 1.

²⁸ Div. Ex. 7 (Department of Health and Social Services, Division of Public Assistance, Child Care Program Office, Child Care Assistance Program Policies and Procedures Manual (rev'd eff. April 1, 2018) at 4350-3.1.b.)

ICCIS number for the home day care. These indicate that Mr. T intended to submit the request for payment for the children at the home day care in March 2018.

Employer A May 9, 2018 submission should be treated as a corrected version of the April 29, 2018 request for payment. The April 29, 2018 request for payment was timely for care rendered in March 2018, and the corrected version delivered May 9, 2018 was also timely because it was transmitted within 30 days of the division's May 2, 2018 denial letter, which informed Employer A of the deficiency of the April 29, 2018 submission. Under the regulation, the April 29, 2018 request should have been returned to Employer A, and if it had been returned promptly on April 30, 2018, under the regulation Employer A would have had until May 31, 2018 to submit corrections. Because the corrections were submitted on May 9, 2018, they should be considered timely under the regulation.

IV. Conclusion

The division's denial of the request for payment for care provided for B F, B X, B X, and U S at Employer A during the month of March 2018 is reversed.

DATED: August 13, 2018.

By: Signed
Signature
Kathryn L. Kurtz
Name
Administrative Law Judge
Title

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

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 28th day of August, 2018.

By: Signed
Signature
Kathryn L. Kurtz
Name
Administrative Law Judge
Title

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