

**PINE CREST NURSING
& CONVALESCENT HOME,**
Petitioner,

v.

**DIVISION OF MEDICAL ASSISTANCE AND
HEALTH SERVICES,**
Respondent.

Initial Decision: April 15, 1982

Final Agency Decision: June 11, 1982

Approved for Publication by the Division of Medical Assistance
and Health Services: May 6, 1985

SYNOPSIS

Petitioner, having agreed to repay over \$70,000 in overpayments from the Division of Medical Assistance and Health Services, contested the Division's right to assess interest penalties under the Medical Assistance and Health Services Act, *N.J.S.A.* 30:4D-17(f).

The administrative law judge assigned to the case found that the overpayments were based upon 1974 and 1975 cost studies for which the field work was finished in February 1976. The first reported audit findings were received by the petitioner in January 1977; after a dispute as to the amount of principal in May 1977, the Division corrected its figures. These revised figures were not communicated to petitioner, however, until July 1980. The Division had notified petitioner in 1977 that an interest assessment would be imposed and subsequently sought to collect that interest dating back to January 1977.

The judge concluded that since the amount of principal had been in dispute until 1981 and had, in fact, been revised three times until that date, the true notice of recovery was dated March 18, 1981 and it was from that date that interest should be calculated.

Upon review, the Director of the Division of Medical Assistance and Health Services rejected this decision. The Director found that *N.J.S.A.* 30:4D-17(f) provides a general rule that interest on an unintentional overpayment shall accrue from the date the overpayment was made and shall continue until the same is repaid. The interest penalty for overpayments was found to be automatically triggered by the provider's receipt of the overpayment and was not dependent upon either completion of an audit or notification of overpayment to the provider. To hold otherwise, the Director observed, would neutralize

the statute's deterrent effect which is to deter careless billing on the part of providers.

The Director noted that the legislative history of the statute establishes a twofold purpose: the creation of an incentive for the State to act quickly on recovering overpayments and secondly, the grant of relief to providers from unduly long delays on the part of the State in giving providers notice of an overpayment. These dual objectives are accomplished by tolling any interest penalty in the event the State does not give the provider preliminary notice of overpayment within 180 days of the field audit. This tolling period would end on the date that preliminary notice is given to the provider.

Accordingly, the petitioner was found to be liable for the payment of interest from the date of overpayment through the 180th day after the completion of the field audit. The period for the payment of interest was then tolled until petitioner received the preliminary notice of overpayment from which date interest began to run again.

Murray J. Klein, Esq., for petitioner (Gelade and Klein, attorneys)
Ivan J. Punchatz, Deputy Attorney General, for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Initial Decision

GEIGER, ALJ:

The petitioner, having agreed to repay \$73,584.11 claimed by the Division of Medical Assistance and Health Services (DMAHS) through a 1974 and 1975 cost study on petitioner, contests the right of DMAHS to assess penalty interest under the Medical Assistance and Health Services Act (*N.J.S.A.* 30:4D-17(f)) because: (1) DMAHS failed to promulgate certain regulations required by the above cited statute, and (2) because DMAHS failed to satisfy "the preliminary notification" requirement of the above cited statute.

Upon receipt of petitioner's request for a hearing, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

Both parties attempted to resolve the matter administratively, but were unable to do so. Both parties stipulated that the basic cost audit was accurate, and Pine Crest agreed to repay the principal amount with an initial payment of \$30,000, and the balance in 11 monthly installments. However, the issue of the hearing was the payment of interest in the amount of \$29,330.21, based upon a principal of \$73,584.11 from January 1977.

As stated in petitioner's brief, the facts of the case are essentially undisputed. The overpayments, totaling \$73,584.11, were based upon a 1974 cost study for the reporting period beginning January 1, 1973 and ending December 31, 1975, and the 1975 cost study for the reporting period beginning January 1, 1974 and ending December 31, 1974. The first round of field work on the cost studies began September 2, 1975 and ended February 20, 1976. The first reported audit findings by DMAHS were mailed to Pine Crest on January 28, 1977, and, at this time, the claimed overpayment was stated to be \$122,157.79. When Pine Crest disputed the amount, conferences were held to resolve the problem administratively, and, shortly after May 20, 1977, DMAHS concluded that the correct figure was \$73,584.11. However, this revision was not communicated to Pine Crest until July 10, 1980—more than three years later.

DMAHS, however, notified Pine Crest that a penalty interest assessment would be imposed upon overpayments and that delays in the administrative processing of the audit would require additional penalty interest to be assessed. This notification was given in a letter dated March 23, 1977, while revisions to the audit were being made by DMAHS. It is noted that Pine Crest and DMAHS held meetings in attempts to resolve difficulties with the audit up to and including February 6, 1981.

The petitioner's attorney observes that within *N.J.S.A.* 30:4D-17(f) the term "field audit," as defined by regulation, presents a problem with direct bearing upon the assessment of interest. "Field audit" is not defined; it is not defined statutorily within the Medical Assistance and Health Services Act itself, nor has DMAHS published a definition of the term. The term "preliminary notification" used within the statute is also undefined, although generally a letter from DMAHS to the party audited would be accepted as notification. An audit took place, and although work in the field on the audit ended February 20, 1976, revisions to this audit extended over a period of time with the result that the original assessment of overpayment was reduced considerably. The initial audit findings mailed to Pine Crest January 28, 1977, claimed an overpayment of \$122,157.79, while a corrected figure finally communicated to Pine Crest on July 10, 1980, was \$73,584.11. Petitioner's attorney observes in his brief that within the context of the statute, the two events denominated "field audit" and "preliminary notification" are highly significant: their occurrence triggers the accrual of interest on overpayments. A provider cannot act upon this contingency unless it knows with certainty when a "field

audit” and “preliminary notification” have occurred. In the instant case, the Division conducted field work at Pine Crest on several occasions, the first and last of which were separated by more than 20 months. Furthermore, the Division issued a series of revisions of audit findings that leaves great doubt as to when preliminary notification occurred. Petitioner’s attorney further argues that the 1979 amendments to the Medical Assistance and Health Services Act, of which the language in question regarding field audit and preliminary notification is a part, had as its intent to grant Medicaid providers relief from long delays on the part of the State in notifying the provider regarding overpayments, and to serve as an incentive to the State to act on recovering overpayments as quickly as possible. The express words of the Senate committee showed that the intention in 1979 was to promote efficiency and accountability on the part of the State and to establish specific standards to guide the State and providers in the recovery of overpayment interest.

Pine Crest received the first notice of overpayment in the form of a letter on January 28, 1977, which called for the repayment of \$122,157.79, and had it complied with the notice, it would have lost the use of \$48,573.68 without interest from January 1977 until February 1981 when DMAHS finally acknowledged that the correct overpayment amount was \$73,584.11. A subsequent notice was sent Pine Crest by DMAHS September 12, 1980 when a revised notice of overpayment claimed \$152,075.78, but this figure was corrected February 6, 1981. Pine Crest claims it would have been unreasonable to have relied on any of the estimates that preceded the March 18, 1981 “Notice of Demand and Administrative Recovery Proceeding.”

Since the accurate and reliable estimate of the amount due was given Pine Crest March 18, 1981 by DMAHS, Pine Crest contends that DMAHS should recalculate penalty interest beginning from that date, if indeed DMAHS is not precluded from assessing any penalty interest because of noncompliance with *N.J.S.A.* 30:4D-17(f).

The attorney for DMAHS states that the field work on the audit was completed February 20, 1976, and that preliminary notification of the results of the audit was mailed January 28, 1977. On February 17, 1977, Pine Crest appealed the preliminary audit findings and began the series of administrative contacts which resulted in a revision of the findings. On July 10, 1980, Pine Crest was notified by DMAHS that the overpayment was considered to be, as of that date, \$73,584.11. The letter sent Pine Crest by DMAHS September 12, 1980, was a further notice of demand, which again was challenged by Pine Crest

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and finally resolved, with a subsequent demand letter issued March 18, 1981, for \$73,584.11. The attorney for DMAHS argues that the petitioner was aware, from the letter dated March 23, 1977, that interest was accruing upon the principal. He states that the Director of the Division granted a waiver of interest to January 15, 1977, and therefore, the statutory exception to the accrual of interest provision is not applicable in this case. The attorney for DMAHS seeks to introduce the notion of estoppel when such was not advanced as an argument by the petitioner's attorney. Furthermore, he claims that petitioner should have minimized his interest liability by calculating and paying back amounts which were never in dispute.

Based upon the foregoing, **I FIND:**

1. Petitioner's attorney has gone to some length to explore the legislative intent behind the 1979 modification of the Medical Assistance and Health Services Act, particularly the section contained in *N.J.S.A.* 30:4D-17(f). His exploration of the legislative history shows that the amendments to that section were intended to promote the State's efficiency and to penalize the State's inefficiency by denying penalty interest when the State fails to provide timely "preliminary notification." In the actual facts of the case, Pine Crest Nursing and Convalescent Home was notified by DMAHS that it was overpaid widely differing amounts: these amounts were \$122,157.79 on January 28, 1977; \$73,584.11 on July 10, 1980; \$152,075.78 on September 12, 1980; and finally a revision back to the amount noticed on July 10, 1980 of \$73,584.11. The Director of the Division claims interest on the final amount of overpayment (\$73,584.11) back to January 15, 1977, or the month of the DMAHS's first notice of overpayment (\$122,157.79).
2. The argument by the attorney for DMAHS that the petitioner was aware that at least "\$73,000 in overpayments" was to be recovered, and, therefore, interest is owing back to January 1977, is, I find, reasonably and mathematically unacceptable, since interest is calculated on a principal, and, since the principal itself was in dispute, the petitioner had every right to pursue the correction of the principal before attempting to pay interest. The amount of principal was changed by DMAHS itself three times subsequent to January 1977.
3. If DMAHS had not sent a further notice to Pine Crest on September 12, 1980 revising the calculation of the principal, it would be reasonable to conclude that the notice sent Pine Crest

on July 10, 1980, would have been sufficient preliminary notification. However, the DMAHS again revised the principal on September 12, 1980 and re-revised the principal February 6, 1981, sending the final notice March 18, 1981.

Based upon the facts adduced at the hearing and pursuant to the agency regulations above cited, I **CONCLUDE** that the argument that petitioner's attorney has presented regarding the intent to the legislation and its revisions in 1979 regarding field audits and preliminary notification are persuasive, and that due to the multiple revisions of the principal, the true notice for recovery was dated March 18, 1981. Therefore, the action of the DMAHS to calculate interest payments from an earlier date than March 18, 1981 is **REVERSED**. Interest on the principal of \$73,584.11 should be calculated only from March 18, 1981, and a schedule of equal payments extending over a two-year period beginning one month from the last day of the final payment on the principal unless some other payment arrangement mutually satisfactory to both parties is agreed upon.

I hereby **FILE** this decision with the Director of the Division of Medical Assistance and Health Services, who by law is empowered to render the final decision in this matter.

**FINAL DECISION BY THE DIRECTOR OF THE DIVISION
MEDICAL ASSISTANCE AND HEALTH SERVICES,
THOMAS M. RUSSO:**

The Director, Division of Medical Assistance and Health Services has reviewed and considered the entire record in this matter, including the initial decision of the Honorable Maria J. Geiger, and exceptions thereto filed on behalf of the agency by Deputy Attorney General Ivan J. Punchatz.

In reviewing the record, the Director notes that no exceptions to the initial decision were submitted on behalf of the petitioner.

The time period for the Agency Head to render a final decision was extended until June 11, 1982 in accordance with an Order of Extension issued on June 1, 1982.

Based upon his full review of the record, the Director hereby rejects the administrative law judge's recommended decision.

FINDINGS

The Director finds that the judge did not properly apply the interest penalty provisions set forth in *N.J.S.A.* 30:4D-17(f) to the facts in this case.

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In her decision, the judge apparently agreed with the petitioner's interpretation that the completion of the field audit and the issuance of the preliminary notification trigger the accrual of interest in an unintentional overpayment situation. However, this interpretation is inconsistent with the language of the statute and is not supported by the history of this legislation.

The statute in question, *N.J.S.A.* 30:4D-17(f), in pertinent part, provides that:

1. Any person or other legal entity, other than an individual recipient who, without intent to violate this act, obtains payments under this act in excess of the amount to which he is entitled, shall be liable to a civil penalty of payment of interest on the amount of the excess payments at the maximum legal rate in effect on the date the payment was made to said person or other legal entity *for the period from September 15, 1976 or the date upon which payment was made, whichever is later, to the date upon which repayment is made to the state.* . . . (Emphasis added).
2. However, . . . no such person . . . or other legal entity shall be liable to such civil penalty when excess . . . payments under this act are obtained by such person . . . or other legal entity as a result of error made by the Division of Medical Assistance and Health Services, as determined by said division;
3. Provided, further, that if preliminary notification of an overpayment is not given to a provider by the division within 180 days after completion of the field audit as defined by regulation, no interest shall accrue during the period beginning 180 days after completion of the field audit and ending on the date preliminary notification is given to the provider.

As set forth above, the interest penalty section of the statute contains three specific provisions.

Section 1 contains the general rule that interest on an unintentional overpayment shall accrue from either the effective date of the statute or the date the overpayment was made, whichever date is later, and shall continue until the State is repaid.

The intent of this section is to deter careless billing on the part of providers by assessing interest on intentional overpayments.

The interest penalty for overpayments resulting from unintentional billing errors is automatically triggered by receipt of the overpayment and is not dependent upon either completion of the field audit or preliminary notification of the provider. To hold otherwise would neutralize the deterrent of this penalty.

Furthermore, a contrary interpretation would only serve to encourage careless billing because providers would be assessed interest only if the overpayment is discovered and then, the interest would only accrue from the date of the preliminary notification.

Section 2 of the above-quoted statute creates an exception to the general rule by exempting the assessment of interest on an overpayment resulting from an error made by the State.

Section 3 of the statute set forth above, provides for tolling of the interest penalty in the event that the State does not give the provider timely notice of the overpayment.

The legislative history of this section indicates that its intent is twofold. Primarily, this provision creates an incentive for the State to act quickly on recovering overpayments, and secondly it grants providers relief from unduly long delays on the part of the State in giving providers notice of an overpayment. The dual objectives of this provision are accomplished by tolling the interest penalty, in the event that the State does not give the provider preliminary notice within 180 days of the completion of the field audit. However, the tolling of the interest penalty ends on the date that preliminary notification is given to the provider.

This section of the statute also requires that the term "field audit" be defined by regulation. However, the fact that a regulatory definition of this term was never promulgated is not fatal to the assessment of the interest penalty because the date of the completion of the field audit is readily ascertainable from the record in this matter.

In reviewing the record, it is evident that the essential facts are not in dispute. The record indicates that a field audit for reimbursement years 1974 and 1975 commenced on September 2, 1975.

This initial field audit ended on February 20, 1976.

By letter, dated January 28, 1977, the petitioner was advised that the preliminary audit findings indicated an overpayment of \$122,157.79.

On February 17, 1977, the petitioner appealed the preliminary audit findings. Based upon the requests of the petitioner and taking into consideration the petitioner's voluntary repayment of the principal, the Director of the Division of Medical Assistance and Health Services waived the accrual of interest from September 15, 1976, the effective date of the interest penalty provision, through January 15, 1977.

On March 23, 1977, the petitioner was sent a letter scheduling a meeting between the Division's auditors and the petitioner's accountants.

The meeting was held on April 27, 1977 and a follow-up field visit to the facility was made on May 20, 1977.

On June 13, 1977 the audit findings were sent to the Division of Criminal Justice for investigation.

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On May 6, 1980, Criminal Justice returned the audit findings to the Division of Medical Assistance and Health Services.

On July 10, 1980, a letter was sent to the facility which indicated that the audit was completed and that penalties will be assessed under section 17 of the False Claims Act. Enclosed with this letter was a copy of the audit report which indicated that the facility received an overpayment of \$73,584.11 and reiterated the fact that the Division will assess penalty interest on the overpayment.

On September 12, 1980, a third notice of overpayment in the amount of \$152,075.78 was sent to the petitioner.

By letter, dated September 23, 1980, the petitioner requested a conference to discuss the overpayment set forth in notice dated September 12, 1980.

A meeting to discuss the overpayments was held on October 22, 1980.

By letter, dated February 6, 1981, the petitioner was advised that the Division's auditors accepted the petitioner's proofs that a relationship did not exist between the lessor and lessee and the amount of the overpayment would be reduced to \$73,584.11.

On March 18, 1981, the petitioner was sent a Notice of Demand and Administrative Recovery Proceeding which indicated that the final repayment figure was \$73,584.11.

Based upon the foregoing findings of fact, the Director concludes as follows:

1. The petitioner received an unintentional overpayment of \$73,584.11 for services rendered during reimbursement years 1974 and 1975.
2. In accordance with *N.J.S.A.* 30:4D-17(f), the petitioner was liable for the payment of interest on the overpayment from September 15, 1976 until the date of repayment to the state.
3. The Director waived the payment of the interest penalty from September 15, 1976 through January 15, 1977.
4. The petitioner is liable for the payment of interest from January 16, 1977 through the 180th day after the completion of the field audit.
5. The field audit was completed on May 20, 1977.
6. The 180-day time period to give the provider preliminary notice of the overpayment expired on November 16, 1977.
7. The provider was never given preliminary notification of the overpayment and interest penalty within the 180-day period.
8. The interest penalty was tolled on November 17, 1977.

9. The letter dated July 10, 1980 and the accompanying audit report constituted adequate preliminary notification of the overpayment.
10. The tolling of the interest penalty ended on July 10, 1980, the date that preliminary notification was given to the provider.
11. The petitioner is liable for the payment of interest from July 11, 1980 to the date that the outstanding overpayment is made to the state.

THEREFORE, it is on this 11th day of June, 1982 ORDERED: That the petitioner reimburse the Division the amount of \$73,584.11 plus accrued interest for the period from January 16, 1977 through November 16, 1977 and for the period from July 11, 1980 until the date of repayment to the State; and

IT IS FURTHER ORDERED:

That the petitioner is not liable for interest for the period from September 15, 1976 through January 15, 1977 and for the period from November 17, 1977 through July 10, 1980; and

IT IS FURTHER ORDERED:

That the Bureau of Administrative Control recalculate the interest due on the principal of \$73,584.11 in accordance with the terms of this decision and make arrangement with the petitioner for the repayment of this amount; and

IT IS FURTHER ORDERED:

That the findings, conclusions and recommendations contained in the initial decision are rejected to the extent that they conflict with the holding in this decision.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey Courts.