

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of the QRC Firm
Registration of PAR, Inc.

**ORDER ON MOTION FOR
PARTIAL SUMMARY DISPOSITION**

This matter comes before Administrative Law Judge Eric L. Lipman on a Motion for Partial Summary Disposition submitted by PAR, Inc. (Respondent or PAR). PAR filed its Motion for Partial Summary Disposition August 3, 2010. The Department of Labor and Industry (Department) filed its Responsive Memorandum in Opposition to PAR's Motion for Partial Summary Disposition on August 30, 2010. Oral argument was heard on the PAR's Motion on September 15, 2010.

Jackson Evans, Assistant Attorney General, appeared on behalf of the Department. Mark A. Karney, Attorney at Law, appeared on behalf of the PAR.

Based upon all the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The PARs' Motion for Partial Summary Disposition is **DENIED** as to Counts 1 through 7 and 9 through 19.
- (2) Count 8 is **DISMISSED**.

Dated: October 8, 2010

/s/ Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

John Richardson is the owner and principal of PAR, Inc. a firm that provides Qualified Rehabilitation Consultant (“QRC”) services.

While PAR holds a QRC license, for a time, Mr. Richardson likewise held a QRC license in his own name. Mr. Richardson surrendered that license on April 15, 2008 as part of a settlement of certain regulatory claims that the Department had against him.¹

The Motion for Summary disposition revolves around the legal significance of certain activities that Mr. Richardson and PAR did before, and after, Mr. Richardson relinquished his QRC license.

PAR’s Motion

PAR’s Motion for Partial Summary Disposition includes Counts 1 through 6, 8 through 13 and 15 through 19.

The Department has voluntarily withdrawn the allegations in Count 8.²

Neither party addressed the allegations in Counts 7, 10 or 14 in their submissions.

Summary Disposition Standards

Summary disposition is the administrative equivalent of summary judgment.³ Summary disposition is appropriate when there is no genuine dispute about the material facts, and one party is entitled to judgment as a matter of law.⁴

The Office of Administrative Hearings has generally followed the summary judgment standards developed in the state courts when considering motions for summary disposition. PAR, as the moving party has the burden of showing the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law.⁵ A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.⁶

¹ Department’s Memorandum in Opposition to PAR’s Motion for Partial Summary Disposition (August 30, 2010) (“Department’s Response”), Affidavit of Phillip Moosbrugger (Moosbrugger Aff.), ¶ 4, Ex. 2.

² Department’s Response, at 14.

³ *Pietsch v. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004); Minn. R. 1400.5500 (K) (2007).

⁴ *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03.

⁵ *Theile v. Stich*, 425 N.W. 2d 580, 583 (Minn. 1988).

⁶ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

When considering a motion for summary disposition, the decision maker must view the facts in the light most favorable to the non-moving party.⁷ Moreover, all doubts and factual inferences must be resolved against the moving party. If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.⁸

A non-moving party may successfully resist a motion for summary judgment by showing that there are specific facts in dispute that have a bearing on the outcome of the case. The nonmoving party cannot rely upon general statements or allegations but must show the existence of specific material facts which create a genuine issue.⁹

At the oral argument on the Motion for Partial Summary Disposition, counsel for the PAR urged the Administrative Law Judge to view this motion in terms of two basic questions:

- (1) Were K.A. and C.J. receiving statutory rehabilitation services at the time they were receiving services from Richardson?
- (2) Did the non-compete agreement that PAR, Inc. required Gerard Guzik and Brian Finstad to sign establish a fee-splitting arrangement in violation of Minn. R. 5220.0710, subpart 5?

Services Requested or Received by K.A., Counts 1 through 6, 8 and 9

The parties agree that only a licensed QRC may provide statutory rehabilitation services. PAR argues, however, that Mr. Richardson did not engage in these services following the surrender of his QRC license. PAR asserts that Mr. Richardson engaged in unregulated activities for the firm and that PAR contracted with other, licensed providers to perform statutory rehabilitation services.¹⁰

Counts 1 through 6 all relate to contact with providers that Richardson had on behalf of K.A. on June 23, 2008. The key fact question in relation to these counts is whether K.A. was receiving statutory rehabilitation services from PAR on that date.

⁷ *Ostendorf v. Kenyon*, 347 N.W. 834 (Minn. Ct. App. 1984), *Carlisle v. City of Minneapolis*, 437 N.W. 2d 712, 715 (Minn. Ct. App. 1988).

⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Thompson v. Campbell*, 845 F.Supp. 665, 672 (D. Minn. 1994); *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Dollander v. Rochester State Hospital*, 362 N.W.2d 386, 389 (Minn. App. 1985).

⁹ *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (Minn. 1976).

¹⁰ PAR's Memorandum in Support of Motion for Partial Summary Disposition (8/3/2010) (PAR's Motion), atp. 3-4, Affidavit of Mark Karney (Karney Aff.), Ex. 4.

PAR asserts that Richardson was hired in his capacity as a CRC (Certified Rehabilitation Counselor) to provide Disability Case Management (DCM) services for K.A.¹¹ PAR further alleges that it was not contacted by K.A. with a request for statutory rehabilitation services until June 24, 2008.¹²

The Department alleges that K.A. requested a Rehabilitation Consultation on June 21, 2008.¹³ The request for a “vocational consult and/or assignment of QRC, Shannon Prudhomme/PAR” was dated June 21, 2008 and signed by Michael Schultz, K.A.’s attorney. It was received by the Department on June 24, 2008.¹⁴ It is not clear from the record when PAR or Richardson became aware of this request.

The nature of the services delivered to K.A. is genuinely disputed and this dispute is material to the case. Therefore, as to Counts 1 through 6, the Motion for Summary Disposition is denied.

Count 8 concerns allegations that Richardson falsely identified himself to K.A.’s physician as a QRC. Based on additional evidence submitted by PAR, the Department has voluntarily withdrawn this count.

Count 9 alleges that PAR allowed Richardson to provide rehabilitation services to K.A. without a license.

Richardson’s services to K.A. amount to “a program of vocational rehabilitation, including medical management, designed to return an individual to work consistent with Minnesota Statutes, section 176.102, subdivision 1, paragraph (b).”¹⁵ As with Counts 1 through 6, there are genuinely disputed issues of material fact which preclude a grant of summary disposition.

Services Requested or Received by C.J., Counts 11-13 and 15

Counts 11 and 12 relate to services Richardson provided to C.J. when Richardson met with her, accompanied her to a doctor’s appointment and contacted her doctor following the appointment. The Department alleges that C.J. requested services from Richardson before Richardson withdrew his QRC registration.¹⁶ The Department presented evidence that Leon Olson, a QRC employed by PAR, contacted C.J. on March 13, 2008 to schedule a Rehabilitation Consultation. The Department maintains that this contact occurred after C.J.’s attorney requested a rehabilitation consultation.¹⁷

¹¹ PAR’s Motion, p. 2.

¹² PAR’s Motion, p. 3, Karney Aff., Exs. 2-4.

¹³ Department’s Response, at 2 (*citing* Karney Aff., Ex. 2 and Affidavit of Denise Micale at ¶ 4).

¹⁴ Karney Aff., Ex. 2.

¹⁵ See, Minn. R. 5220.0100 (29) (2008) (“Rehabilitation services”).

¹⁶ Department’s Response, at 3; Moosbrugger Aff.; Exs. A and E.

¹⁷ *Id.*, Ex. E.

In addition, the Department introduced evidence to show that C.J. was never authorized by her employer's insurance carrier to receive non-statutory rehabilitation services from Richardson.¹⁸

PAR claims that C.J.'s attorney, Roger Poehls, Jr., hired Richardson as a CRC to "work briefly with C.J. in the capacity of a disability case manager." In support of its claim, the PAR relies on a letter from Mr. Poehls stating that Liberty Mutual, C.J.'s insurer, approved Mr. Poehls' request to hire a case manager for C.J.¹⁹ Mr. Poehls alleges that he knew Richardson was not a QRC and that it was only after C.J.'s April 17, 2008 doctor appointment that PAR became involved in providing statutory rehabilitation services.²⁰

The Department alleges that, in addition to providing QRC services, Richardson contacted C.J.'s medical provider without her written consent, when he attended the appointment and when he sent a letter to C.J.'s doctor concerning C.J.'s treatment.²¹ PAR states that, because he was acting as C.J.'s CRC, Richardson "had the right to attend the meeting with Dr. Butcher . . . because she gave her express consent in person for the doctor to communicate with [Richardson]." A letter from C.J.'s doctor acknowledged that "we do not typically have written authorization with the patient as long as another individual is in the room at the same time, so I do not have any written authorization regarding my exchange with Mr. Richardson."²²

The nature and timing of the services delivered to C.J. is genuinely disputed and this dispute is material to the case. Therefore, as to Counts 11 through 12, the Motion for Summary Disposition is denied.

Counts 13 and 15 allege that PAR violated Minn. R. 5220.1801, subp. 9, and 5220.1805 (B), when Richardson held himself out as a QRC to C.J.'s physician, Dr. Butcher.

The evidence as to the nature of Mr. Richardson's representations is in conflict. A contemporaneous note in C.J.'s chart stated "[s]he presents today with a QRC to discuss ongoing treatment options."²³ A letter written more than two years later by the doctor, acknowledges the note referring to Richardson as a QRC, then says "I cannot say with any certainty that he introduced himself or implied that he was a QRC." The nature of the representations, if any, made by Mr. Richardson to Dr. Butcher, is genuinely disputed and material to these claims. The Motion for Summary Disposition as to Counts 13 and 15 is denied.

¹⁸ *Id.*, Affidavit of Jaime Ruiz.

¹⁹ PAR's Motion, at 10, Karney Aff., Ex. 10.

²⁰ *Id.*

²¹ Department's Response, at 15-16.

²² PAR's Motion, Karney Aff., Ex. 12.

²³ Department's Response, Moosbrugger Aff., Ex. I.

Fee-splitting Agreement, Counts 16-19

PAR, Inc. required the QRC interns with whom it affiliated to sign a non-competition agreement. The agreement provided that if any of the interns were to leave PAR and continue to provide services to PAR's former clients while at a new firm, the signatory would remit to PAR either fifty-percent of the earned fee, or \$2,000, whichever was greater. Gerard Guzik and Brian Finstad were QRC interns with PAR and each signed such an agreement.

Mr. Guzik left PAR and founded his own firm, Integrity Rehabilitation. When he provided services to employees who were former clients of PAR, PAR sought to enforce the provision of its non-competition agreement.

Count 16 alleges PAR violated 5229.0710, subpart 5. This subpart provides in part:

If the assigned qualified rehabilitation consultant leaves a firm to work for another firm or to start a solo practice, the employee may either choose to continue with the assigned qualified rehabilitation consultant or remain with the qualified rehabilitation consultant's former firm. Neither option will exhaust the employee's right to choice of a qualified rehabilitation consultant pursuant to subpart 1.

PAR argues that the non-compete agreement did not, in fact, prevent any of PAR's clients from receiving services through Integrity Rehabilitation. PAR argues that the three clients that chose to follow Guzik, did receive services, and therefore no violation of the rule occurred.

The Department argues that PAR violated the rule because Guzik "only accepted former PAR clients if those clients were adamant about being transferred."²⁴ Furthermore, the Department claims that the fee-splitting requirement acted as a significant financial disincentive to Guzik accepting transfer clients from PAR.²⁵

While the Administrative Law Judge is inclined to agree with PAR that Minn. R. 5220.0710, subpart 5 does not proscribe the formation of non-competition agreements – and is aimed at a different object entirely – the record developed so far is not complete enough to demonstrate PAR's entitlement to judgment as a matter of law. Mr. Moosbrugger's affidavit addresses some of the history of the application of this regulation, but not all. Some additional facts were referenced at the oral argument, but not through sworn testimony. A grant of summary disposition is not appropriate on this record.

²⁴ Department's Response, at 17, Affidavit of Gerard Guzik, ¶ 6.

²⁵ *Id.*, Moosbrugger Aff., at ¶ 18.

Count 17 alleges that PAR violated Minn. R. 5220.1805 (G) when PAR required its QRC interns to accept a fee-splitting clause in the non-compete agreement. The rule states that a “rehabilitation provider shall not incur profit, split fees, or have an ownership interest with another rehabilitation provider outside of the firm that employs the provider.”

For its part, PAR does not deny sending letters to certain insurers in July of 2008, demanding that they pay PAR a portion of future fees earned by Integrity Rehabilitation. Instead, PAR asserts that two of the three clients who chose to move to Integrity Rehabilitation when Mr. Guzik left PAR, had their cases closed before PAR sent the letters, and Integrity was paid in full. PAR states that the letters never impeded the rights of any of the three individuals to select a QRC and that neither Integrity Rehabilitation nor Gerard Guzik paid PAR pursuant to the terms of the non-complete agreement.²⁶

The Department argues that merely entering into an agreement to split QRC fees violates the rule. Furthermore, it asserts that PAR attempted, through demands to insurers and filing suit, to obtain a portion of Integrity Rehabilitation’s fees.²⁷

Whether PAR “incurred profit” or “split fees” on services performed by Integrity Rehabilitation is genuinely disputed and material to this claim. Summary Disposition as to Count 17 is denied.

Count 18 alleges that PAR violated Minn. R. 5200.1900, subpart 2 when PAR sought to collect for rehabilitation services that it did not perform.²⁸ The rule provides:

A rehabilitation provider shall bill for only those necessary and reasonable services which are rendered in accordance with Minnesota Statutes, section 176.102 and the rules adopted to administer that section. A dispute about reasonable and necessary services and costs shall be determined by the commissioner or a compensation judge. The commissioner's or a compensation judge's review must include all the following factors:

- A. the employee's unique disabilities and assets in relation to the goals, objectives, and timetable of the rehabilitation plan;
- B. the type of rehabilitation services provided and the actual amount of time and expense incurred in providing the service;
- C. an evaluation of whether services provided were unnecessary, duplicated other services, were available at no charge to public, or were excessive relative to the actual needs of the employee; and,

²⁶ PAR’s Motion, at 10, Karney Aff., Ex. 13.

²⁷ Department’s Response, at 18.

²⁸ *Id.*, at 19.

- D. an evaluation of whether services rendered were expressly called for by the employee's rehabilitation plan.

PAR argues that it did not violate this rule because it does not proscribe attempts to collect fees for services not performed.

The Department responds that it has interpreted this rule to apply to a rehabilitation provider who seeks to bill for services not performed, because such claims are not reasonable billing practices.²⁹

Whether PAR billed for services that were not “rendered in accordance with Minnesota Statutes 176.102 and the rules adopted to administer that section,” is genuinely disputed and material to this claim. Summary Disposition as to Count 18 is denied.

Count 19 alleges PAR violated the requirement at 5220.1805 (F). This rule states that “[a]ny fee arrangement which prevents or compromises individualized assessment and services for each employee” is grounds for discipline.

PAR argues that it did not violate this rule because none of its former patients “alleged rehabilitation services were diminished”³⁰ The Moosbrugger and Guzik affidavits, however, suggest that the interests of former PAR-clients in receiving thorough, dispassionate and independent services from QRCs who are subject to the non-compete agreement, are placed at risk.³¹

Whether PAR’s non-compete agreement is a “fee arrangement which ... compromises individualized assessment and services for each employee,” is genuinely disputed and material to this claim. Summary Disposition as to Count 19 is denied.

E.L.L.

²⁹ *Id.*

³⁰ PAR’s Motion, at 12.

³¹ Moosbrugger Aff., ¶ 21; Guzik Aff., ¶ 7.