ISSUE

Whether the Department properly issued an Order of Summary Suspension to Petitioner on July 31, 2020 following Petitioner's federal indictment on one count of Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances in violation of 21 U.S.C. 841(a)(1), 846 and six counts of Unlawful Distribution of Controlled Substance, Aiding & Abetting in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

FINDINGS OF FACT

1. On REDACTED 2020, Petitioner, Dr. REDACTED REDACTED signed a Medical Assistance Provider & Trading Partner Agreement, in which he agreed to all the terms and conditions listed therein. (Exhibit A; Testimony)

2. On REDACTED 2020 Petitioner was indicted in the United States District Court, REDACTED District of Michigan, on one count of Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances in violation of 21 U.S.C. 841(a)(1), 846 and six counts of Unlawful Distribution of Controlled Substance, Aiding & Abetting in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. (Exhibit B; Testimony)

3. On July 31, 2020, Respondent issued an Order of Summary Suspension to Petitioner, suspending Petitioner from participation in the Michigan Medicaid Program, based on the aforementioned indictment, effective August 3, 2020. (Exhibit C; Testimony)

4. Allegations from the indictment contained in the Order of Summary Suspension include:

    a. Beginning in September 2017 and continuing up to and including June 2020, a scheme and pattern of illegal conduct involving the unlawful acquiring and distribution of prescription drug controlled substances was formed and active in the REDACTED District of Michigan and elsewhere.

    b. REDACTED was hired by a co-conspirator to work in medical clinics whose fundamental purposes was to create prescriptions for controlled substances that could be filled at pharmacies. The purpose of filling the prescriptions was not for the legitimate treatment of patients, but rather to obtain controlled substances that could be sold at a substantial profit on the illegal street market.

    c. REDACTED and his co-conspirators prescribed a combined total of more than 1,951,148 dosage units of Schedule II controlled substances and 739 prescriptions for promethazine with codeine cough syrup.

d. The Oxycodone and Oxymorphone, alone, carried a conservative street value of more than $41 million.

i. Most of the unlawful controlled substance prescriptions were paid for in cash. However, in addition, both the controlled substances and the non-controlled "maintenance" medications would be billed to health care benefit programs by the pharmacies.

ii. This "maintenance medication" was used in order to make the doctor's prescribing practices appear more legitimate by reducing the percentage of controlled substance prescriptions.

iii. The adding of maintenance medications also increased the profits made by the cooperating pharmacies. Billings to the Medicare and Medicaid programs for medically unnecessary prescription drug medications during the course of this conspiracy exceeded $146,000.

e. REDACTED knowingly prescribed prescription drug controlled substances outside the course of legitimate medical practice and for no legitimate medical purpose, in furtherance of this scheme. REDACTED and his co-conspirators generated income by writing controlled substance prescriptions or by signing blank prescriptions.

f. REDACTED also issued prescriptions after either a cursory examination or without any examination at all. At times during the scheme, patient names would simply be provided, and the medical professionals would write prescriptions and create patient charts without examining any purported patient.

(Exhibit C)

5. The Department's Order of Summary Suspension notified Petitioner of his right to a hearing to contest the Order of Summary Suspension. On August 13, 2020, Petitioner requested a hearing and asked that the scheduled hearing date be adjourned. On September 3, 2020, a Notice of Hearing was issued, scheduling a hearing for September 22, 2020.

6. On September 4, 2020, Respondent filed a Motion for Summary Disposition. On September 10, 2020, Petitioner filed a Response to Respondent's Motion for Summary Disposition.

CONCLUSIONS OF LAW

The Administrative Procedures Act (APA) allows parties "an opportunity to present oral and written arguments on issues of law and policy[.]" MCL 24.272(3). Pursuant to MCL 24.272(3), a party may pursue a motion for summary disposition to address questions of

law that do not involve factual disputes. *Smith v Lansing Sch Dist*, 428 Mich 248, 256-257; 406 NW2d 825 (1987).

MCR 2.116(3) serves as a guide for summary disposition motions under MCL 24.272(3). See *e.g. American Community Mutual Ins Co v Commr of Ins*, 195 Mich App 351, 361-363; 491 NW2d 597 (1992). Pursuant to MCR 2.116(c)(10), summary disposition is appropriate when there is no genuine dispute of material fact among parties to an action. Pursuant to MCR 2.116(c)(8), summary disposition is appropriate when the opposing party has failed to state a claim on which relief can be granted.

Furthermore, the Michigan Administrative Code allows for summary disposition under Rule 792.10129, which provides, in pertinent part:

> (1) A party may make a motion for summary disposition of all or part of a proceeding. When an administrative law judge does not have final decision authority, he or she may issue a proposal for decision granting summary disposition on all or part of a proceeding if he or she determines that that any of the following exists:
>
> (a) There is no genuine issue of material fact.
>
> (b) There is a failure to state a claim for which relief may be granted.
>
> (c) There is a lack of jurisdiction or standing.
>
> (2) If the administrative law judge has final decision authority, he or she may determine the motion for summary decision without first issuing a proposal for decision.
>
> (3) If the motion for summary disposition is denied, or if the decision on the motion does not dispose of the entire action, then the action shall proceed to hearing.

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As such, this Administrative Law Judge has the authority to hear and decide preliminary dispositive motions and the authority to issue a decision for summary disposition.

The Social Welfare Act of 1939, 1939 PA 280, (Act) as amended; specifically MCL 400.111f, provides in pertinent part:

> (1) <u>The director may issue an order incorporating a finding that emergency action is required to protect the state's interest, as the state's interest is described in this subsection by the statement of circumstances warranting emergency action, in any of the following: the public health, welfare, or safety; medically indigent individuals; or public funds of the program of medical assistance</u>. Circumstances that warrant emergency action include, <u>but are not limited to</u>, any of the following:

* * *

(b) A reasonable belief that the provider has violated the Medicaid false claims act, Act No. 72 of the Public Acts of 1977, being sections 400.601 to 400.613 of the Michigan Compiled Laws, the health care false claims act, Act No. 323 of the Public Acts of 1984, being sections 752.1001 to 752.1011 of the Michigan Compiled Laws, or a substantially similar statute of another state or the federal government.

* * *

(5) Upon a determination that circumstances described in subsection (1) exist, the director may issue an order for the summary suspension of payments on pending or subsequent claims, in whole or in part, or for the summary suspension of a provider from participation in the program of medical assistance. The summary suspension shall be effective on the date specified in the order or on service of a certified copy of the order on the provider, whichever occurs later, and shall remain in effect during administrative or judicial proceedings on the suspension. Upon request of a provider, a contested case hearing pursuant to chapter 4 and chapter 6 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.271 to 24.287 and 24.301 to 24.306 of the Michigan Compiled Laws, shall be commenced not later than 15 days after the summary suspension. If a contested case hearing is requested by a provider relative to an emergency suspension under this section, a hearing shall be held to determine whether the emergency suspension is supported by competent, material, and substantial evidence on the whole record. Under appropriate circumstances, the state department may hold or institute a hearing under section 111c(1), or take an action under section 111d at the same time an action is taken under this section, while an action under this section is pending, or after a decision on an action is made. The presiding officer may consolidate the 2 hearings into a single proceeding in the interest of economy. However, the director shall not make a final decision in a contested case under section 111c(1) or 111d arising from or related to an emergency action or the circumstances upon which an emergency action was taken.

[MCL 400.111f(1)(b), (2) & (5)].

The *Michigan Medicaid Provider Manual* governs termination of Medicaid Providers enrollments, including summary suspensions. It states as follows:

SECTION 6 – DENIAL OF ENROLLMENT, TERMINATION AND SUSPENSION

6.1 TERMINATION OR DENIAL OF ENROLLMENT

MDHHS may terminate or deny enrollment in the Michigan Medicaid program. Termination of enrollment means a provider's billing privileges have been revoked and all appeal rights have been exhausted or the timeline for appeal has expired. Denial of enrollment means the provider's application will not be approved for participation in the Medicaid program.

MDHHS must terminate or deny a provider's enrollment in Michigan's Medicaid program for the following reasons:

- Termination on or after January 1, 2011 under Medicare or the Medicaid program, or the Children's Health Insurance Program (CHIP) of any other state.

- Convicted of a relevant crime described under 42 USC 1320a-7(a):

  - Conviction of program-related crimes Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under subchapter XVIII or under any State health care program.

  - Conviction relating to patient abuse Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

  - Felony conviction relating to health care fraud Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph [1]) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

  - Felony conviction relating to controlled substance

  Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Providers who have been excluded due to one of the federal mandatory exclusions listed above will remain on the MDHHS Sanctioned Provider List

until the minimum period for their exclusion has been completed and the provider has requested a lifting of their sanction from the sanctioning body.

- Failure to comply with the enrollment requirements of the Social Welfare Act, Public Act 280 of 1939 (MCL 400.111b -111e) and the provider screening and enrollment requirements pursuant to 42 CFR 455.416. The basis for termination or denial of enrollment under this section includes, but is not limited to, the provider's:
    - failure to submit timely and accurate information;
    - failure to cooperate with MDHHS screening methods;
    - failure to submit sets of fingerprints as required within 30 days of a CMS or MDHHS request;
    - failure to permit access to provider locations for site visits;
    - falsification of information provided on the enrollment application or subsequent information requests;
    - inability to verify their identity; or
    - failure to comply with Medicaid policies regarding submission of claims and billing Medicaid beneficiaries.
- The provider is excluded from participating in a provider capacity in Medicare, Medicaid or any other Federal health care programs.
- The provider is convicted of violating the Medicaid False Claims Act, the Health Care False Claims Act, a substantially similar statute, or a similar statute by another state or the federal government.
- The provider has a federal or state felony conviction within the preceding 10 years of their provider enrollment application, including but not limited to, any criminal offense related to:
    - murder, rape, abuse or neglect, assault, or other similar crimes against persons;
    - extortion, embezzlement, income tax evasion, insurance fraud, and other similar financial crimes;
    - the use of firearms or dangerous weapons; or
    - any felony that placed the Medicaid program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.

- The provider has a federal or state misdemeanor conviction within the preceding five years of their provider enrollment application, including but not limited to, any criminal offense related to:
    - any misdemeanor crime listed as a permissive exclusion in 42 USC 1320a-7(b);
    - rape, abuse or neglect, assault, or other similar crimes against persons;
    - extortion, embezzlement, income tax evasion, insurance fraud, or other similar financial crimes; or
    - any misdemeanor that placed the Medicaid program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.

For the purposes of the excluded offenses mentioned above, an individual or entity is considered to have been convicted of a criminal offense when:

- a judgment of conviction has been entered against the individual or entity by a federal, state, tribal or local court regardless of whether there is an appeal pending;
- there has been a finding of guilt against the individual or entity by a federal, state, tribal or local court; or
- a plea of guilty or nolo contendere by the individual or entity has been accepted by a federal, state, tribal, or local court.

The criminal history screening will be conducted by MDHHS through reputable and reliable data sources. Screenings for providers will be done as required by law and as deemed necessary by MDHHS for the protection of the Medicaid program and beneficiaries. For criminal offenses that fall under the mandatory exclusions of 42 USC 1320a-7(a), the definition of conviction will conform with 42 USC 1320a-7(i), which may include, but is not limited to, a record relating to criminal conduct that has been expunged.

Any entity that offers, in writing or verbally, discounts on co-pay amounts, fax machines, computers, gift cards, store discounts and other free items, or discounts/waives the cost of medication orders if an entity uses their services:

- may violate the Medicaid False Claim Act and Medicaid/MDHHS policy, which may result in disenrollment from Medicaid/MDHHS programs.

- may violate the Michigan Public Health Code's prohibition against unethical business practices by a licensed health professional, which may subject a licensee to investigation and possible disciplinary action.

Pursuant to MCL 400.111e, the Medicaid Director may terminate or deny enrollment if that action is necessary to protect the health of medically indigent individuals, the welfare of the public, and/or the funds appropriated for the Medicaid program. Additionally, the Medicaid Director may reduce or extend a provider's exclusion from the Medicaid program if, in the Medicaid Director's judgment, the continuation or reduction of the exclusion period is necessary to protect beneficiaries or the Medicaid program.

Providers who are already enrolled at the time of a finding by MDHHS will have their enrollment ended as of the date MDHHS was notified of the excluded offense. Claims with dates of service on and after the provider's enrollment termination date will be denied.

6.2 ENROLLMENT AND REINSTATEMENT AFTER TERMINATION OR DENIAL

Providers who are excluded from participation in the Medicaid program due to conviction of a crime listed in the previous subsection may request enrollment or reinstatement upon a showing that the provider's participation is in the best interest of the Medicaid program and of Medicaid beneficiaries. Factors that may be considered when determining whether enrollment or reinstatement in the Medicaid program is in the best interest of the Medicaid program and beneficiaries includes, but is not limited to:

- whether the exclusion poses an undue hardship to beneficiaries;
- whether the provider is the sole community physician or sole source of specialized services in the community;
- subsequent offenses of the provider;
- amount of time that has lapsed since the excluded offense;
- whether all conditions, terms of probation or parole, penalties, fines, etc. of the felony or misdemeanor offenses that resulted in exclusion have been fully completed;
- provider's participation in Medicare or other state Medicaid programs; or
- other factors that demonstrate the provider does not otherwise pose a risk to the Medicaid program or beneficiaries.

Requests for reinstatement must be sent in writing to the Medicaid Provider Enrollment Unit. (Refer to the Directory Appendix for contact information.)

MDHHS will address requests for enrollment and reinstatement within 30 days after all requested information has been provided.

6.3 SUSPENSION

Summary suspension prevents further payment after a specified date, regardless of the date of service (DOS).

If an indication of fraud or Medicaid misuse/abuse is discovered during any of the following, MDHHS considers it as a basis for summary suspension:

- An evaluation of billing practices.
- The prior authorization (PA) process.
- An on-site review of financial and medical records and a written report of this review is filed.
- The construction of a profile to evaluate patterns of utilization of Medicaid beneficiaries served by the provider.
- A peer review of services or practices.
- A hearing or conference between MDHHS and the provider (and counsel, if so requested).
- Indictment or bindover on charges under the Medicaid or Health Care False Claims Act or similar state/federal statute.

6.4 LOSS OF LICENSURE/LIMITED LICENSES

For providers who must be licensed to practice their profession, continued enrollment in Medicaid is dependent upon maintaining licensure. Failure to renew a provider's license results in disenrollment from Medicaid effective the date of final lapse of the provider's license.

Limited or suspended licenses may result in disenrollment or denial of enrollment if MDHHS determines the basis of the action to be detrimental to the health or safety of medically indigent individuals, the welfare of the public, and/or the funds appropriated for the Medicaid program.

Suspension or revocation of a provider's license by the appropriate standard setting authority results in termination of Medicaid participation effective on the date the provider is no longer licensed. In the case of a

> provider not located in Michigan, suspension or revocation would be administered by the appropriate state licensing board.
>
> If a provider is no longer licensed to practice (e.g., the license was suspended, lapsed, or revoked), MDHHS does not reimburse for services ordered, prescribed, referred or rendered by that provider after the termination of the license. Medicaid payments obtained for services rendered during a period when the provider was unlicensed must be refunded to the State.
>
> A provider may submit an on-line application to MDHHS to request re-enrollment as a Medicaid provider when his license is reinstated. Refer to the Provider Enrollment Section of this Chapter for information on the enrollment process.
>
> *Medicaid Provider Manual*
> *General Information for Providers Chapter*
> *July 1, 2020, pp 16-20*
> *Emphasis added*

In order to support a summary suspension, the Department must show by competent, material and substantial evidence on the record that there was a reasonable belief that Petitioner's actions placed the public health, welfare, or safety of medically indigent individuals or public funds of the program of medical assistance at risk as contemplated in MCL 400.111f(1).

The Department argues that its Motion for Summary Disposition should be granted, and the summary suspension should be upheld because there is no genuine issue of material fact and the Department is entitled to judgment as a matter of law. The Department argues that the indictment is sufficient basis for formulation of the reasonable belief requirement under MCL 400.111f(1) because Petitioner's federal indictment on one count of Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances in violation of 21 U.S.C. 841(a)(1), 846 and six counts of Unlawful Distribution of Controlled Substance, Aiding & Abetting in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 places the public health, welfare, or safety; medically indigent individuals; or public funds of the program of medical assistance in danger.

The Department further argues that summary suspension is supported under MCL 400.111f(1)(b) and MPM Section 6.3 because Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances in violation of 21 U.S.C. 841(a)(1), 846 and Unlawful Distribution of Controlled Substance, Aiding & Abetting in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 are similar to the Medicaid False Claims Act and Health Care False Claims Act.

Petitioner argues that the Department's finding that "emergency action is required to protect the public funds of the Medicaid program" is not based on any allegations or finding made by MDHHS but based only on the federal indictment. Petitioner argues that

according to the Jury Instructions in the REDACTED District of Michigan, Instruction 1.03, "An indictment is not any evidence at all of guilt. It is just the formal way that the government tells the defendant what crime he is accused of committing. It does not even raise any suspicion of guilt." As such, Petitioner argues that MDHHS may not rely on the indictment for the summary suspension here.

Petitioner further argues that the Department cannot argue that there is no genuine issue of material fact because there are no "facts" in this case; only allegations contained in the indictment. Petitioner also argues that the Department's reliance on MPM Section 6.3 is misplaced because the charges in the indictment are not similar to charges under the Medicaid or Healthcare False Claims Act or a similar state/federal statute. Petitioner also points out that summary suspension under MPM Section 6.3 is not mandatory but rather discretionary.

Having considered the parties' arguments in full, it is determined that the Department has met its burden of proof to show that there was a reasonable belief that emergency action was required to protect the public health, welfare, or safety of medically indigent individuals or public funds of the program of medical assistance as contemplated in MCL 400.111f(1). And, while the undersigned agrees with Petitioner that Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances and Unlawful Distribution of Controlled Substance, Aiding & Abetting are not similar charges to charges under the Medicaid or Healthcare False Claims Act or a similar state/federal statute, the Director can also take emergency action at any time where there is a reasonable belief that the public health, welfare, or safety of medically indigent individuals or public funds of the program of medical assistance is at risk. (See MCL 400.111f(1)). Here, given the nature of the charges alleged, Petitioner's actions as outlined in the indictment would put medically indigent individuals at risk as well as risk the public funds of the Medicaid program. It is alleged that Medicaid was billed for some of the fraudulent prescriptions written by Petitioner and his co-conspirators. The fraudulent nature of these prescriptions would certainly place funds of the Medicaid program at risk. In addition, it is alleged that the conspiracy here involved filling prescriptions for controlled substances in order to then sell those controlled substances on the street. Certainly, such an action would place all individuals in the community at risk, including medically indigent individuals participating in the Medicaid program.

Petitioner's argument that an indictment cannot form the basis of the reasonable belief requirement is without merit. A grand jury serves the function of determining if there is probable cause to believe that a crime has been committed. *United States v Sells Eng'g, Inc.,* 463 U.S. 418, 423, 103 S. Ct. 3133, 3137, 77 L. Ed. 2d 743 (1983). By returning an indictment in this case, the federal grand jury found that there was probable cause that a crime was committed by Petitioner. In this manner, the grand jury serves the same purpose as the preliminary examination under state law. *People v Yost,* 468 Mich. 122, 125-26, 659 N.W.2d 604, 606 (2003) (the preliminary examination has a dual function, i.e., to determine whether a felony was committed and whether there is probable cause to believe the defendant committed it). The Michigan Supreme Court has stated that a finding of probable cause "requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *Id.* (emphasis added). As such, the Department has met the reasonable

belief standard solely by relying on the indictment. In other words, the indictment, on its face, is competent, material and substantial evidence on the record that there was a reasonable belief that Petitioner engaged in activities that placed the public health, welfare, or safety of medically indigent individuals or public funds of the program of medical assistance at risk as contemplated in MCL 400.111f(1).

It would not be feasible for the Department to investigate and litigate the underlying grounds for every ongoing criminal prosecution when deciding whether to issue a summary suspension. If the Department were required to duplicate the criminal investigation, it would vitiate the Emergency Action section of the Social Welfare Act, the purpose of which is to allow the Department to act quickly and take temporary action at a lower standard of proof to protect the Medicaid program while awaiting the definitive proceeding on the underlying criminal proceedings. Should Petitioner ultimately be cleared of these charges, the summary suspension will be removed. And, while Petitioner is correct that the Department must meet the reasonable belief standard by putting forth competent, material, and substantial evidence on the whole record, that requirement does not increase the burden of proof on the Department. That burden is only a reasonable belief, a very low standard.

Given that the indictment will continue to exist even if an evidentiary hearing is held on the summary suspension, (as Petitioner does not argue that he is not the Dr. REDACTED REDACTED named in the indictment), there is no genuine issue of material fact and the Department is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that:

The Order of Summary Suspension issued by the Department to Petitioner on July 31, 2020, effective August 3, 2020 is UPHELD.

The administrative hearing scheduled for September 22, 2020 at 10:00 a.m. is CANCELLED.