

ISSUE

Whether the Department's Orders of Summary Suspension should be upheld.

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material, and substantial evidence on the whole record, finds as material fact:

1. On September 25, 2014, Petitioner 2 entered into a Medical Assistance Provider & Trading Agreement. (Exhibit (Ex) A.)
2. Petitioner submitted the September 25, 2014 agreement on behalf of Petitioner 2. (Ex A.)
3. Petitioner is the sole owner of Petitioner 2. (Ex B.)
4. On September 26, 2019, the United States District Court — REDACTED District of Michigan Southern Division, indicted Petitioner. (Ex C.)
5. Petitioner was indicted for one count of Conspiracy to Commit Health Care Fraud and Wire Fraud in violation of 18 U.S.C. § 1349 and five counts of Health Care Fraud in violation of 18 U.S.C. § 1347 and 18 U.S.C. §2. (Ex C.)

6. On February 12, 2021, the Department issued an Order of Summary Suspension excluding Petitioner and summarily suspending Petitioner 2 from any direct or indirect participation in the Michigan Medicaid program effective February 16, 2021 pursuant to 42 CFR §1001.1001(a)(1)(iii) and (2), MCL 400.111d, MCL 400.111e, and MCL 400.111f. (Ex D.)
7. On February 25, 2021, MOAHR received from Petitioner, a request for hearing.

CONCLUSIONS OF LAW

The Administrative Procedures Act (APA) allows parties "an opportunity to present oral and written arguments on issues of law and policy[.]"¹ 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.²

MCR 2.116 serves as a guide for summary disposition motions under MCL 24.272(3).³ 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.

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.

¹ MCL 24.272(3).

² *Smith v Lansing Sch Dist*, 428 Mich 248, 256-257; 406 NW2d 825 (1987).

³ See e.g. *American Community Mutual Ins Co v Commr of Ins*, 195 Mich App 351, 361-363; 491 NW2d 597 (1992).

- (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.

* * *

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) 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. Circumstances that warrant emergency action include, but are not limited to, 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.⁴

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):

⁴ MCL 400.111f(1)(b), (2) & (5).

- > 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.

6.3 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.⁵

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 Commit Health Fraud and Wire Fraud in violation of 18 U.S.C. §1349 and five counts of Health Care Fraud in violation of 18 U.S.C. §1347 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 went on to indicate since Petitioner has sole ownership and controlling interest in Petitioner 2, Petitioner and Petitioner 2 must be summarily suspended/excluded in accordance with 42 CFR 1001.1001(a)(1)(iii) & (2).⁶

The Department further argues the summary suspension is supported under MCL 400.111f(1)(b) and MPM Section 6.3 because Health Care Fraud under 18 U.S.C. §1347 & §1349 are the same or substantially similar to the Medicaid False Claims Act and Health Care False Claims Act. And the Indictment supports a reasonable belief that Petitioner committed a crime substantially similar to the Medicaid False Claims Act or Health Care False Claims Act.

Petitioners argue that the summary suspension is not warranted as there is no statutory or regulatory basis for the exclusion of Petitioner and summary suspension of Petitioner 2. Specifically, Petitioners argue Petitioner was indicted in a wholly unrelated matter

⁵ Medicaid Provider Manual, General Information for Providers Chapter, pp 15-18.

⁶ If a person with a relationship with an entity has been excluded from participation in Medicare or any State health care program and such person has a direct or indirect ownership or control interest in the entity, the entity may be excluded.

that occurred 2 years prior and that Petitioner 2 has not been indicted and has a clean record.

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). The Director can 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.' A grand jury serves the function of determining if there is probable cause to believe that a crime has been committed.⁸ 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.⁹ 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."¹⁰ 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.

The exclusion of Petitioner was in accordance with MCL 400.111f. Orders issued pursuant to MCL 400.111f are not limited to "providers". Exclusion from the Michigan Medicaid Program is not dependent upon whether a person is an enrolled Provider. Exclusion prevents direct or indirect ownership or controlling interest in a Michigan

MCL 400.111f(1).

⁸ *United States v Sells Eng'g, Inc.*, 463 U.S. 418, 423, 103 S. Ct. 3133, 3137, 77 L. Ed. 2d 743 (1983).

⁹ *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).

¹⁰ *Id.*

Medicaid Provider. To argue otherwise, as Petitioners' attempt to do, the Department would be helpless to prevent Petitioner from participating, benefiting, and endangering beneficiaries and Medicaid dollars. As a result, Petitioner's enrollment status as a Michigan Medicaid Provider is irrelevant.

Moreover, Petitioner is the sole owner of Petitioner 2. As a result of Petitioner being properly excluded from participation, the Department had both the authority and obligation to suspend Petitioner 2 from further participation in the Michigan Medicaid Program.¹¹ Consequently, the suspension of Petitioner 2 is appropriate and in accordance with MCL 400.111d and 400.111e.

Given that the indictment will continue to exist even if an evidentiary hearing is held on the summary suspension and exclusion, (as Petitioner does not argue that he is not the individual 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 Petitioners on February 12, 2021, effective February 16, 2021 is UPHELD.
- The administrative hearing scheduled for March 25, 2021 at 9:00 a.m. is CANCELLED.