

**BEFORE THE
DEPARTMENT OF DEVELOPMENTAL SERVICES
STATE OF CALIFORNIA**

In the Matter of the Appeal By:

**LAUREL CANYON RETIREMENT
COMMUNITY, INC.,**

Appellant,

vs.

**NORTH LOS ANGELES COUNTY
REGIONAL CENTER,**

Respondent.

OAH Case No. 2010090032

PROPOSED DECISION

Nancy Beezy Micon, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on May 19, 2011, and July 11, 2011, at Los Angeles, California.

Judith A. Enright, Enright and Ocheltree, represented the North Los Angeles County Regional Center (NLACRC, Respondent or Regional Center).

India S. Thompson, Attorney at Law, represented Laurel Canyon Retirement Community, Inc. (LCRC or Appellant).

Oral and documentary evidence was received at the hearing. The record was held open to and including July 18, 2011, for the submission of written closing arguments, and until July 25, 2011, for the submission of written reply arguments. The Regional Center's closing argument, marked as Exhibit 18 for identification only, was received by OAH on July 18, 2011. Appellant's Closing Argument, marked as Exhibit L for identification only, was received by OAH after the close of business on July 18, 2011. On July 25, 2011, Regional Center submitted its reply argument, marked as Exhibit 19 for identification only. Appellant's reply argument, marked as Exhibit M for identification only, was received by OAH on July 26, 2011. Respondent's attorney's explanation that the late filing was caused by an electricity outage at her office was accepted as an excuse for the late filing. The record in the proceeding was therefore reopened to and including August 5, 2011, to provide Regional Center with an opportunity to object to the late filings of the closing and reply

arguments. No objection having been received, respondent's written closing argument and reply were accepted.

In order to protect the privacy of the NLACRC consumers identified in this case, the ALJ ordered that the exhibits in this matter be sealed after their use in issuance of the Proposed Decision. The exhibits shall remain under seal and shall not be opened except by order of the Office of Administrative Hearings, by a duly designated and authorized representative of the Department of Developmental Services, by the ALJ or another ALJ assigned to preside over further proceedings in this matter, or by a reviewing court.

The matter was submitted on August 5, 2011.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Appellant is, and at all times relevant to this matter was, a Regional Center vendor as a geriatric facility/residential care facility for the elderly. LCRC agreed, for a set monthly fee negotiated with NLACRC, to provide care and supervision services and room and board to any NLACRC consumer. LCRC received funds from NLACRC for providing care and supervision services to several of its consumers residing at LCRC. This case involves a dispute concerning the payment of funds by NLACRC to LCRC for the period between October 5, 2007, and April 30, 2009, for services provided to three NLACRC consumers residing at LCRC.

2. NLACRC was contacted by a representative of the Department of Health Care Services (DHCS) in April 2009, who informed NLACRC that three of its consumers at LCRC were participating in the Medi-Cal Assisted Living Waiver Pilot Project (ALW) through DHCS, which was funding their care and supervision services at LCRC. On June 9, 2009, Regional Center notified Appellant that it had come to their attention that LCRC had been receiving funding from the ALW program through DHCS for supplemental assistance services provided to three of its consumers (MJR, RT, and MM).¹ Respondent contended that, according to the information provided to NLACRC, the funding received through the ALW program was payment in full for all supplemental assistance services needed by the three NLACRC consumers. Respondent asserted that it had therefore overpaid Appellant because the monthly rate paid to LCRC included a supplemental portion for care and assistance. NLACRC informed LCRC that LCRC was entitled only to that portion of the NLACRC rate that was for board and care or rent. NLACRC requested reimbursement from LCRC, as follows: \$26,175.07 for consumer MJR for the period between October 16, 2007, and April 30, 2009 (Exhibit 1); \$26,646.27 for consumer RT for the period between October 5, 2007, and April 30, 2009 (Exhibit 2); and \$24,185.65 for consumer MM for the period

¹ Regional Center consumers are identified by their initials to protect their privacy. Appellant was provided with the identity of the consumers.

between December 1, 2007, and April 30, 2009 (Exhibit 3). NLACRC thereafter conducted fiscal audits of LCRC pertaining to the payments made and services received for the three consumers.

3. On July 17, 2009, the Regional Center issued a Final Audit Report, in which it reported the findings of its audits that, for the time period in question, Appellant had been paid a total of \$77,006.99 for direct care services provided to consumers MJR, RT, and MM that was not due to LCRC from NLACRC because LCRC had received payment for these services from the Department of Health Services under the ALW program. Regional Center concluded it had overpaid Appellant the sum of \$77,006.99, which amount Respondent requested Appellant to remit. Appellant was informed that, if it disagreed with the findings in the Final Audit Report, it could file a written Statement of Disputed Issues with the California Department of Developmental Services, Audit Appeals Unit (DDS), the state agency which oversees the funding and implementation of services for the developmentally delayed and disabled. (Exhibit 5.)

4. On September 28, 2009, Appellant submitted an appeal of the Regional Center's Final Audit Report to DDS. (Exhibit 6.) LCRC also entered a Repayment Agreement, effective June 22, 2009, in which it agreed to repay NLACRC \$1,283.45 per month for a five year period between July 1, 2009, and June 1, 2014. (Exhibit 5, final three pages.) DDS conducted an informal administrative review of this matter, pursuant to California Code of Regulations, title 17 (Regulation), section 50732. Respondent submitted a response to the appeal. (Exhibit 8.) On July 30, 2010, DDS issued a Letter of Findings, in which it affirmed the Regional Center's Final Audit Report and upheld the Regional Center's reimbursement request of \$77,006.99. DDS concluded: "LCRC billed and received duplicate payments from NLACRC and Medi-Cal for providing direct services to the same three consumers residing at LCRC."

5. Appellant appealed DDS's Letter of Findings and, pursuant to Regulation 50750, requested a formal administrative hearing in order to challenge the reimbursement sought by the Regional Center.

The Regional Center's Audit

6. When Appellant applied to become a vendor for NLACRC as a residential facility for the elderly, it agreed as follows: "The provider agrees to accept the above fee(s) [\$2,502 per month, effective June 1, 2008] as payment in full from the regional center for this service. Provider affirms that the rate of payment charged to the regional center does not exceed the rate of payment that the provider charges any other person for this service." (Exhibit 12.) LCRC agreed to provide room and board as well as supportive care for the NLACRC consumers. Supportive care was defined, as follows: "Assisting residents who need assistance with the activities of daily living, e.g. bathing, dressing, grooming, toileting, eating and ambulating. Especially good in providing care for the medically frail. Wheelchairs welcome." (Exhibit 16.)

7. The Regional Center's audit confirmed that for the time period in question, Appellant was paid the sum of \$77,006.99 for care and supervision services that were funded for NLACRC consumers MJR, RT, and MM through payments received from their participation in the Medi-Cal ALW program. (Exhibit 4.)

Appellant's Evidence

8. Tillman Pink, Jr., Appellant's executive director, wrote to the DDS audit appeals unit when presenting LCRC's statement of disputed issues. In his September 24, 2009 letter, Pink contended that it was permissible for LCRC to receive payments from both NLACRC and DHCS, through the ALW program. (Exhibit 6.) Pink explained that, when the ALW program was first being considered, he asked a representative from the ALW program, if it "presented a problem" for LCRC to have a NLACRC consumer in the ALW program and was told, "no." Pink argued that the needs of the NLACRC consumers were different than those of the non-developmentally disabled population and it therefore made sense that payments could be received from both sources. Appellant contended that the services provided through the ALW program was for mainly physical medical conditions whereas the NLACRC consumers had developmental conditions to contend with as well as physical medical conditions. Appellant provided DDS with a one page "schedule" prepared by Pink, claiming that it was entitled to an offset of \$69,556 due to estimated costs associated with the staffing levels required under its contract with NLACRC (which Appellant asserted were lower than the staff to resident ratio required in the ALW program). During the administrative review before the DDS, Appellant provided no source documents to DDS to support its factual contentions.

9. During the instant hearing, Appellant did not dispute that it had received payment from the Department of Health Services through the ALW program for services provided to the three identified NLACRC consumers residing at LCRC, and that the payments received exceeded the amount NLACRC paid under its contract with LCRC. Appellant, through the testimony of Pink, repeated the arguments made in its appeal to DDS. Appellant presented an email, dated June 2, 2011, from Bernie Finneran, Health Program Manager for the ALW program, to Pink, confirming that Mark Mimnaugh communicated to Pink that an individual with a developmental disability could be in the ALW program. However, in the email Finneran explained to Pink that it was still required that "there is only one source paying or reimbursing the RCFE [residential care facility for the elderly] for residential services." (Exhibit J.) The communication that there was "no problem" having NLACRC consumers in the ALW program did not establish that it was acceptable for Appellant to accept payment from both NLACRC and DHCS. It established only that it was acceptable for a consumer with a developmental disability, served through a regional center, to also participate in the ALW program, through the DHCS. Appellant provided no source documents or other substantive evidence to support its assertion that the services it provided to the consumers through the ALW program were different or greater than the services required under the contract with Respondent.

10. Pink testified concerning his opinion that LCRC had been “underpaid” by NLACRC between October 2007 and April 2009. Pink is a certified public accountant. He has a Masters of business administration degree from the University of Southern California. He attended two years of law school at Cleveland State and has extensive experience as a chief executive officer of LCRC. Pink presented documentation to support the wage figures he used in the “schedule” submitted to DDS. (Exhibits 6 and E.) Pink admitted that the figures he used were estimates and were based upon his years of experience. Pink’s opinions were speculative. In addition, Respondent presented evidence, through the testimony of Geri Sue Cox, the NLACRC service coordinator for the three identified consumers, that the level of services provided to the consumers and the type of room and board they received did not change after they entered the ALW program.

11. Appellant failed to establish by a preponderance of the evidence that the Regional Center’s audit was incorrect.

LEGAL CONCLUSIONS

1. Pursuant to Regulation 50758, subdivision (k), Respondent had the initial burden of proof, to demonstrate by a preponderance of the evidence, that its audit findings were correct. In this case, NLACRC met its burden. That being so, the burden of proof shifted to Appellant to demonstrate by a preponderance of the evidence that its position was correct and the audit findings and/or reimbursement order were incorrect.

2. Cause exists to sustain the findings of Respondent’s Final Audit Report, and the DDS Letter of Findings, that Respondent overpaid \$77,006.99 for services because Appellant received payment during the period covered by the audit from both NLACRC and the Department of Health Services, through its ALW program, for care and supervision services provided to the three identified NLACRC consumers residing at LCRC.

3. Regulation 54326, subdivision (a)(10), requires vendors to “bill only for services which are actually provided to consumers and which have been authorized by the referring regional center. When the vendor is receiving payment for a consumer from the Department of Rehabilitation and/or the Department of Health Services for a portion of the program day, and the vendor’s rate of reimbursement is based on costs reported pursuant to Section 57422 (c)(2), the vendor shall only bill the prorated share of the daily rate.”

4. The payments Appellant received through the ALW program during the period covered by the audit should have been considered payment in full for the residential care services provided to the three identified NLACRC consumers residing at LCRC. California Welfare and Institutions Code section 14019.3, subdivision (d), states: “A provider shall return any and all payments made by a beneficiary, or any person on behalf of a beneficiary, other than a third party obligated to pay charges by reason of a beneficiary’s other contractual or legal entitlement for Medi-Cal program covered services upon receipt of Medi-Cal payment.” In this case, Appellant should have prorated the bills to NLACRC to

charge solely for the cost of room and board for the three identified NLACRC consumers. Appellant has, at all three levels of this appeal, failed to provide any evidence that it was justified in billing both NLACRC and the Department of Health Services. The documents and evidence provided by Appellant do not substantiate that it was entitled to receive payment from both the Department of Health Services, through the ALW program, and Respondent during the period covered by the audit for the residential services for the three identified NLACRC consumers residing at LCRC. The payment Appellant received for care and supervision services through the ALW program of the Department of Health Services constituted payment in full for the residential care services provided to the consumers.

5. Appellant argues that the doctrines of laches and equitable estoppel support a ruling in favor of LCRC. The requirements for application of the doctrine of equitable estoppel are: “(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.” (Citations.) (*Fontana Paving, Inc. v. Hedley Brothers, Inc.* (1995) 38 Cal.App.4th 146, 156-157.) As cited by Appellant, the doctrine of equitable estoppel “results from a representation of fact that the party making the representation is not legally permitted to deny.” (*Buillargeon v. Department of Water and Power* (1977) 69 Cal.App.3d 670, 678.) Here, Appellant claims to have relied upon a statement from a representative of the ALW program that there was “no problem” with the NLACRC consumers participating in the ALW program. This statement did not convey, as Appellant now argues, that it was acceptable for Appellant to receive duplicate payment for services. Appellant has not established a defense based upon the doctrine of equitable estoppel.

6. A successful laches defense requires the establishment of two elements: An unreasonable delay in bringing the action, and resulting prejudice. (*Mt. San Antonio Community College District v. Public Employment Relations Board* (1989) 210 Cal.App.3d 178; *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, rev. den.) The theory behind the laches defense is that an unreasonable delay in bringing an action can result in witnesses’ faded memories and a party’s inability to locate witnesses and other evidence. The unreasonable delay can, therefore, prejudice the party’s ability to adequately defend against the alleged charges. However, each of the components must be affirmatively established, and prejudice can never be presumed. (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614.) In this case, Respondent contacted Appellant in June 2009, two months after learning that Appellant was receiving payment through the ALW program for services to the three identified NLACRC consumers. Respondent immediately conducted an audit and provided Appellant with the results of the audit the following month (July 2009). Appellant was given an opportunity to respond to the audit, which it did within two months (September 24, 2009). DDS initiated its administrative review one month later (October 7, 2009). DDS provided Appellant with its “Letter of Findings,” which were dated July 30, 2010. Appellant then appealed, dated September 29, 2010. These facts do not establish an unreasonable delay. Further, the prejudice required for a finding of laches to be made relates to the ability of a respondent to mount an adequate defense, rather than the fact that the party continues to

deal with an unpleasant event many years after its occurrence. (*Vaughn v. State Bar* (1973) 9 Cal.3d 698, 702-703 [108 Cal.Rptr. 806].) Appellant has not established it was precluded from mounting an adequate defense. Appellant has not established a defense based upon laches.

7. Cause therefore exists pursuant to Regulation 50705 to sustain the Regional Center's Final Audit Report, and the DDS Letter of Findings, ordering Appellant to reimburse the Regional Center \$77,006.99. (Factual Findings 1-11.)

ORDER

The appeal is denied. Appellant Laurel Canyon Retirement Community, Inc. shall reimburse the North Los Angeles County Regional Center \$77,006.99.

DATED: February ____, 2012

Nancy Beezy Micon
Administrative Law Judge
Office of Administrative Hearings