

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the SIRS Appeal of
Caring Professionals Homecare, LLC,
Matthew Dewey and Flavianna Tesha.

**ORDER GRANTING
DEPARTMENT'S MOTION
FOR SUMMARY DISPOSITION
AND RECOMMENDATION**

On August 15, 2011, the Department of Human Services (Department or DHS) issued a Notice of and Order for Hearing and Prehearing Conference alleging that DHS was entitled to recover \$91,870.33 overpaid to Caring Professionals Homecare, LLC. (Caring Professionals or Appellants).

On January 13, 2012, DHS filed its Notice of Motion and Motion for Summary Disposition, with accompanying documents, requesting that the Administrative Law Judge issue a recommendation granting summary disposition in its favor. DHS asserts that it is entitled to recover funds paid to Caring Professionals for personal care assistant (PCA) services that were either not properly documented or not reimbursable because they were provided to a recipient's "responsible party." The Department also argues that it is entitled to suspend Matthew Dewey and Flavianna Tesha, both in management positions with Caring Professionals, for violating the terms of the settlement agreements they entered into with DHS.

On February 28, 2012, Caring Professionals filed its Memorandum of Law in Opposition to the Department's Motion for Summary Disposition, accompanied by the Affidavits of Matthew Dewey and Flavianna Tesha, and associated exhibits.

On March 20, 2012, DHS filed a Reply Memorandum and the OAH record on the motion closed on that date.

Corrie A. Oberg, Assistant Attorney General, appeared on behalf of DHS. Richard Student, Attorney at Law, Gaskins, Bennett, Birrell & Schupp, LLP, appeared on behalf of Caring Professionals.

For the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER and RECOMMENDATION

IT IS HEREBY ORDERED: The Department's Motion for Summary Disposition is GRANTED.

IT IS HEREBY RECOMMENDED: That the Department recover \$91,870.33 in overpayments made to Caring Professionals, and suspend Matthew Dewey and Flavianna Tesha from participation in the MHCP for a period of two years for violating the terms of their Stipulated Provider Agreements.

Dated: April 23, 2012

s/Beverly Jones Heydinger

Beverly Jones Heydinger
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record and may adopt, reject or modify the Order Granting Department's Motion for Summary Disposition and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Lucinda Jesson, Commissioner, Department of Human Services, 540 Cedar Street, St. Paul, MN 55164, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Department is seeking to recover \$91,870.33 in Medical Assistance payments it made to Caring Professionals.¹ The Department contends that an audit revealed that it paid Caring Professionals for PCA services that were either improperly documented or were not reimbursable because they were provided by a recipient's "responsible party."² The Department is also seeking to suspend Appellants Matthew Dewey (Dewey) and Flavianna Tesha (Tesha), the Administrator and Director of Care of Caring Professionals, for a period of two years for violating terms of their prior settlement agreements.

Medicaid Program

Medicaid is a jointly financed federal/state program established under federal law.³ The purpose of Medicaid is to provide necessary medical assistance to eligible persons who have insufficient income and resources to pay for the cost of the medical care they require.⁴ The federal government shares the cost of providing medical assistance with states that elect to participate in the Medicaid program.⁵ In return, the states must comply with federal statutes and also with rules issued by the Centers for Medicare and Medicaid ("CMS") of the U.S. Department of Health and Human Services.⁶ CMS regulations require states to have surveillance and utilization control programs in order to guard against the "unnecessary or inappropriate use of Medicaid services and . . . excess payments."⁷ CMS requires the states to conduct post-payment reviews on a random basis in order to discover and correct the inappropriate use of Medicaid payments or the receipt of excess payments.⁸

The Medicaid program in Minnesota is administered by the Department and is referred to as the Minnesota Health Care Programs (MHCP), or more commonly as Medical Assistance (MA).⁹ Because DHS receives and administers federal funds, it must establish and maintain a program of utilization review in order to prevent the unnecessary or inappropriate use of MA and determine whether excess MA payments are being made.¹⁰ If the Department discovers that a provider has inappropriately billed MA or erroneously received excess payments, state law permits the Department to

¹ All citations are to current statutes and rules unless otherwise indicated.

² Minn. Stat. § 256B.0655, subd. 1h (2008). (Responsible party is defined as an individual capable of providing the support necessary to assist a recipient to live in the community and actively participates in the planning and directing of the recipient's PCA services and is not the personal care assistant.) This section was repealed by Session Laws 2009, chapter 79, article 8, section 86 and replaced with Minn. Stat. § 256B.0659. Under Minn. Stat. § 256B.0659, subd. 3(a) (2010) PCA services provided by a responsible party are not eligible for payment under MA.

³ Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v.

⁴ See 42 U.S.C. § 1396; *Atkins v. Rivera*, 477 U.S. 154, 156 (1986).

⁵ See 42 U.S.C. § 1396a and 1396b.

⁶ See 42 U.S.C. § 1396a, 42 C.F.R. § 430.10; *Atkins*, 477 U.S. at 156-57.

⁷ 42 C.F.R. § 456.3(a).

⁸ 42 C.F.R. § 456.23.

⁹ See Chapter 256B of the Minnesota Statutes.

¹⁰ Minn. Stat. § 256B.04, subd. 15(a); see also 42 C.F.R. § 456.1 through 456.725.

impose sanctions on the provider and/or recover the excess payments.¹¹ The provider is entitled to a contested case hearing if the provider files an appeal request within 30 days of receiving the Notice of Agency Action from the Department.¹²

In order to safeguard against inappropriate use of MA and excess MA payments, DHS has created the Surveillance and Integrity Review Section (SIRS) and promulgated rules to monitor providers' compliance with federal and state MA requirements, as well as requirements under other health care programs administered by the Department.¹³ SIRS conducts post-payment reviews or audits of claims submitted for MA payments.¹⁴ SIRS selects providers' claims for review at random or based on suspicion of fraud or improper payment.¹⁵ These investigations are necessary to prevent fraud and abuse, as well as to detect instances of improper payment of MA funds due to error or inadvertence.¹⁶

DHS is entitled to recover from a provider funds improperly paid as a result of error, regardless of whether it was the Department's error or the provider's error and regardless of whether the error was intentional.¹⁷ The Department is also entitled to recovery of funds paid as a result of "abuse."¹⁸ Abuse is defined under the rules governing the M.A. program to include the following practices: submitting claims that lack required information or contain incorrect information; submitting claims that overstate the level or amount of health service provided; submitting repeated claims or causing claims to be submitted for health services that are not reimbursable under the programs; and failing to develop and maintain required health service records.¹⁹

Personal Care Assistance Services

Recipients of PCA services require services to live independently in the community, in a stable medical condition.²⁰ PCA services covered under the Medicaid program include "activities of daily living, instrumental activities of daily living, health-related functions through hands-on assistance, supervision and cueing; and redirection and intervention for behavior including observation and monitoring."²¹ The amount and types of services authorized are based on assessment of the recipients needs in several areas of dependency.²²

¹¹ See Minn. Stat. §§ 256B.064 and 256B.0641.

¹² Minn. Stat. §§ 256B.04, subd. 15(c) and 256B.064, subd. 2; Minn. R. 9505.2230, subp. 1, and 9505.2245, subp. 1.

¹³ See Minn. R. 9505.2160 to 9505.2245.

¹⁴ Tsuchiya Aff. at ¶4.

¹⁵ See 42 CFR § 456.23 (requiring post-payment reviews); Minn. Stat. § 256B.04, subd. 15(a) (requiring post-payment reviews).

¹⁶ See Minn. R. 9505.2200, subp. 1 and 9505.2215, subp. 1(A).

¹⁷ Minn. Stat. § 256B.064, subd. 1c(a).

¹⁸ *Id.*

¹⁹ Minn. R. 9505.2165, subp. 2.

²⁰ See Minn. R. 9505.0335, subp. 1(H).

²¹ See Minn. Stat. § 256B.0655, subd. 2(a) (2008). (Note: This section was repealed by Session Laws 2009, chapter 79, article 8, section 86 and replaced with Minn. Stat. § 256B.0659.)

²² Minn. Stat. § 256B.0655, subd. 2(c) (2008).

To be eligible for PCA services, a recipient must be capable of identifying his or her own needs and directing his or her own care, or have a “responsible party” who is able to do so.²³ A “responsible party” is defined by statute as an “individual who is capable of providing the support necessary to assist the recipient to live in the community, is at least 18 years old, actively participates in the planning and directing of the personal care assistant services, and is not the personal care assistant.”²⁴ PCA services may not be reimbursed if the PCA is the responsible party for the recipient.²⁵ Likewise, Minnesota law prohibits reimbursement of PCA services provided by a recipient’s spouse, guardian or parent if the recipient is under age 18.²⁶ In addition, PCA services must be provided under the supervision of a qualified professional.²⁷ The qualified professional is responsible for, among other things, ensuring that the personal care assistant is capable of providing the required services and knowledgeable about the plan of services as well as about essential observations of the recipient’s health.²⁸

SIRS Investigation

On September 30, 2012, SIRS investigator Deborah Tsuchiya (Tsuchiya) notified Caring Professionals in writing that SIRS had initiated a post-payment review of Caring Professionals claims for the period of September 1, 2008, to August 31, 2009.²⁹ Tsuchiya also notified Caring Professionals that SIRS would conduct an onsite review on October 1, 2009, and requested records for recipients E.A. and D.H.³⁰ The notice also provided that investigators would request additional recipient files during the onsite visit.³¹ At the October 1, 2009, onsite visit, Tsuchiya requested Caring Professionals provide her records for 23 recipients for specified time periods.³²

During the audit, Tsuchiya noted that recipient G.R.’s “responsible person” was her father, O.R., who also acted as a PCA for G.R.³³ Tsuchiya reviewed timesheets for PCA services provided to G.R. and noted that O.R. signed in the box for “recipient/responsible party.”³⁴ Tsuchiya confirmed with G.R.’s case manager that O.R. was G.R.’s responsible party,³⁵ and Tsuchiya noted that O.R. was listed as G.R.’s responsible party on entries in the Department’s Medicaid Management Information System (MMIS).³⁶

²³ Minn. Stat. § 256B.0625, subd. 19a.

²⁴ Minn. Stat. § 256B.0655, subd. 1h (2008).

²⁵ Minn. Stat. § 256B.0625, subd. 19a.

²⁶ Minn. Stat. § 256B.0625, subd. 19a.

²⁷ See Minn. Stat. § 256B.0655, subd. 13 (2008).

²⁸ See Minn. R. 9505.0335, subp. 4.

²⁹ Affidavit of Deborah Tsuchiya at ¶ 6 and Ex. 1.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at ¶ 17 and Ex. 3.

³³ *Id.* at ¶ 9.

³⁴ *Id.* at ¶ 10 and Ex. 5.

³⁵ *Id.* at ¶ 11.

³⁶ *Id.* at ¶ 12 and Exs. 7-9.

On January 26, 2010, Tsuchiya notified O.R. that he could not be G.R.'s PCA while he was her responsible party pursuant to Minnesota law. G.R.'s responsible party was changed shortly thereafter.³⁷

Tsuchiya also discovered in her review of Caring Professionals' records that Caring Professionals submitted several claims for PCA services that it did not have the required documentation in its client files.³⁸ In addition, Tsuchiya found that Caring Professionals submitted claims for qualified professional supervision of PCA services that lacked legally required documentation to support those claims.³⁹

Based on these findings, Tsuchiya calculated that Caring Professionals was improperly paid MHCP Funds for claims totaling \$91,870.33.⁴⁰ Of the \$91,870.33, \$89,780.15 was for claims paid for PCA services by O.R. to G.R. while he was her responsible party. Of the remainder, \$555.90 was for inadequately documented PCA services, and \$1,534.28 was for inadequately documented qualified professional supervision of PCA services.⁴¹

On March 30, 2010, DHS issued its Notice of Agency Action seeking recovery of the overpayments.⁴² The Department also determined that the managers of Caring Professionals, Dewey and Tesha, had failed to meet the terms of an earlier settlement agreement by not billing for PCA services in accordance with the governing rules and statutes. Therefore, in its Notice of Agency Action, the Department proposed that Dewey and Tesha be suspended from participation in MHCP for two years.⁴³

The Respondents timely appealed the Notice of Agency Action, and this contested case proceeding was initiated thereafter.

Standard for Summary Disposition

Summary disposition is the administrative equivalent of summary judgment.⁴⁴ The standards for summary disposition in a contested case proceeding are equivalent to the standards for summary judgment under Rule 56.03 of the Minnesota Rules of Civil Procedure.⁴⁵ The Administrative Law Judge (ALJ) may recommend summary disposition of the case or any part of the case "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a

³⁷ *Id.*

³⁸ *Id.* at ¶¶ 13-16 and Ex. 10.

³⁹ *Id.* ¶¶ 17-29 and Exs. 11-22.

⁴⁰ *Id.* at ¶¶ 29-30 and Exs. 23-24.

⁴¹ *Id.* at ¶ 30 and Ex. 24.

⁴² Ex. 24.

⁴³ Ex. 24.

⁴⁴ *Pietsch v. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004); Minn. R. 1400.5500 (K).

⁴⁵ See Minn. R. 1400.6600 (the Minnesota Rules of Civil Procedure may apply to motions in contested cases as appropriate).

judgment as a matter of law.”⁴⁶ A genuine issue is one that is not a sham or frivolous. A fact is material if its resolution will affect the result or outcome of the case.⁴⁷

When considering a motion for summary disposition, the ALJ must view the facts in the light most favorable to the non-moving party and resolve all doubts and factual inferences in that party’s favor.⁴⁸ DHS, as the moving party, has the initial burden to show that there is no genuine issue concerning any material fact.⁴⁹ To successfully resist a motion for summary disposition, the non-moving party cannot rely upon general statements or allegations, but must show by substantial evidence that there are specific facts in dispute that have a bearing on the outcome of the case.⁵⁰ “Substantial evidence” refers to the legal sufficiency of the evidence and not the quantum of evidence.⁵¹ Speculation alone, without some concrete evidence, is insufficient to survive summary disposition.⁵² However, if reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.⁵³

Arguments of the Parties

A. Overpayment of Funds for PCA Services Provided by Responsible Party

The Department argues that it is entitled to recover \$89,780.15 in MHCP funds paid to Caring Professionals for PCA services provided by O.R. to G.R. while O.R. was G.R.’s responsible party.⁵⁴ DHS maintains that it is undisputed that O.R. was G.R.’s responsible party until January 29, 2010.⁵⁵ According to G.R.’s February 2008 Assessment, obtained by Tsuchiya from Caring Professionals files, G.R. is identified as being unable to direct her own care and O.R. is identified as her responsible party.⁵⁶ Timesheets for PCA services provided to G.R. contain O.R.’s signature in the box for provided for “recipient/responsible party.” When O.R. was providing the PCA services to his daughter, he would sign the timesheets both as the PCA and as the recipient/responsible party.⁵⁷ Tsuchiya also confirmed with G.R.’s case manager that

⁴⁶ Minn. R. Civ. P. 56.03; *Osborne v. Twin Town Bowl, Inc.* 749 N.W.2d 367, 371 (Minn. 2008)(citing *Anderson v. Dep’t of Natural Res.*, 683 N.W. 2d 181, 186 (Minn. 2005)); *Sauter v. Sauter*, 244 Minn. 482, 484-85, 70 N.W.2d 351, 353 (Minn. 1955)

⁴⁷ *O’Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996); *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Dep’t of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

⁴⁸ *Osborne*, 749 N.W.2d at 371; *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

⁴⁹ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁵⁰ *Papenhausen v. Schoen*, 268 N.W.2d 565, 571 (Minn. 1978).

⁵¹ *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69-70 (Minn. 1997); *Murphy v. Country House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976).

⁵² *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

⁵³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *DLH, Inc.*, 566 N.W.2d at 69.

⁵⁴ Minn. Stat. § 256B.0625, subd. 19a.

⁵⁵ Tsuchiya Aff. at ¶¶ 9-12 and Exs. 4-9.

⁵⁶ *Id.* at Ex. 4.

⁵⁷ *Id.* at Ex. 5 (DHS 800, 804-805, 811, 813, and 815).

O.R. was G.R.'s responsible party,⁵⁸ and the Department's MMIS database lists O.R. as G.R.'s responsible party on entries from 2004 and 2006.⁵⁹

Because PCA services provided by a recipient's responsible party are not reimbursable, the Department asserts that all funds paid to Caring Professionals for PCA services provided by O.R. to G.R. while he was her responsible party were paid in error and as a result of abuse.⁶⁰ In order to determine the total amount of MHCP funds improperly paid to Caring Professionals for PCA services provided by O.R. to G.R., Tsuchiya reviewed claims submitted by Caring Professionals between June 2007 and January 2010. The claim forms identify the recipient, the PCA, the procedure code, and service dates, as well as the "Transaction Control Number" and "Warrant Date."⁶¹ The Transaction Control Number is a unique number assigned to each claim by the Department and provided to Caring Professionals as part of its Remittance Advice.⁶² The Warrant Date is the date that Caring Professionals received payment for the claim.⁶³ Tsuchiya created a spreadsheet based on the claims submitted by Caring Professionals between June 18, 2007, and January 22, 2010,⁶⁴ and determined that Caring Professionals was paid a total of \$89,780.15 for PCA services provided by O.R. to G.R.⁶⁵ The Department contends that it is entitled to recover this amount as an overpayment.

The Appellants do not deny that O.R. provided PCA services to G.R. while he was her responsible party. They argue, however, that the Department has failed to support its claim that Caring Professionals was paid a total of \$89,780.15 between June 2007 and January 2010. The Appellants point out that, apart from copies of timesheets reflecting work performed by O.R. during a four month period in 2009,⁶⁶ the Department has not produced any documents to support the summary data contained in its spreadsheet.⁶⁷ The timesheets from 2009 indicate that O.R. performed 406 hours of PCA services for G.R. at a rate of \$16.24 per hour, which amounts to a total of \$6,593.44 in payments. The Appellants concede that they are obligated to return the \$6,593.44 to the Department, but they contend that the balance of the alleged overpayment (in excess of \$83,000) has not been established.

The Appellants assert further that the Department failed to provide them documents evidencing the alleged overpayment despite the Appellants' request during discovery that DHS produce:

⁵⁸ *Id.* at ¶ 11.

⁵⁹ *Id.*

⁶⁰ Abuse is defined to include submission of claims for services that are not reimbursable under program rules.

⁶¹ Second Affidavit of Tsuchiya at ¶¶ 1, 6 and 7.

⁶² *Id.* at ¶¶ 2 and 7.

⁶³ *Id.* at ¶6.

⁶⁴ Ex. 23, DHS 947-962 (DHS spreadsheet entitled "[O.R.] Overpayment").

⁶⁵ *Id.*

⁶⁶ Ex. 5.

⁶⁷ Ex. 23.

- (1) all documents contained in any and all investigative files the Department has created and/or maintains regarding the allegations set forth in the Department's March 30, 2010 Notices of Agency Action,
- (2) all documents generated, produced, seized or which otherwise came to be in the possession of the Department during, and because of, its on-site review of Caring Professionals, and during and because of any subsequent investigation or analysis conducted by the Department concerning the on-site review, and
- (3) any statements which the Department claims evidences or otherwise supports its allegation that overpayments of MHCP funds in the amount of \$91,870.33, or any other amount, were made to any of the [Appellants].

Caring Professionals maintains that the Department did not produce any documents in response to these requests or in support of its motion for summary disposition that evidence the alleged overpayments listed on its spreadsheet. Caring Professionals insist that because it does not have the supporting documents, it has "no way to challenge the accuracy" of the exhibit and asserts that the spreadsheet and Tsychiya's "bald assertions" should be disregarded by the Administrative Law Judge as insufficiently reliable under the rules of evidence for contested case hearings.⁶⁸

In response, the Department asserts that the data listed on its spreadsheet (Exhibit 23) is based on information supplied by Caring Professionals when it submitted claims to DHS for reimbursement. With each claim submitted, Caring Professionals provided the identity of the recipient, the PCA, the procedure code, and service dates. The spreadsheet also includes the Department's Transaction Control Number, which is the unique number assigned to each "adjudicated claim" by the Department, and Warrant Date, which is the date that Caring Professionals received payment for the claim. The Department argues that it is disingenuous for Caring Professionals to assert that it is unable to challenge the accuracy of the spreadsheet when it is based on the claims Caring Professionals submitted over the years.

In addition, given the dates of service and the unique Transaction Control numbers, the Department maintains that Caring Professionals should be able to check the data against its own records, which by law it is required to maintain.⁶⁹ Pursuant to Minnesota Rule 9505.2175, Caring Professionals is required to document each health service provided to a recipient and maintain records that include, among things, the recipient's name, the date on which health service is provided, the length of time spent with the recipient if the amount paid for the service depends on time spent, and the signature and title of person providing the service.⁷⁰ With respect to PCA services, Caring Professionals must document the recipient's name, the name of the PCA, the

⁶⁸ Appellants' Memorandum Opposing Summary Disposition at 9-10. Minn. R. 1400.7300.

⁶⁹ See Minn. Rule 9505.2175, subp. 1, Minn. Rule 9505.0335, subp. 6(F), and Minn. Stat. § 256.0655, subd. 2(f)(1)(iv).

⁷⁰ Minn. R. 9505.2175, subp. 2.

date the services were provided, the total number of hours spent providing the service, the PCA's time of arrival and departure from the site, and the type of PCA services provided.⁷¹

Finally, DHS argues that if Caring Professionals is now claiming that the services listed on the Department's spreadsheet (Exhibit 23) were not provided by O.R. or were not provided to G.R., then DHS is still entitled to recovery of the funds because Caring Professionals submitted claims containing false information.⁷²

The Administrative Law Judge concludes that the Department has submitted undisputed evidence that Caring Professionals submitted claims for PCA services provided by O.R. to G.R. while O.R. was G.R.'s responsible party. Such services are not reimbursable.⁷³ Caring Professionals' assertion that it has "no way to challenge the accuracy" of the alleged overpayments is not convincing and is inadequate to defeat the Department's motion for summary disposition. The Department's spreadsheet lists specific identifying information for each claim that it seeks to recover. The identifying information was supplied by Caring Professionals when it submitted the claims and Caring Professionals is required by law to keep its own records of claims. Given this, Caring Professionals must identify specifically what it contends is inaccurate about the list of overpayments in order to successfully resist the Department's motion for summary disposition. Arguing generally that it is unable to challenge the itemized listing of overpayments is insufficient to survive summary disposition. Caring Professionals bears the burden of demonstrating either the accuracy of its original claims and appropriateness of the payments, or the inaccuracies in the Department's claim for recovery and supporting summary data contained in Exhibit 23.

Caring Professionals has failed to put forward substantial evidence that there are specific facts in dispute with respect to the Department's claim that it is entitled to reimbursement of \$89,780.15 in overpayment of MHCP funds paid for PCA services provided by O.R. to G.R. while O.R. was G.R.'s responsible party. The Department is entitled to recover \$89,780.15 in overpayments of these funds and its motion for summary disposition with respect to this issue is granted.

B. Overpayment of Funds for Services Inadequately Documented

1. \$555.90 Overpayment for Undocumented PCA Services

The Department argues that it is also entitled to recover \$555.90 in MHCP funds paid to Caring Professionals for PCA services for which Caring Professionals submitted claims that either lacked required information or contained incorrect information. The Department asserts that submitting such claims constitutes abuse under Minnesota law and requires recovery of MHCP funds paid by DHS. In addition, the Department contends that services that are not properly documented in health services records are not entitled to reimbursement.

⁷¹ Minn. R. 9505.2175, subp. 7H.

⁷² See Minn. Rule 9505.2165, subp. 2(A)(1) and (7); Minn. Rule 9505.2215, subp. 1.

⁷³ Minn. Stat. § 256B.0625, subd. 19a.

In order to receive payment by MHCP, a health service provider must document each occurrence of a health service provided to a recipient.⁷⁴ MHCP funds paid for services not documented in the recipient's health service record are required to be recovered by DHS.⁷⁵ All health service records are required to contain the date on which the entry was made, the date on which the service was provided, and the length of time spent with the recipient if the amount paid for the service depends on time spent.⁷⁶ Personal care providers are required to keep records as required in Minnesota Rules 9505.2160 to 9505.2195.⁷⁷

As set forth above, for each day that PCA services are provided to a recipient, the personal care provider service record must contain documentation of the recipient's name, the PCA's name, the total number of hours spent, the PCA's arrival and departure times, the type of services provided, the PCA's signature and the signature of the recipient or responsible party.⁷⁸ Personal care provider service records must also document the supervision provided by the supervising qualified professional, including the date the supervision of PCA services was provided as specified in part 9505.0335, subp. 4.⁷⁹ Failing to maintain required health service records and submitting claims with false or misleading information constitutes abuse.⁸⁰ The Commissioner is required to seek monetary recovery of funds received through abuse.⁸¹

The Department argues that records provided by Caring Professionals show that eight units of service (2 hours) were documented by PCA Jerry Linder for PCA services provided to D.M. on September 5, 2008.⁸² However, Caring Professionals submitted claims to DHS for twelve units of PCA services provided by Jerry Linder to D.M. on September 5, 2008.⁸³ The Department asserts that four units of service were either not documented or the claim submitted by Caring Professionals contained false information. According to the Department, either scenario constitutes abuse under the governing rules.⁸⁴ The Department contends that because the services were not documented in the recipient's health service record, Caring Professionals was not entitled to payment for those services.⁸⁵ The Department also argues that because the funds were paid in error and as a result of abuse, DHS is entitled to recover the funds.⁸⁶

In addition, the Department asserts that Caring Professionals submitted claims without any of the required documentation for 25 units of service provided by PCA Jerry Linder to D.H. on October 6, 2008. Likewise, according to the Department, Caring

⁷⁴ Minn. R. 9505.2175, subp. 1; Minn. Stat. § 256B.0655, subd. 2(f)(1)(iv).

⁷⁵ Minn. R. 9505.2175, subp. 1.

⁷⁶ Minn. R. 9505.2175, subp. 2(C)(1)-(3).

⁷⁷ Minn. R. 9505.0335, subp. 6(F).

⁷⁸ Minn. R. 9505.2175, subp. 7(H).

⁷⁹ Minn. R. 9505.2175, subp. 7(L).

⁸⁰ Minn. R. 9505.2165, subp. 2(A)(1) and (7).

⁸¹ Minn. R. 9505.2215, subp. 1.

⁸² *Tsuchiya Aff.* at ¶ 13 and Ex. 3 and Ex. 10. (One unit of service equals 15 minutes.)

⁸³ *Id.* at ¶ 13.

⁸⁴ See Minn. R. 9505.2165, subp. 2(A)(1) and (7).

⁸⁵ See Minn. R. 9505.2175, subp. 1; Minn. Stat. § 256B.0655, subd. 2(f)(1)(iv).

⁸⁶ See Minn. Stat. § 256B.064, subd. 1c(a); Minn. R. 9505.2175, subp. 1; Minn. R. 9505.2215, subp. 1.

Professionals submitted claims for 24 units of PCA services provided by Mr. Linder to C.L. on October 18, 2008, and for 20 units of PCA services provided by Mr. Linder to C.L. on October 19, 2008. Finally, the Department asserts that Caring Professionals submitted claims without the required documentation for services provided by PCA Emma Pratt to J.S. on November 3-6, 2008, for 16 units per day.

The Department maintains that because Caring Professionals failed to meet the documentation requirements set forth in statute and rule for the development and maintenance of health service records, it is not entitled to payment for such claims.⁸⁷ The Department contends that it is entitled to recover \$555.90 in MHCP funds paid to Caring Professionals for the identified PCA services that lacked the required documentation.

Except for the four units (1 hour) of services that Caring Professionals claims were provided by PCA Jerry Linder to D.M. on September 5, 2008, the Appellant concedes that all of the PCA services identified by the Department were insufficiently documented and that DHS is entitled to recover \$539.98 of the \$555.90 it seeks. With respect to the four units of PCA services provided by Mr. Linder on September 5, 2008, the Appellants argue that those units of services were documented. Appellants points out that the weekly PCA Time & Activity form submitted by Caring Professionals indicates that Mr. Linder provided three hours (or 12 units) of PCA services to D.M. on September 5, 2008. Appellants concede, however, that the form also references a time period of 10:00 a.m. to 12:00 p.m, which reflects only 8 units of service. The Appellants maintain that the conflicting data on the form creates a factual dispute as to how many units of service were actually provided.

Personal care provider service records are required to contain the day, month, and year the PCA services were provided; the total number of hours spent providing the services; and the time of arrival at the site where the services were provided and the time of departure from the site.⁸⁸ In this case, the PCA Time & Activity Documentation form signed by Mr. Linder and submitted by Caring Professionals indicates that Mr. Linder provided services to D.M. from 10:00 a.m. to 12:00 p.m. on Friday September 5, 2008. Although this period of time reflects two hours of services, the Daily Total column indicates a total of “3 hrs” of service was provided. In order for 12 units or 3 hours of PCA services to be sufficiently documented under the Rules, the timesheet must contain an arrival and departure time that would add up to a total of 3 hours. Appellants assertion, without any further supporting evidence, that 3 hours of service was the actual amount of service provided is insufficient to raise a factual dispute and does not change the fact that the documentation submitted by Caring Professionals for this claim did not satisfy the requirements under the Rules. Accordingly DHS is entitled to recover the entire \$555.90 in funds paid for insufficiently documented claims, including the disputed claim for PCA services provided by Mr. Linder on September 5, 2008.

⁸⁷ See Minn. Stat. § 256B.0655, subd. 2(f)(1)(iv)(2008); Minn. R. 9505.0335, subp. 6(F); Minn. R. 9505.2175, subps. 1, 2(c)(1)-(3), and 7(H).

⁸⁸ See, Minn. R. 9505.2175, subp. 7(H).

2. \$1,534.28 Overpayment for Undocumented Qualified Professional Supervision Services

The Department argues that Caring Professionals failed to maintain health service records that comply with Minnesota statutes and rules for qualified professional supervision of PCA services for claims totaling \$1,534.28. According to the Department, Caring Professionals submitted over 100 claims that lacked required documentation and for many of the claims, Caring Professionals provided no documentation at all.⁸⁹ Specifically, the Department asserts that for eight claims reviewed for recipient L.J., Caring Professionals claimed qualified professional supervision of PCA services for time periods when there were no documented PCA services provided to L. J.⁹⁰ The Department also contends that most of the documentation that was provided consisted of computerized notes that indicated large blocks of time spent reviewing records or performing other tasks, apparently for several recipients.⁹¹ Only one record contained the length of time spent providing services to a particular recipient.⁹²

In addition, the Department maintains that several of the claims submitted were supported by documentation for tasks that do not qualify as qualified professional supervision of PCA services.⁹³ For other claims, the notes clearly refer to services provided to more than one client without any delineation as to which specific services were provided to which specific client.⁹⁴ According to the Department, the notes provided by Caring Professionals in support of the qualified professional supervision services are so vague as to the service provided and the recipient to whom it was provided, it is impossible to tell if the service meets the duties of a qualified professional as defined by Minnesota Rule 9505.0335, subp. 4.

Caring Professionals concedes that the Department is entitled to recovery for claims it submitted for qualified professional services that were not performed by a qualified professional.⁹⁵ It also concedes that the Department is entitled to recovery for claims where Caring Professionals failed to provide required documentation of qualified professional services,⁹⁶ and where the documentation it did provide lacked the length of time the qualified professional supervision service was provided.⁹⁷ According to Caring Professionals, the claims that it concedes were insufficiently documented are 167 units

⁸⁹ Tsuchiya Aff. at ¶¶17 (g), (j), (m)-(o); 18 (e)-(h); 19 (e)-(h); 20 (a)-(c); 21 (b), (c), and (e); 25 (b)-(d), (f)-(h) and (i); 26 (h), (k), (l), (o)-(r), (y) and (z); 27 (g) and (j)-(o); and 28 (b)-(c).

⁹⁰ *Id.* at ¶25 (a)-(g) and (i).

⁹¹ *See id.* at ¶¶17 (b)-(f); 18 (b)-(d); 19 (a)-(d); 22 (a)-(c); 24 (b)-(d); 26 (b)-(g); 27 (c)-(h); 28 (d).

⁹² *Id.* at ¶ 26.

⁹³ *See id.* at ¶¶17 (b)-(c); 18 (b)-(c); 19 (b)-(c); 24 (c); 25 (e); 26 (c); and 27 (d); *see also* Minn. Stat. § 256B.0655, subd. 13 (2008) and Minn. R. 9505.0335, subp. 4.

⁹⁴ *See id.* at ¶¶17 (l); 18 (d); 19 (d); 22 (a); 26 (n) and 27 (e)-(g).

⁹⁵ *Id.* at ¶¶17(g); 25(c); and 26(aa).

⁹⁶ *Id.* at ¶¶17(j); 20(a), (b), (c); 21(b), (c), (e); 25 (a)-(i); 26 (h), (k), (l), (v), (z); 27(b), (j)-(o); Appellants' Brief at 12.

⁹⁷ *Id.* at ¶¶ 17(m) and (n); 18 (e)-(i); 19(e)-(i); 21(a) and (d); 23; 24 (a); 26(a), (o)-(u), (w)-(y); 27 (a), (d)-(g), and (i); 28 (a)-(c); Appellants' Brief at 12.

out of the 208 units identified by the Department, which amounts to \$1,241.54 of the \$1,534.28 the Department seeks to recover.⁹⁸

Caring Professionals asserts, however, that the Department is not entitled to recovery for claims where it entered a single time period for qualified professional services covering multiple recipients. Caring Professionals disputes that such a practice renders the documentation deficient under the statutes or rules. Caring Professionals also disputes the Department's claim that certain activities did not meet the definition of qualified professional services.

To receive payment, the health service record must contain the length of time spent with the recipient if the amount paid for the service depends on the time spent.⁹⁹ Qualified professional supervision of PCA services is paid based on units of time. The records identified by the Department and disputed by Caring Professionals do not indicate the length of time spent providing qualified supervision of PCA services to the particular recipient.¹⁰⁰ The lack of this documentation violates Minnesota Rule 9505.2175 and entitles the Department to recovery of these payments. Therefore, the Department motion for summary disposition as to this claim is granted. The Department is entitled to recover \$1,534.28 in MHCP funds paid to Caring Professionals for qualified professional supervision of PCA services for which Caring Professionals did not maintain the required health service records.

C. Two-Year Suspension of Dewey of Tesha

Dewey and Tesha are the former owners of a personal care provider agency called Redicare Plus, Inc. (d/b/a Home Helpers of Minnesota) (Redicare). In June 2008, Dewey and Tesha entered into a settlement agreement with DHS and the State of Minnesota as a result of an investigation by the Medicaid Fraud Control Unit of the Minnesota Attorney General's Office (MFCU).¹⁰¹ Dewey and Tesha also entered into Stipulated Provider Agreements (SPAs) with DHS agreeing to comply with certain terms and conditions of continued participation in MHCP.¹⁰² Specifically, Dewey and Tesha agreed that as managers of an agency they would:

1. bill MHCP for services actually provided in accordance with the rules of the program;
2. bill only for services rendered to MHCP eligible recipients by an eligible provider;
3. ensure that individuals providing qualified professional supervision services met the requirements to do so; and

⁹⁸ Appellants' Brief at 13-14.

⁹⁹ Minn. R. 9505.2175, subps. 1-2.

¹⁰⁰ See *Tsuchiya Aff.* ¶¶ 17 (a)-(f), (h), (i), (k), (l), (o); 18 (a)-(d); 19 (a)-(d); 22 (a)-(c); 24 (b)-(d); 26 (b)-(g), (j), (j), (m) and (n); 27 (c) and (h); and 28 (d); and Exs. 11-13, 16, 18, 20-22.

¹⁰¹ See *Tsuchiya Aff.* ¶¶ 31 and 32, and Ex. 25.

¹⁰² *Id.* at ¶ 33 and Ex. 26.

4. bill for qualified professional supervision services that were actually provided.¹⁰³

In addition, Dewey and Tesha agreed to attend the Personal Care Provider Organization (PCPO) training offered by DHS within three months of the date of the SPAs, if they remained in a management position with a PCPO.¹⁰⁴ The SPAs further provided that if the Department determined that either Dewey or Tesha failed to meet the terms and conditions of the Agreement by June 1, 2010, DHS would suspend the individual who had violated the agreement from participation in MHCP for a period of two years.¹⁰⁵

Dewey and Tesha are both in management positions with Caring Professionals, which is a PCPO.¹⁰⁶ Neither Dewey nor Tesha completed the PCPO training offered by DHS within three months of executing the SPAs.¹⁰⁷ In addition, as managers of Caring Professionals, both were responsible for the submission of claims that were not provided in accordance with MHCP rules.¹⁰⁸ Because Dewey and Tesha violated the terms of the SPAs and the violations occurred prior to June 1, 2010, the Department asserts that it is contractually obligated to suspend Dewey and Tesha for a period of two years.

The Appellants concede that Dewey and Tesha violated the terms of the SPAs but contend that the two-year suspension provision of the SPAs is “essentially a liquidated damages provision” and that the Administrative Law Judge should decline to enforce the provision as unreasonably severe in light of the actual losses sustained by DHS as a result of the breaches of the SPAs. Appellants assert that the alleged overpayments to Caring Professionals are extremely small when compared to the amount of services Caring Professionals provides to Medicaid recipients in a single year. In addition, the Appellants point out that Dewey and Tesha did attend a PCPO training, albeit not within three months of executing the SPA as required under the terms of the Agreement.

The suspension provision of the SPA is an enforceable contract term. Dewey and Tesha agreed that if they violated the terms of their SPAs, they would be suspended for a period of two years. The suspensions are not an amount of money awarded to compensate DHS for a loss and thus cannot properly be considered “liquidated damages.” The SPAs essentially required Dewey and Tesha to comply with the laws and rules governing the Medicaid program and to attend a PCPO training offered by DHS. The Appellants violated the law by submitting claims that were not entitled to reimbursement and they failed to complete the PCPO training within three months of their agreements. In fact, neither completed any training until May 2010, more than a month after they received the March 30, 2010, suspension letters.

¹⁰³ *Id.* at Ex. 26

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at ¶ 31.

¹⁰⁷ *Id.* at ¶ 34.

¹⁰⁸ *Id.* at Ex. 27.

Because Dewey and Tesha violated the SPAs before June 1, 2010, DHS is entitled to suspend them from participation as a provider in the Minnesota Health Care Programs for a period of two years.

For all of the reasons set forth, the Appellants have failed to demonstrate that there are any material facts in dispute. As a matter of law, the Department is entitled to recover the total amount asserted in this proceeding, \$91,870.33 and to suspend Dewey and Tesha from participating in MHCP for a period of two years.

B.J.H.