

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE )  
ADMINISTRATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 06-5029MPI  
 )  
POLARIS PHARMACY CORPORATION )  
d/b/a LIMA'S PHARMACY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,<sup>1</sup> on March 27, 2007, in Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Tracie L. Wilks, Esquire  
Jeffries H. Duvall, Esquire  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308-5403

For Respondent: Lawrence R. Metsch, Esquire  
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STATEMENT OF THE ISSUES

1. Whether Medicaid overpayments were made to Respondent and, if so, in what amount.

2. Whether Respondent should be fined \$5,000.00 for failing to document that it had available sufficient quantities of product to support its Medicaid billings.

PRELIMINARY STATEMENT

Respondent is a provider of pharmacy services to eligible Medicaid recipients in Florida. By letter dated November 14, 2006 (Final Agency Audit Report), the Agency for Health Care Administration (AHCA) advised Respondent that, following a "review of [Respondent's] claims for Medicaid reimbursement for dates of service during the period April 1, 2005 through March 31, 2006" (Audit Period), it had determined that Respondent had been "overpaid \$198,509.55 for services that in whole or in part [were] not covered by Medicaid," and that, pursuant to Section 409.913, Florida Statutes, and Florida Administrative Code Rule 59G-9.070, in addition to seeking recovery of this \$198,509.55 in alleged overpayments, it was imposing a fine of \$5,000.00, making "[t]he total amount due . . . \$203,509.55." According the letter, AHCA was also "entitled to recover all investigative, legal, and expert witness costs" pursuant to Section 409.913(23)(a), Florida Statutes. The last

page of the letter contained a "Notice of Administrative Hearing and Mediation Rights."

Respondent filed a Petition for Formal Hearing. On December 12, 2006, AHCA referred the matter to the Division of Administrative Hearings (DOAH), requesting the assignment of a DOAH Administrative Law Judge to conduct a "formal administrative hearing." The undersigned was subsequently assigned the case, and he set the case for hearing.

On February 16, 2007, AHCA filed a Motion to Deem Request for Admissions Admitted. That same day, the undersigned issued an order directing Respondent to file a written response to the motion within seven days. On February 22, 2007, Respondent filed a response in which it stated that it did "not object to the entry of an order deeming Petitioner's Request for Admissions Admitted." On February 26, 2007, the undersigned issued an order "find[ing] that Respondent ha[d] admitted the [following] matters set forth in Petitioner's Request for Admissions by operation of Florida Rule of Civil Procedure 1.370(1)":

I. RESPONDENT'S MEDICAID-RELATED INFORMATION

1. Respondent was an authorized Medicaid provider during the audit period.
2. During the audit period, Respondent had been issued the following Medicaid provider number: 0265314 00.

3. During the Audit Period, Respondent had a valid Medicaid Provider agreement(s) with AHCA.

## II. APPLICABLE LAWS, RULES, AND REGULATIONS

4. For the subject Audit Period, Respondent was subject to all of the duly enacted Medicaid statutes, laws, rules and policy guidelines that governed Medicaid providers of its type.

5. For the subject Audit Period, Respondent was required to follow all of the Medicaid Coverage and Limitation[s] Handbooks for its type of provider.

6. For the subject Audit Period, Respondent was required to follow all of the Medicaid Reimbursement Handbooks for its type of provider.

7. For the subject Audit Period, the applicable Medicaid statutes, laws, rules and policy guidelines in effect required Respondent to maintain all "Medicaid-related Records" and information that supported any and all Medicaid invoices or claims made by Respondent during the Audit Period.

8. For the subject Audit Period, the applicable Medicaid statutes, laws, rules and policy guidelines in effect required Respondent, at AHCA's request, to provide AHCA (or AHCA's representatives), all Medicaid-related Records and other information which supported all the Medicaid-related invoices or claims that Respondent made during the Audit Period.

## III. MISCELLANEOUS

9. This Respondent filed a claim with Florida Medicaid for payment for the services and goods which are the subject of this audit.

10. This Respondent was paid by AHCA for the services/goods which are the subject of this audit.

11. The Medicaid provider agreement between Respondent and AHCA requires that the provider agree that only records made at the time the goods and services were provided will be admissible in evidence in any proceeding relating to the Medicaid program.

On February 21, 2007, the parties filed a Joint Prehearing Stipulation, which provided, in pertinent part, as follows:

A. STATEMENT OF THE NATURE OF THE CASE

The Respondent, Polaris Pharmacy Corporation, d/b/a Lima's Pharmacy, at all times material hereto, was a health care provider in the State of Florida, and was enrolled as a Medicaid provider.

1. The Respondent was notified by the Agency by a Provisional Agency Audit Report dated October 16, 2006, of a determination of an overpayment to the Respondent for goods and services provided to Medicaid recipients covering the period April 1, 2005 through March 31, 2006 (Audit Period). This letter indicated that the Respondent had submitted claims and had been overpaid in the amount of \$202,847.33. This determination was based on an "invoice review." An "invoice review" is one in which the records of purchases of drugs and supplies of the provider pharmacy are compared with the goods and services claimed to have been dispensed during the same period. If the provider is unable to demonstrate that it had an inventory or had purchased drugs or supplies from qualified retailers or wholesalers in a quantity sufficient to equal the amount dispensed during the audit period, the difference is considered an overpayment.

2. Following receipt of the Provisional Agency Audit Report, the Respondent was given the opportunity to submit additional information which could result in a reduction in the provisional determination of overpayment. Additional information was furnished by the provider which reduced the overpayment determination.

3. On November 14, 2006, the Respondent was notified by a Final Agency Audit Report of a determination of overpayment to Respondent for services provided to Medicaid recipients covering the Audit Period. This letter indicated that the Respondent had submitted claims and had been overpaid in the amount of \$198,509.55 for services that, in whole or in part, were not covered by Medicaid.

4. The Respondent has appealed the agency action of November 14, 2006 and sought an administrative hearing pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

\* \* \*

D. STATEMENT OF ADMITTED FACTS.

1. Respondent has operated as an authorized Medicaid provider at all times during the Audit Period and has been issued the Medicaid provider number 0265314 00.

2. During the Audit Period, the Respondent had a valid Medicaid provider agreement with the Agency.

3. For services provided during the Audit Period, the Respondent received in excess of \$198,509.55 in payments for services to Medicaid recipients.

\* \* \*

F. STATEMENT OF AGREED ISSUES OF LAW.

1. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to § 120.57(1), Florida Statutes.

2. Venue for this proceeding is in Leon County, Florida, or such other place as designated by the Administrative Law Judge.

3. The Agency for Health Care Administration is an executive agency created by Sections 20.42 and 23.21, Florida Statutes.

4. The Agency for Health Care Administration has the responsibility for overseeing and administering the Medicaid Program for the State of Florida.

5. The Agency has the burden of proof in this proceeding and must show by a preponderance of the evidence that there exists an overpayment to the Respondent.

6. All pleadings were timely and appropriately filed in this matter.

\* \* \*

Prior to the final hearing, AHCA reviewed additional documentation from Respondent and, based on its review, determined that the amount that Respondent had been overpaid was \$198,332.78, not \$198,509.55 as previously determined. AHCA created a document (found at page 189 of Petitioner's Exhibit 9, hereinafter referred to as the "Overpayment Reduction Document") reflecting this reduction in the alleged overpayment amount.

As noted above, the final hearing was held on March 27, 2007.<sup>2</sup> AHCA's case consisted exclusively of documentary evidence in the form of 16 exhibits (Petitioner's Exhibits 1 through 16), which were received into evidence without objection. These exhibits included the Final Agency Audit Report, supporting audit work papers, and the Overpayment Reduction Document (collectively constituting Petitioner's Exhibit 9). Respondent presented no evidence.

At the close of the evidentiary portion of the hearing on March 27, 2007, the undersigned set the deadline for the filing of proposed recommended orders at 10 days from the date of the filing of the hearing transcript with DOAH.

The hearing Transcript (consisting of one volume) was filed with the DOAH on April 11, 2007. AHCA filed its Proposed Recommended Order on April 12, 2007. To date, Respondent has not filed any post-hearing submittal.

#### FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following findings of fact are made to supplement the facts (set forth above) established by admission and stipulation:

1. Respondent's records fail to demonstrate that it had available during the Audit Period sufficient quantities of drugs to support its Audit Period billings to the Medicaid program.



2. For these Audit Period billings, Respondent was overpaid \$198,332.78, as established by the Final Audit Report, as revised by the Overpayment Reduction Document, and the supporting audit work papers, which were received into evidence at hearing and went unchallenged.

CONCLUSIONS OF LAW

3. AHCA is statutorily charged with the responsibility of "operat[ing] a program to oversee the activities of Florida Medicaid recipients, and providers and their representatives, to ensure that fraudulent and abusive behavior and neglect of recipients occur to the minimum extent possible, and to recover overpayments<sup>[3]</sup> and impose sanctions as appropriate."

§ 409.913(1), Fla. Stat.

4. "Overpayment," as that term is used in Section 409.913, Florida Statutes, "includes any amount that is not authorized to be paid by the Medicaid program whether paid as a result of inaccurate or improper cost reporting, improper claiming, unacceptable practices, fraud, abuse, or mistake."

§ 409.913(1)(e), Fla. Stat. "[T]he plain meaning of the statute dictates that it is within the AHCA's power to demand repayment" of such monies, regardless of the circumstances that produced the unauthorized payment, provided the overpayment is not "attributable to error of [AHCA] in the determination of eligibility of a recipient." Colonnade Medical Center, Inc. v.

State, Agency for Health Care Administration, 847 So. 2d 540, 541-42 (Fla. 4th DCA 2003); § 409.907(5)(b), Fla. Stat.; and § 409.913(11), Fla. Stat.

5. In the instant case, AHCA is seeking to recover \$198,332.78 in Medicaid overpayments allegedly made to Respondent for pharmacy services Respondent claimed it rendered during the Audit Period.

6. Pursuant to Section 409.913(21), Florida Statutes, "[w]hen making a determination that an overpayment has occurred, [AHCA must] prepare and issue an audit report to the provider showing the calculation of overpayments."

7. A provider who is the subject of an audit report that reveals overpayments is entitled to an administrative hearing pursuant to Chapter 120, Florida Statutes, before AHCA takes final agency action ordering repayment.

8. At any such hearing, AHCA has the burden of establishing, by a preponderance of the evidence, that Medicaid overpayments in the amount it is seeking to recoup were made to the provider. See South Medical Services, Inc. v. Agency for Health Care Administration, 653 So. 2d 440, 441 (Fla. 3d DCA 1995); Southpointe Pharmacy v. Department of Health and Rehabilitative Services, 596 So. 2d 106, 109 (Fla. 1st DCA 1992); Florida Department of Transportation v. J. W. C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Florida

Department of Health and Rehabilitative Services, Division of Health v. Career Service Commission, 289 So. 2d 412, 415 (Fla. 4th DCA 1974); and Full Health Care, Inc. v. Agency for Health Care Administration, No. 00-4441, slip op at 18 (Fla. DOAH June 25, 2001)(Recommended Order).

9. Section 409.913(22), Florida Statutes, provides that "[t]he audit report, supported by agency work papers, showing an overpayment to a provider constitutes evidence of the overpayment." It has been said that this language enables AHCA to "make a prima facie case without doing any heavy lifting: it need only proffer a properly-supported audit report, which must be received in evidence." Full Health Care, slip op at 19. "[O]nce [AHCA] has put on a prima facie case of overpayment---- which may involve no more than moving a properly-supported audit report into evidence----the provider is obligated to come forward with written proof to rebut, impeach, or otherwise undermine [AHCA's] statutorily-authorized evidence; it cannot simply present witnesses to say that [AHCA] lacks evidence or is mistaken."<sup>4</sup> Id. at 19-20.

10. As is reflected in the Findings of Fact set forth above, at the administrative hearing that Respondent requested and was granted in the instant case, AHCA met its burden of proving, by a preponderance of the evidence, that Respondent

received Medicaid overpayments in the amount AHCA is seeking to recover from Respondent (\$198,332.78).

11. AHCA did so through its presentation of the Final Agency Audit Report, as revised by the Overpayment Reduction Document, and the supporting audit work papers. This documentary evidence (pursuant to Section 409.913(22), Florida Statutes) established a prima facie case of overpayment (totaling \$198,332.78) that Respondent made no attempt (through the presentation of evidence of its own) to overcome.

12. Respondent's not having overcome AHCA's prima facie showing of overpayment, AHCA should enter a final order finding that Respondent was overpaid a total of \$198,332.78 for Audit Period Medicaid claims. Were AHCA to do otherwise it would be acting in derogation of its statutory responsibility, under Section 409.913, Florida Statutes, to exercise oversight of the integrity of the Florida's Medicaid program.

13. Upon entering such an order, AHCA will be "entitled to recover all investigative, legal, and expert witness costs" pursuant to Section 409.913(23), Florida Statutes, which provides as follows:

(a) In an audit or investigation of a violation committed by a provider which is conducted pursuant to this section, the agency is entitled to recover all investigative, legal, and expert witness costs if the agency's findings were not

contested by the provider or, if contested, the agency ultimately prevailed.

(b) The agency has the burden of documenting the costs, which include salaries and employee benefits and out-of-pocket expenses. The amount of costs that may be recovered must be reasonable in relation to the seriousness of the violation and must be set taking into consideration the financial resources, earning ability, and needs of the provider, who has the burden of demonstrating such factors.

(c) The provider may pay the costs over a period to be determined by the agency if the agency determines that an extreme hardship would result to the provider from immediate full payment. Any default in payment of costs may be collected by any means authorized by law.

Should there arise a dispute of a factual nature regarding the amount of costs that can be recovered, Respondent may timely request an administrative hearing on the matter. Should AHCA determine that the petition requesting the hearing is sufficient and raises disputed issues of material fact, AHCA may then refer the matter to DOAH for the assignment of an administrative law judge to conduct the requested hearing and issue a recommended order. See Agency for Health Care Administration v. Brown Pharmacy, No. 05-3366MPI, 2006 Fla. Div. Adm. Hear. LEXIS 515 \*59 (Fla. DOAH November 3, 2006)(Recommended Order)("[A]ny claim for costs may be raised once it is determined that the Petitioner has prevailed in this case, whereupon, if it should attempt to assess them against the Respondent, the Respondent

would have the opportunity, by separate proceeding, to contest the matter before the Division of Administrative Hearings."); Lepley v. Agency for Health Care Administration, No. 04-3025MPI, 2004 Fla. Div. Adm. Hear. LEXIS 2528 \*30 (Fla. DOAH December 14, 2004)(Recommended Order)("Respondent, once it has 'ultimately prevailed' in this case, may then determine the amount of its costs and assess them against Petitioner. Should Petitioner dispute Respondent's determination and raise disputed issues of material fact, the matter may then be referred by Respondent to the Division of Administrative Hearings."); and Meji, Inc. v. Agency for Health Care Administration, No. 03-1195MPI, slip op. at 10 (Fla. DOAH July 15, 2003)(Recommended Order)("[T]he Agency, once it has 'ultimately prevailed' in this case, may then determine the amount of its costs associated with this matter and assess those costs against Meji. Should Meji dispute the Agency's determination and raise disputed issues of material fact, the matter may then be referred by the Agency to the Division for hearing.").

14. Not only is AHCA seeking to recover the \$198,332.78 in overpayments Respondent received, as well as the "investigative, legal, and expert witness costs" it has incurred, it also seeks to impose a "sanction" on Respondent in the form of a fine of \$5,000.00 pursuant to Section 409.913(15)(n), Florida Statutes,

and Florida Administrative Code 59G-9.070(7)(n), which provide as follows:

Section 409.913(15)(n), Florida Statutes

The agency may seek any remedy provided by law, including, but not limited to, the remedies provided in subsections (13) and (16) and s. 812.035, if:

The provider fails to demonstrate that it had available during a specific audit or review period sufficient quantities of goods, or sufficient time in the case of services, to support the provider's billings to the Medicaid program.

Florida Administrative Code 59G-9.070(7)(n)

SANCTIONS: Except when the Secretary of the Agency determines not to impose a sanction, pursuant to Section 409.913(16)(j), F.S., sanctions shall be imposed for the following:

During a specific audit or review period, failure to demonstrate sufficient quantities of goods, or sufficient time in the case of services, that support the corresponding billings or claims made to the Medicaid program. [Section 409.913(15)(n), F.S.].

15. Subsection (16)(c) of Section 409.913, Florida Statutes, authorizes AHCA to impose "a fine of up to \$5,000 for each violation." AHCA may impose such a fine "in addition to [its] authority to recover a determined overpayment." Fla. Admin. Code R. 59G-9.070(10)(a). It may do so, however, only if the violation is proven by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and

Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 935 (Fla. 1996).

16. Inasmuch as AHCA, through un rebutted evidence, clearly and convincingly established that Respondent's records fail to demonstrate that it had available during the Audit Period sufficient quantities of drugs to support its Audit Period billings to the Medicaid program, the imposition of a \$5,000.00 fine against Respondent is within AHCA's power.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that AHCA enter a final order finding that Respondent received \$198,332.78 in Medicaid overpayments for paid claims covering the period from April 1, 2005, through March 31, 2006; directing Respondent to repay this amount<sup>5</sup>; and fining Respondent \$5,000.00 for failing to demonstrate that it had available during the Audit Period sufficient quantities of drugs to support its Audit Period billings.



DONE AND ENTERED this 25th day of April, 2007, in  
Tallahassee, Leon County, Florida.

S

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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of April, 2007.

ENDNOTES

<sup>1</sup> All references to Florida Statutes in this Recommended Order are to Florida Statutes (2006).

<sup>2</sup> The final hearing was originally scheduled for March 6, 2007, but was continued at Respondent's request.

<sup>3</sup> "The Medicaid program provides reimbursement to service providers on a 'pay-and-chase' basis. In other words, claims are paid initially subject to preliminary review. [AHCA] or its agent may later subject these claims to closer scrutiny during periodic audits. If overpayments are found, [AHCA] obtains reimbursement from the service provider." Agency for Health Care Administration v. Cabrera, No. 92-1898, 1994 Fla. Div. Adm. Hear. LEXIS 5127 \*3 (Fla. DOAH January 24, 1994)(Recommended Order).

<sup>4</sup> "[O]bligat[ing] [a provider] to come forward with written proof to rebut, impeach, or otherwise undermine [AHCA's] statutorily-authorized evidence" of overpayment is not an unreasonable burden to place on the provider. See Illinois Physicians Union v. Miller, 675 F.2d 151, 158 (7th Cir. 1982)("We see nothing arbitrary or capricious about requiring

physicians who are benefiting from the [Medicaid] program to bear this burden, particularly when the state has already borne the cost of the initial audit and the evidence to rebut that initial determination is uniquely within the physician's control." ).

<sup>5</sup> Section 409.913(25)(c), Florida Statutes, provides that "[o]verpayments owed to [AHCA] bear interest at the rate of 10 percent per year from the date of determination of the overpayment by the agency, and payment arrangements must be made at the conclusion of legal proceedings."

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.