

STATE OF NORTH CAROLINA  
COUNTY OF GUILFORD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
13DHR14369

J MARK OLIVER DDS, PLLC Petitioner  v.  N C DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE Respondent	<b>ORDER GRANTING SUMMARY JUDGMENT IN PART</b>
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THIS MATTER comes before the Honorable Donald W. Overby, Administrative Law Judge presiding for consideration of Petitioner's Motion for Summary Judgment filed with the Office of Administrative Hearings (OAH) on November 19, 2013, and Respondent's response thereto filed with OAH on December 2, 2013.

Upon consideration of Petitioner's Motion for Summary Judgment pursuant to Rule 56 of the NC Rules of Civil Procedure and Respondent's response thereto, the undersigned **GRANTS** Summary Judgment for Respondent as to Issue 1, and **GRANTS** Petitioner's Summary Judgment in part as to Issue 2.

**APPEARANCES**

For Petitioner: Knicole Carson Emanuel  
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For Respondent: Rajeev K. Premakumar  
Asst. Attorney General  
NC Department of Justice  
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## **ISSUES**

1. Whether Respondent DMA violated N.C. Gen. Stat. § 108C-5(j) by failing to credential PCG's auditor prior to extrapolation?
2. Whether Respondent DMA violated N.C. Gen. Stat. § 108C-5(i) by failing to provide Petitioner proper notice prior to extrapolation?

## **FINDINGS OF FACT**

### **ISSUE 1**

1. There is no genuine issue of material fact that the clinical reviewer, Cassie Minor, who performed the audit in this case, has the appropriate credentials to perform this audit. In addition to its statutory duty, Respondent's agent Public Consulting Group ("PCG") has a contractual obligation to confirm all certifications, licenses, good standing status, and continuing education credits for all its employees before such employees are allowed to participate in Respondent's post-payment review audits. Additionally, all PCG employees are required to be educated (1) in the relevant service type, and (2) complete the appropriate service type training from DMA. PCG has complied with its statutory and contractual duties.

### **ISSUE 2**

2. There is no genuine issue of material fact that on October 26, 2012, Respondent's agent PCG as a Medicaid review contractor issued a Notice of Tentative Overpayment ("TNO") to Petitioner. In the TNO, PCG advised Petitioner that the results of its post-payment review of Medicaid claims submitted by Petitioner revealed that Petitioner "failed to substantially comply with the requirements of State and federal law or regulation." The TNO stated that "DMA has tentatively identified the total amount of improperly paid claims in the [reviewed] sample [was] \$7,721.59," and that PCG "utilized random sampling and extrapolation in order to determine that your agency received a total Medicaid overpayment in the amount of \$56,456.00."

3. The October 5, 2012 TNO was the first notice Petitioner received that it had "failed to substantially comply with the requirements of State and federal law or regulation."

4. After a reconsideration review, Respondent's Hearing Officer Dorlene McDuffie notified Petitioner by certified mail dated May 20, 2013 that Respondent was upholding PCG's recoupment for the claims in dispute in its entirety in the amount of \$98,333.00.

## **CONCLUSIONS OF LAW**

1. Respondent's Program Integrity Unit and its authorized agents, PCG, conduct post-payment reviews of Medicaid paid claims to identify program abuse and overpayments in accordance with 42 USC § 1396a, 42 CFR 455 & 456, and 10A NCAC 22F.

### **ISSUE 1**

2. N.C. Gen. Stat. § 108C-5 sets forth the process and procedures whereby Respondent and its agents conduct post-payment reviews. N.C. Gen. Stat. § 108C-5(q) states:

Except as required by federal agency, law, or regulation, or instances of credible allegation of fraud, the provider shall be subject to audits which result in the extrapolation of results for a time of up to 36 months from date of payment of a provider's claim.

3. N.C. Gen. Stat. § 108C-5(j) states:

Audits that result in the extrapolation of results must be performed and reviewed by individuals who shall be credentialed by the Department, as applicable, in the matters to be audited, including, but not limited to, coding or specific clinical issues.

4. In this case, there is no genuine issue of material fact that Respondent's agent PCG complied with the requirements of N.C. Gen. Stat. § 108C-5(j) by having its individual reviewer credentialed in the matters audited in this case. As there is no genuine issue of material fact, Respondent is entitled to summary judgment as a matter of law regarding this issue.

### **ISSUE 2**

5. N.C. Gen. Stat. § 108C-5 describes the process Respondent or its agent must follow in seeking recoupment of any overpaid Medicaid funds from a Medicaid provider. N.C. Gen. Stat. § 108C-5(k) states:

The Department, prior to conducting audits that result in the extrapolation of results, shall identify to the provider the matters to be reviewed and specifically list the clinical, including, but not limited to, assessment of medical necessity, coding, authorization, or other matters reviewed and the time periods reviewed.

6. N.C. Gen. Stat. § 108C-5(i) provides:

Prior to extrapolating the results of any audits, the Department shall demonstrate and inform the provider that (i) the provider failed to substantially comply with the requirements of State or federal law or regulation or (ii) the Department has credible allegation of fraud concerning the provider.

7. N.C. Gen. Stat. § 108C-5(p) provides:

The provider shall have no less than 30 days from the date of the receipt of the Department's notice of tentative audit results to provide additional documentation not provided to the Department during any audit.

8. Reading N.C. Gen. Stat. § 108C-5 in its entirety, and in context with the applicable provisions of 42 CFR 455 & 456, and 10A NCAC 22F, N.C. Gen. Stat. § 108C-5 requires Respondent to demonstrate and to inform Petitioner that Petitioner “failed to substantially comply” with the applicable State and Federal law or regulation before Respondent extrapolates the results of any audits. The purpose of N.C. Gen. Stat. § 108C-5(i) is to allow the provider time to submit additional documentation to Respondent/PCG before PCG performs an extrapolation of any overpayment.

a. In this case, there are no allegations that Petitioner committed any fraud.

b. In this case, there is no genuine issue of material fact that Respondent through its agent PCG violated N.C. Gen. Stat. § 108C-5(i) when it simultaneously notified Petitioner, in the October 5, 2012 TNO, that

(1) Petitioner failed to substantially comply with the State and federal requirements, and  
(2) Petitioner owed an extrapolated overpayment amount based on such audit findings.

c. By violating the procedural requirements of N.C. Gen. Stat. § 108C-5(i), Respondent’s extrapolated recoupment amount of \$56,456.00 is invalid and void. Petitioner is entitled to summary judgment as matter of law as to that issue, and Respondent may not recoup the extrapolated recoupment/overpayment amount from Petitioner.

9. Nevertheless, there remains a genuine issue of material fact concerning what effect, if any, did PCG’s violation of the procedural requirement of N.C. Gen. Stat. § 108C-5 have on the claims in dispute that Respondent actually reviewed, which Respondent’s agent PCG seeks to recoup from Petitioner. As such, this case is ripe for a contested case hearing on that issue.

## **FINAL DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned **GRANTS** Summary Judgment for Respondent as to Issue 1, and **GRANTS** Summary Judgment for Petitioner on Issue 2 regarding the extrapolated overpayment amount. The remaining issue for trial is whether Respondent, through its agent PCG, erred in determining that Respondent overpaid Petitioner for the Medicaid claims that were actually reviewed and identified as overpayments.

## **NOTICE**

Under the provisions of N.C. Gen. Stat. § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of the Superior Court within 30 days of receipt of the Petitioner for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 19<sup>th</sup> day of March, 2014.

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Donald W. Overby  
Administrative Law Judge